THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 1

TUESDAY, NOVEMBER 17, 1970

First Proceedings on Bill C-172,

intituled:

"An Act respecting the Federal Court of Canada"

(Witness: — See Minutes of Proceedings)

23179—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

*Ex officio member

(Quorum 7)

Orders of Reference

Extract from the Minutes of Proceedings of the Senate of Monday, November 16, 1970:

"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 Lamontagne, P.C., for the second reading of the Bill C-172, intituled: "An Act respecting the Federal Court 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 Connolly, P.C., moved, seconded by the Honourable Senator Kinnear, 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
(1)

Pursuant to notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 11:00 a.m.

Present: The Honourable Senators: Connolly (*Ottawa West*), Flynn, Grosart, Hayden, Langlois, Smith, Urquhart, Walker. (8)

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

The Clerk of the Committee reported the absence of the Chairman and requested a Motion to elect an Acting Chairman. The Honourable Senator Connolly (*Ottawa West*) moved that the Honourable Senator Urquhart be elected Deputy Chairman. The question being put on the Motion, it was Resolved in the affirmative.

On Motion of the Honourable Senator Grosart it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill C-172, intituled: "An Act respecting the Federal Court of Canada".

The following witness was heard in explanation of the Bill:

Mr. D. S. Maxwell, Deputy Minister and Deputy Attorney General, Department of Justice.

At 12:15 p.m. the Committee adjourned to Thursday, November 26, 1970, at 10:00 a.m.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Tuesday, November 17, 1970.

[*Text*]

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-172, respecting the Federal Court of Canada, met this day at 11 a.m., to give consideration to the bill.

The Clerk of the Committee: Honourable senators, in the absence of the chairman of the committee, is it your pleasure to appoint an Acting Chairman?

Senator Connolly (Ottawa West): Honourable senators, I should like to move that Senator Urquhart be appointed not Acting Chairman but Deputy Chairman of this committee, so that it will be unnecessary for us to elect an Acting Chairman at each sitting.

Senator Langlois: I second the motion.

Motion agreed to and Senator Earl W. Urquhart appointed Deputy Chairman.

Senator Earl W. Urquhart (Deputy Chairman) in the Chair.

The Deputy Chairman: Honourable senators, I should like to thank you for electing me Deputy Chairman of this the Standing Senate Committee on Legal and Constitutional Affairs. I shall endeavour to do the best I can at this and subsequent meetings to fulfil the duties of Deputy Chairman.

We have before us this morning for consideration Bill C-172, an Act respecting the Federal Court of Canada.

This bill was sponsored in the Senate by the honourable Senator Connolly (Ottawa West), who gave a complete analysis of the bill and an excellent historical review of the Exchequer Court of Canada, as it is known today. The purpose of this bill is really to remodel and update the Exchequer Court of Canada, which was established many years ago, in 1875. I do not propose to give a summary of the bill, in view of the fact it was so well explained by Senator John Connolly.

We have with us this morning as our witness, and as an expert on this piece of legislation, Mr. Maxwell, who is the Deputy Minister of Justice and the Deputy Attorney General of Canada. I think perhaps it would be well for Mr. Maxwell to give us a quick review of the highlights of the bill, and then honourable senators could question Mr. Maxwell on any of the clauses of the bill on which they desire clarification.

Mr. D. S. Maxwell, Q.C., Deputy Minister of Justice and Deputy Attorney General of Canada: Thank you, Senator Urquhart.

This bill was prepared to do a number of things that we felt desirable from the point of view of the federal administration of justice in this country. One of the primary things was to create a new court of appeal that would sit in between, as it were, the trial bench of the Federal Court and the Supreme Court of Canada.

That was needed for a number of reasons, one of which was simply the very great overloading that the Supreme Court of Canada judges have experienced in recent years. A great deal of that overloading was coming from the Exchequer Court of Canada. I estimate that roughly 20 per cent of the work load of the Supreme Court of Canada was resulting from that Court. What was worse was that it was coming up to the Supreme Court of Canada as the final Court of Appeal in an undigested form. Those who are lawyers and practise in the courts will know that the court of last resort in this country is not perhaps too well equipped to deal with appeals that come directly from a trial judge and a trial bench. So it was felt that this was a needed reform that was long overdue.

Senator Connolly (Ottawa West): Mr. Maxwell, would you mind explaining that a little more fully? I refer to the last statement you made, that the Supreme Court of Canada has not been able to deal with judgments coming directly from a trial court.

Mr. Maxwell: Yes. As you know, Senator Connolly, the work load of the Supreme Court of Canada comes largely from the courts of appeal of the provinces. At that stage you have the case looked at, first of all, by a trial judge and then by a provincial Court of Appeal, consisting usually of three to five judges. Then, ultimately, the questions are boiled down to usually a fairly few important questions of law that the Supreme Court of Canada has to decide. But where there is no intervening Court of Appeal, you have really a mish-mash of facts, if I could put it that way, that has not been digested by an intervening Court of Appeal, and it means that the Supreme Court of Canada has to do the work not only of the court of final resort but also the work of the original Court of Appeal to refine the issues that are worth deciding and then make a final judgment on questions of law. So it very substantially increases the work load of the

Supreme Court of Canada, to the point where it has become a serious problem. We feel that this particular measure will go a substantial distance to remedying the serious work load the Supreme Court of Canada has before it on its normal lists at the present time.

Another virtue the intervening Court of Appeal has, is practice to develop because, again as part of the problem I was originally mentioning, the Supreme Court of Canada has been very reluctant to entertain appeals on practice matters arising in the federal courts. They simply have not got the time, and you have to have a matter of extreme importance before you could ever convince the Supreme Court of Canada to look at a matter of practice. The result is that at the federal level in this country there is virtually no law of practice in the federal courts.

This new intervening court of appeal, we hope, will permit a jurisprudence of a practice nature to develop at the federal level, which we think is highly desirable from the practitioners' point of view.

There is another point I should mention. Over the past few years—indeed, the last 10 to 15 years—there has been developed a practice of dumping appeals from a variety of special tribunals directly into the Supreme Court of Canada. You have boards with three to five members sitting on them. I could mention the National Energy Board, just to take an example. The tendency has developed to drop appeals from that sort of board directly into the Supreme Court of Canada—I suppose because it was felt it would not be cricket to give an appeal to a single judge of the Exchequer Court when the judgment, in effect, was coming from, say, a five-man board.

Senator Connolly (Ottawa West): This was done under statutory authority?

Mr. Maxwell: Yes, but a great many statutes in recent years have been written in that form. Again, this has produced an undesirable result of the Supreme Court of Canada having to direct its attention to appeals directed to it from a whole series of federal boards and tribunals. This again has created problems for the Supreme Court of Canada, and we feel that an intervening court of appeal can take up that kind of work, leaving the final but more limited appeal to the Supreme Court of Canada on any important question of law that happens to arise.

We also felt that this would be a good time to attempt to improve the administrative law procedures that have heretofore prevailed in this country with regard to federal tribunals. As I am sure all honourable senators know, the federal tribunals in this country have been, if I may use the term, policed by the superior courts of the provinces for a great many years. This has been, in some respects, unsatisfactory, largely because of the fact that we have potentially ten different superior courts policing one federal tribunal. That can result, and has resulted, in a serious interference with the orderly functioning of these tribunals, because you can get conflicting decisions in the provincial courts throughout the country, and you can get harassment. If you attack a decision in one province and are not successful, you can then attack it in another province.

Senator Connolly (Ottawa West): Are you thinking of the prerogative writs?

Mr. Maxwell: Yes, that is right, prerogative writs and injunction proceedings, and things of that sort. This, we felt, was an unhappy situation in which federal boards and tribunals must function, and the obvious answer seemed to us to be to put the jurisdiction into the new Federal Court. This we have done in a variety of ways which I shall explain, if called upon to do so. It has caused a great deal of discussion. We think that what the bill does makes sense, and we hope that we can convince you that it does make sense on this point.

In effect, we have left the ordinary prerogative jurisdiction with the trial bench, and we have built into the legislation a new review remedy which we feel will substantially simplify the claims of persons who feel they have not been treated properly by a federal administrative tribunal. Perhaps I should just say in this regard that to the extent that the new review remedy is not available then, of course, the prerogative remedies are available, but in practice we believe that the new review remedy will be available in virtually all of the cases that will arise with the possible exception of a writ of mandamus, which applies where somebody exercising a statutory office refuses for some reason to exercise it. That sort of problem does arise, but it does not arise frequently.

Senator Connolly (Ottawa West): What you are saying, in summary, is that you are substituting a statutory authority to deal with the things that normally heretofore have been dealt with by the prerogative writs?

Mr. Maxwell: That is right, Senator Connolly, but in addition we have broadened the jurisdiction to take care of what we thought were some obvious deficiencies in the remedies provided by the prerogative writs. We feel that if you cannot get justice under the new review remedy that we are establishing then there "just ain't no justice" in this country, because the jurisdiction of the court is quite broad and virtually unencumbered. It can look at findings of fact in cases where the tribunal has obviously proceeded in an arbitrary and improper manner.

Senator Flynn: Would you mention the section in which that is provided?

Mr. Maxwell: I am talking basically, Senator Flynn, about clause 28.

Senator Langlois: Do I understand that the jurisdiction of the provincial courts remains?

Mr. Maxwell: No, the jurisdiction of the provincial courts will not remain. That jurisdiction has been vested in the Federal Court.

Mr. Russell S. Hopkins, Law Clerk and Parliamentary Counsel: Exclusively?

Mr. Maxwell: Exclusively, that is right.

Senator Connolly (Ottawa West): There are some cases in which there is not exclusive jurisdiction. I have not my notes in front of me at the moment, but there is concurrent jurisdiction, is there not?

Mr. Maxwell: Yes, there is concurrent jurisdiction in certain kinds of cases, Senator Connolly, but in regard to the matter of superintending federal boards and tribunals the jurisdiction is exclusive.

Senator Connolly (Ottawa West): But the prerogative writs will still remain, and they will still run in respect of the Federal Court. You can still issue one of these writs and apply it to the Trial Division, and even to the Appellate Division?

Mr. Maxwell: Well, what you really have, Senator Connolly, is a brand new remedy of review that goes directly to the Court of Appeal. Incidentally, I should mention that the Court of Appeal will be an itinerant court. It will not be a stationary court. It will be a court that will move about the country, as has the Exchequer Court. It will mean that people will not have to come to Ottawa to enforce their claims. We concede that this is to some extent experimental, but we feel that it is something that is a requirement from the standpoint of the federal administration of justice. My guess is that it will not be too long before we find similar things developing in some of the provincial jurisdictions.

Senator Flynn: This review procedure covers all the prerogative writs.

Mr. Maxwell: That is right, it covers everything that there is now.

Senator Flynn: And more.

Mr. Maxwell: Yes, and more, that is right.

Senator Flynn: It is inclusive. You do not mention the prerogative writs anywhere else in the bill.

Senator Langlois: And you have it under clause 18.

Mr. Maxwell: Yes, they are mentioned in clause 18 of the bill. I should say that these clauses have caused a fair amount of comment. We have had a great deal of mail in the Department of Justice about these clauses from all sorts of people, although it has come mostly from university professors.

The philosophy behind clause 18 is to vest existing prerogative jurisdiction that is in the provincial courts now in the Trial Division of the Federal Court of Canada. We take it from the provincial courts, and we give it to the Trial Division. Then we go to the new Court of Appeal, and give to that court a broad review jurisdiction which embraces virtually everything that you find—not quite everything, but virtually everything—in clause 18 and in clause 28, and that is a jurisdiction that takes you directly to the Court of Appeal. You do not have to go before the Trial Division; you go before the Court of Appeal.

Senator Flynn: Why would you give the prerogative writs to the Trial Division, and this review jurisdiction, which is an extension of the same remedy, to the Appeal Division?

Mr. Maxwell: Normally, you see, if you are attacking a board such as the Canada Labour Relations Board by saying it erred in its jurisdiction or it erred in law, or something like that, then we feel that an application for relief should go directly to the Court of Appeal, basically because of the time factor.

With respect to these federal tribunals we want the remedy to come from the courts. This is very important, in our view, in terms of the way in which our laws function. But, we do not want to hamstring the boards and tribunals in the performance of their duties.

One of the problems we have experienced at the federal level is that these boards are attacked before the trial judge, and that takes time, after which there is an appeal to the Court of Appeal, and that takes more time. Finally, there may be an appeal to the Supreme Court of Canada, and that takes even more time. Sometimes—and it has happened—the whole point of the proceedings before the tribunal has been lost to a large extent by virtue of the time factor involved in the enforcement by a citizen of his legal rights and remedies. We are seeking to avoid this by taking most of the attacks that can be brought directly to the Court of Appeal. You do not have to go to a trial judge in the first instance, but to the new Court of Appeal and then only on a matter of some considerable consequence would you receive leave to go to the Supreme Court of Canada.

Senator Flynn: The difference would be subtle though. I am thinking of the Canadian Transport Commission. In the event it refused to exercise its authority and I obtained a writ of mandamus before the Trial Division, that would go to the Trial Division. However, if they make a decision with which I am not satisfied and which may contain some elements of jurisdiction, I would then have to judge that I have to go to the Appeal Court.

The frontier between the prerogative of clause 18 and the power of review of clause 28 is not too clear.

Senator Langlois: You may have a choice of remedies.

Mr. Maxwell: There is no serious problem here, Senator Flynn. Quite obviously, if you take your proceedings for review before the Court of Appeal and there is nothing there to be reviewed you will be told nicely that your remedy must be before the trial bench. You then talk to a trial judge with regard to the matter.

This has been made to sound very horrific.

Senator Flynn: Would it be referred to the Trial Division, or would it have to start all over again?

Mr. Maxwell: I am reasonably certain that the rules of the court would be so evolved that there would be a referral technique. I, of course, cannot speak for the bench, but I really cannot think that this is the serious and horrific problem it is considered to be by some members of the academic side of our profession.

As a matter of fact, for the most part we have not had too much comment from the practising Bar, but there has been a fair amount from the academicians.

Senator Grosart: I am not a lawyer, but as a layman I am interested, naturally, in the right of appeal, particularly from federal boards or, for that matter, any boards.

You have used the phrases Appeal Court, Court of Appeal, new Court of Appeal and federal court. Would you distinguish them, if there is a distinction, for a layman?

Mr. Maxwell: I am probably referring to the same animal.

Senator Grosart: I wondered why you used the four names.

Mr. Maxwell: I apologize, but when I refer to the new Court of Appeal I am speaking of the Court of Appeal that is created by this bill and is new in the sense that none presently exists.

Senator Grosart: How would you designate the old courts of appeal?

Mr. Maxwell: I would normally refer to the Supreme Court of Canada only, because it is the only Court of Appeal. That is not its name, but it is an appellate court.

The Chairman: It is a court of appeal from the Exchequer Court.

Senator Grosart: But there are other courts of appeal.

Mr. Maxwell: There are provincial courts of appeal. I hope I have not confused you in that regard.

Senator Grosart: It is not difficult to confuse me in this area. As I say, I am not a lawyer. Are there any boards at the moment from which there is no appeal?

Mr. Maxwell: Yes. For example, the Canada Labour Relations Board is one from which there is no appeal of any kind. The only way in which that board may be challenged is through the prerogative remedies.

If and when this bill becomes law, in addition to the prerogative remedies there will be the new right of review under clause 28 of the bill. However there will still be no appeal as such.

When we lawyers refer to appeals we mean a right of appeal conferred in that terminology by a statute. There is no appeal apart from statute.

Senator Grosart: Unless you go to the foot of the throne.

Mr. Maxwell: Well, even there.

Senator Flynn: The words "tribunal" and "court" have the same meaning. However, no federal tribunals or courts exist now, other than the Exchequer Court of Canada and the Supreme Court of Canada. Just in case others would be created in the future, what is meant by the reference here to tribunal?

Mr. Maxwell: This legislation as it is written contemplates that it will deal with all federal tribunals. Incidentally, while you are quite right in saying that the word "tribunal" in its broad sense means court, it is not so in the broad context I am using. When I refer to courts I mean courts, which are somewhat different from tribunals as such. I am referring to tribunals that do not function as courts.

Senator Flynn: The Income Tax Appeal Board, for instance, could be classified as a tribunal?

Mr. Maxwell: That is correct.

Senator Grosart: You gave one example of a board or tribunal from which there is no appeal, the Canada Labour Relations Board. Are there others?

Mr. Maxwell: I am sure there are others. For example, there are tribunals within the framework of the Public Service Commission from which there are no appeals as such. Again they have to be attacked, if they are attacked, by way of *certiorari* and prohibition. Certainly the Canada Labour Relations Board is the most well known.

Senator Grosart: Why is it in this special position with respect to appeal?

Mr. Maxwell: I am guessing to some extent, but much federal legislation was drafted in the past in such a way as to prevent interference by the courts with the tribunals. An attempt has been made to insulate these tribunals from interference in many cases by the provincial courts. That is why some of this legislation contains provisions that were designed to prevent interference by *certiorari* and prohibition. The Government wished to avoid the possibility of the tribunals being interfered with and frustrated, in effect, depending on your point of view. This is why I am certain that there is no appeal from some tribunals. It is the desire that they virtually be a law to themselves.

That is not part of our thinking; we feel that there must be some manner of review. On the other hand, that must be balanced with a mechanism which will ensure that the boards are not frustrated.

Senator Grosart: Could your department furnish us with a list of these tribunals from which there is no appeal?

Mr. Maxwell: I am sure we can give you such a list. However, I am not sure it would ever be exhaustive.

Senator Connolly (Ottawa West): Senator Grosart, you may find some assistance in the schedules. Some 30 or more Acts are amended, many of which are related to such boards.

Mr. Maxwell: There is now a limited right of appeal from most of the boards referred to in the schedules. I think Senator Grosart is concerned with tribunals from which there is no remedy at all.

Senator Grosart: Yes. As a matter of fact I have some qualms about the phrase "interference by the courts". I think I understand the lawyers' basis of using the phrase. From the point of view of the rights of individuals before these boards, they would hardly regard it as interference to have a right of appeal. I would therefore be very interested in knowing the area in which a litigant has no right of appeal from a board that is not itself a fully judicial body, in the accepted sense of the division of powers between the legislature, the judiciary and the executive. It is a very important point, to my mind, because we are looking at our Constitution.

The Chairman: I do not think Schedule B covers your point.

Senator Grosart: It does not?

The Chairman: No.

Mr. Maxwell: As I conceive the question, I am not sure I understand the connection between this and the Constitution. I am not asking you a question, but I just do not see the connection at the moment.

Senator Grosart: The essential connection here is the division of powers, the balance of powers if you like, between the legislature, the judiciary and the executive. If there are boards, or instruments if you like, set up by the legislature or the executive, or both, which are exempt from the normal balance of power between the three levels, then this will be important in the restructuring of our Constitution, if it is to be restructured. To what extent do we find it acceptable that Parliament should set up quasi-judicial boards from which there is no appeal, in other words remove them from the normal functioning of the judicial system?

Mr. Maxwell: Speaking again purely personally here, I do not like that. Another board that comes to mind is the Public Service Staff Relations Board. That is another board from which there is no right of appeal.

Senator Grosart: And a very good recent example of that.

Mr. Maxwell: That is right. Speaking again personally and as a lawyer, I do not favour that sort of situation. This legislation, of course, is designed to meet that.

Senator Grosart: That was the point I hoped you would bring out.

Mr. Maxwell: It was designed to meet it, yes. But having met it, or at least attempted to meet it, we also do not want to err on the other side and get these boards so entangled with litigation of one sort or another that, in effect, they cannot really perform as the legislators thought they were going to.

Senator Flynn: There is a problem of balance.

Mr. Maxwell: Exactly, there is a problem of balance.

Senator Flynn: Administrative efficiency would suggest that sometimes you would refer matters to a quasi-judicial board, an administrative board with some discretion, but if there is a remedy like the one provided in clause 28 I think you cover the point raised by Senator Grosart.

Mr. Maxwell: We hope so. Admittedly there is a certain amount of trial and error involved, but we hope that we will have gone a long way to bring this more into balance, as Senator Grosart was suggesting, than perhaps has heretofore pertained.

Senator Smith: I wonder if I could ask a question as the other layman on the committee, in order to understand what we are getting at here. I put to you a hypothetical question, of course. Let us assume the CRTC made a very harsh ruling that had serious financial implications. Is there any form of appeal today, or will there be any form of appeal following the passage of this bill?

Mr. Maxwell: The answer to that is that there is a limited right of appeal now directly to the Supreme Court of Canada. When this legislation is passed there will be that remedy plus the right of review, which we think is a good deal broader than what is now given. Of course, the right of appeal will be in the first instance of the new Court of Appeal, the one established by this legislation, with a final appeal to the Supreme Court of Canada if leave is given. In addition to that right of appeal, there will also be this right of review, which will enable people to get at certain kinds of problems that I suspect they are not able to get at under the present right of appeal.

Senator Smith: Presently with regard to this kind of thing, is the appeal based only on points of law, or are the judgments on the whole implications involved in the decision appealable.

Mr. Maxwell: At the present time these rights of appeal are limited to questions of law.

Senator Smith: That is what I suspected.

Mr. Maxwell: I am afraid this is getting a little technical from the legal point of view. The fact of the matter is that a right of appeal on a question of law only is not unimportant, but it certainly does not enable you to get at, for example, findings of fact that were improvidently or improperly made. A tribunal is not governed by the rules of evidence. A tribunal can look to its own knowledge, its own expertise, upon which to make findings of fact.

Senator Connolly (Ottawa West): Sometimes it goes even further and takes evidence after the hearing and uses it.

Mr. Maxwell: Sure. One of the great vices—or perhaps I should not say vices, but one of the great difficulties with some of these boards is that they can fall into serious error by making findings of fact that there is really no justification to make. This is why the right of review, which supplements the right of appeal on a question of law, is a very important right.

Senator Smith: I can assume, then, in this hypothetical case that I have put of the CRTC, that this will be a very substantial improvement in righting so-called wrongs, or assumed wrongs.

Mr. Maxwell: That would be my opinion, yes.

Senator Flynn: I think it is important for the record to mention how the bill sees the review on the basis of a question of fact. I refer to paragraph (c) of clause 28, where a tribunal or board has:

> based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

It would be interesting to see how the court interprets that. There may be some caprice by the court itself.

Mr. Maxwell: Well, we hope not, not in my terminology, but then I have to appear before it. I will say frankly that this is not cribbed from any other source. It was something we felt gave the court the required latitude.

Senator Grosart: Some concern has been expressed recently by laymen about the limitation of access to the Supreme Court of Canada. Will this bill to some extent remedy that by providing access to the Federal Court in cases where there has been recently a limitation of access to the Supreme Court?

Mr. Maxwell: I think in fact that will be so. My guess is that substantially less work will be found coming from the Exchequer Court, or the new Federal Court, to the Supreme Court of Canada. I think the work load will therefore become much better distributed, and I suspect the Supreme Court of Canada will have more time to devote to appeal work from the provinces. That would be my guess how this thing would work. I am using a crystal ball a bit here.

Senator Connolly: This is a little off the subject, Mr. Chairman, but I would like to talk to Mr. Maxwell about one thing which I think would be of interest to this committee. In the United States in the Supreme Court the people who appear are very restricted as to time. They file a factum and are given perhaps 20 or 30 minutes to summarize the facts and that is it. Apparently this is the only way they can handle their work load. Do you suppose that procedural development will eventually take place in our courts? There are cases where the argument goes on for not only days but sometimes weeks.

Mr. Maxwell: You are talking now, senator, about the Supreme Court of Canada?

Senator Connolly: Yes.

Mr. Maxwell: As you perhaps know, you can only get to the Supreme Court of the United States by way of having your *certiorari* application allowed. In short, the equivalent in Canadian terms is that you have to get leave to appeal. We have, of course, moved somewhat in that direction in this country. We may find that as the nation grows and litigation multiplies we will have to follow that tack and require people to get there only with leave. As a matter of fact, to some extent this legislation is the harbinger of that sort of thing because basically that is the way you will get to the Supreme Court of Canada from the new Federal Court established by this bill.

Senator Connolly: By leave of either court?

Mr. Maxwell: That is right. There would be no just absolute appeal as such. Now, I know the Supreme Court of Canada has considered the question as to restricting counsel and this sort of thing. I think there is a real reluctance on the part of the judges.

Senator Flynn: It is within their powers to establish rules.

Mr. Maxwell: Of course, Senator Flynn, we all know that if you appear there and you have nothing to say you will not be permitted to go on indefinitely saying nothing. There are ways and means by which judges control counsel in this way.

Senator Flynn: There are some indicators.

Mr. Maxwell: But, they have never been prepared up to the present to arbitrarily say that you can have half an hour and by that time a little light goes on, as in the Supreme Court of the United States, and you must sit down.

Senator Hayden: In the United States Supreme Court do you know whether the length of time is allocated? Is that an individual decision of the court in each appeal?

Mr. Maxwell: My impression is that it is pretty well standard. I did know something about this a few years ago, because we were trying to intervene in a case in the United States on behalf of the Canadian Government. I was told that our counsel could have 20 minutes to make a submission. They go very much by the written brief that is filed, and you are just given enough time to explain the high points of the brief that you submit to the court. It is a highly formalized procedure, and I am sure most of our practising lawyers hope that we do not get into that situation too quickly. Maybe in the course of evolution we may have to come to it.

Senator Flynn: There is prejudice, of course, and members of the court have already taken cognizance of the briefs.

Mr. Maxwell: That is very true.

Senator Flynn: They may know something about the case before.

Senator Connolly: They do their homework.

Senator Flynn: If they do not you have to speak a little longer.

Mr. Maxwell: I understand that there is a little red or green light sitting in front, and I gather that the light comes on signalling the end. One light comes one when you have five minutes left and then a red one comes on and you must stop.

Senator Flynn: Perhaps this is in the realm of policy and maybe you do not feel obliged to discuss the matter, but many objections have been raised to the fact that the appeal division is formed of judges of the same court who have been working together and occasionally making decisions as trial judges and as appeal judges.

Mr. Maxwell: I am going to answer very directly, because I am a member of the Bar of the Province of Ontario where essentially we have the same system. There are eminent lawyers there from this province who know this is exactly the system which prevails here. You have a Supreme Court of Ontario which is composed of two branches, the High Court of Justice and the Court of Appeal and when you are appointed to one you are made *ex officio* a judge of the other.

Senator Flynn: Both ways?

Mr. Maxwell: Of course, in the Province of Ontario it very seldom happens. In point of fact, a judge in the Court of Appeal can sit if asked to by the Chief Justice as a trial judge, and a trial judge can move up and sit as a member of the Court of Appeal. The system we have elaborated in this bill is strangely similar to that system, which I think is a very good one, at least when you are starting out and when you are not quite certain how the work load is going to flow. You are not quite certain how many judges you are going to need. This gives a flexibility that we felt was desirable in the initial stages. I am sure that it will not remain this way forever, and I feel it is not necessarily a serious problem. I know there has been some expression of opinion that it is a bad thing. My guess is that if it turns out to be a serious problem the government will amend it.

Senator Flynn: I may be speaking as a Quebecer, but it is the other way around in my province. The members of the Appeal Court never sit as trial judges, although a member of a Trial Division may sit as an ad hoc member of the appeal.

Mr. Maxwell: There are various forms in the provinces. Quebec has one system, whereas in some provinces they are completely watertight and you are a member of one court and not of the other. However, I do not feel that what this bill is attempting to achieve is necessarily going to be a serious problem. If it does become one I am certain that the Government of the day whatever it happens to be, will correct the situation. I certainly think that is worth a try.

Senator Flynn: There is no doubt in any event that the member in an appeal court would feel more independent if he never had to sit as a trial judge.

Mr. Maxwell: Perhaps if one were talking about the most desirable end I suppose they might be entirely separate, but for the time being I think there are some advantages in having this flexibility which our system permits. I suppose it might be that they should be entirely separate, but I think there are some advantages in having this flexibility that this system permits, in the initial stages, until we see what we are up against in point of practice. We are a pragmatic government.

Senator Flynn: I see that the new members who will be appointed will retire at the age of 70, whereas those who were appointed before the act, will remain until 75. I suppose it is an indication that we may see an amendment to the British North America Act pretty soon.

Mr. Maxwell: You may see a lot of amendments to the B.N.A. Act.

Senator Flynn: We may see the age of retirement brought down to 70 for all members of the judiciary appointed by the federal Government.

Senator Smith: As well as members of the Senate.

Mr. Maxwell: I would say that, on balance this is the trend.

The Deputy Chairman: Are there any further questions, honourable senators?

Senator Flynn: No, but I understand that next week this committee will have a brief by Mr. Stephen Scott. I think it would be very useful if Mr. Maxwell could be in attendance at that time, to comment on the objections raised in this brief.

Mr. Maxwell: I would be very glad to be here.

Senator Langlois: We may have at this time further questions to put to Mr. Maxwell.

The Deputy Chairman: We have circulated the brief by Professor Stephen Scott, who is in the law faculty of McGill University and is a lecturer on constitutional law at McGill. In his brief he has proposals for certain amendments to this bill. He wishes to appear before this committee and be heard, and I think we should hear him. Perhaps we should meet on Thursday, the 26th November at 10 o'clock, as other committees meet on Wednesday. It would give us a free morning and enable good attendance. We would hear from Professor Scott and members of the committee could question him on his proposals. We would be delighted if Mr. Maxwell could be in attendance so that he could also deal with the

proposals and assist the members of the committee in dealing with the proposals and as to what conclusions we should arrive at.

Senator Connolly: Could Mr. Maxwell tell us whether Professor Scott appeared before a committee of the House of Commons?

Mr. Maxwell: I do not believe he did, Senator Connolly. I think we had some submissions in writing from him at one stage. His name is familiar to me. We had many submissions over the months in which this bill was under consideration. I am sure Professor Scott wrote to us on one or two occasions and we dealt with this, or thought we dealt with this.

Senator Smith: This question may not be relevant. It seemed to me that the questions started rather early this morning, and I had a question in mind, as to whether Mr. Maxwell had completed the statement he thought would be useful for the lay members of the committee to have complete? As far as I know it was complete, but I do not know.

Mr. Maxwell: Actually, I had not formulated anything special, really. I was trying to hit what I thought were the highlights of this piece of legislation, from the standpoint of the committee's benefit.

I might mention that we have gone some wee distance to give this court an increased jurisdiction in some areas—for example, in aeronautics.

Here again to some extent we are admittedly experimenting with jurisdiction. We have found over the years, that there would be many advantages in having such matter as airplane disasters covered. We have the odd such disaster and I am sure it is inevitable. We could have jurisdiction in regard to such matters in a Federal Court. Sometimes one finds that there are suits all over the country, against airlines, and it is a chaotic situation. Sometimes the federal Government is implicated for one reason or another, not necessarily because there is an army aircraft involved but perhaps because of some improprieties at an airport or something of that sort. We thought it would be useful, from the standpoint of litigants, to be able to get their cases all together in the one tribunal.

Senator Flynn: Is this exclusive?

Mr. Maxwell: No, it is not exclusive, it is not exclusive, it is concurrent.

Senator Flynn: Like marine law.

Mr. Maxwell: We felt it would be a useful thing. We had some criticism of this. On balance, my feeling is that this is a desirable thing to try to achieve. If it proves to be unsatisfactory, I am sure the government of the day will change it. I feel it is worth experimenting with and from my point of view I cannot see anything wrong with it.

Senator Grosart: Mr. Maxwell, I am sure you have given a great deal of consideration to the name of this court. It seems to me that certainly, offshore and in other jurisdictions, it is bound to create some confusion. The citation, for example, of a decision of the Federal Appeal Court would appear to suggest on the surface that this was the final court of appeal in Canada. You use almost throughout the phrase and throughout your evidence the phrase "Federal Appeal Court". This is of course only one division of the court. Has this problem of the name arisen in your discussions?

Mr. Maxwell: I can say frankly that the matter of the name of this court was given a lot of consideration, not so much by myself but by others. It occupied a lot of time. Various things were tried out and this was the thing they settled on. I can only say that there may be some confusion. It is rather similar to the terminology there is in the United States. It might produce some confusion, but basically these courts are domestic courts and not really for the outside. They are really for us and if people become confused that is too bad. I do not think too many people would confuse the United States Supreme Court with the Federal Court of Appeal that they have throughout their country. It seems to work, Senator Grosart.

Senator Grosart: Just laymen.

Mr. Maxwell: It is not very mandatory.

Senator Connolly: Would you be sorry to see the word "exchequer" go?

Mr. Maxwell: I am, personally, but on balance it is a word which does not have much meaning for the average person today. It has a historical meaning, really. I have a feeling that it was a word that conjured up, in the minds of the practitioner who perhaps did not practice too much in the federal courts, something horrific, from his point of view.

Senator Connolly: The jurisprudence that it has developed, where applicable, will still be applicable?

Mr. Maxwell: Oh yes. As a matter of fact the Exchequer Court is continued, it really is not abolished. It is continued with a new name and added to, and so on.

The Deputy Chairman: Honourable senators, we will adjourn until Thursday morning, November 26. Professor Scott will be in attendance and Mr. Maxwell will be here also.

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

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 2

THURSDAY, NOVEMBER 26, 1970

Second Proceedings on Bill C-172,

intituled:

"An Act respecting the Federal Court of Canada"

(For Appendices and Witnesses:—See Minutes of Proceedings)

23181—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

*Ex officio member

(Quorum 7)

Orders of Reference

Extract from the Minutes of Proceedings of the Senate of Monday, November 16, 1970:

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 Lamontagne, P.C., for the second reading of the Bill C-172, intituled: "An Act respecting the Federal Court 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 Connolly, P.C., moved, seconded by the Honourable Senator Kinnear, 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

23181—1½

Minutes of Proceedings

Thursday, November 26, 1970
(2)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators: Urquhart (*Deputy Chairman*), Burchill, Connolly (*Ottawa West*), Eudes, Everett, Fergusson, Flynn, Gouin, Haig, Hollett, Langlois, McGrand and Walker. (13).

The following Senators, not members of the Committee, were also present: The Honourable Senators: Lafond, Macnaughton, McDonald.

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

On Motion of the Honourable Senator Langlois it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee continued its consideration of Bill C-172, intituled: "An Act respecting the Federal Court of Canada".

The following witnesses were heard in explanation of the Bill:

Professor Stephen A. Scott, Professor of Constitutional Law, Law Faculty, McGill University, Montreal;

Mr. D. S. Maxwell, Deputy Minister of Justice, and Assistant Attorney General.

On Motion of the Honourable Senator Langlois it was ordered that the two briefs presented by Professor Scott, entitled "Proposals for Amendments to an Act respecting the Federal Court of Canada" and "Bill C-172: An Answer to Constitutional Objections", be printed as appendices to these proceedings. They appear as appendices "A" and "B" respectively.

At 12:05 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

The Standing Senate Committee on Legal and Constitutional Affairs Evidence

Ottawa, Thursday, November 26, 1970.

[*Text*]

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 10 a.m. to give further consideration to Bill C-172, respecting the Federal Court of Canada.

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

The Deputy Chairman: Honourable senators, this morning we will give further consideration to Bill C-172, an act respecting the Federal Court of Canada. Last week Mr. D. S. Maxwell, the Deputy Minister of Justice and the Deputy Attorney General of Canada, appeared before us and gave a very clear and informative analysis of this bill. We are most pleased that he is able to be present again today.

Honourable senators, you will recall that at our last meeting I advised the committee that Professor Stephen Scott, who is Professor of Constitutional Law at McGill University, expressed a desire to appear before this committee. He forwarded in advance a brief containing certain proposed amendments to Bill C-172. This was distributed to the members of the committee, but if any member should not have one we have additional copies which we will gladly distribute.

Professor Scott is present now. On behalf of our committee I welcome you, Professor Scott, to this meeting and would now ask you to kindly present your views on Bill C-172.

Professor Stephen A. Scott, Professor of Constitutional Law, McGill University: Thank you, sir. First of all I would like to thank honourable senators for the courtesy of hearing me. This is the first time I have had the privilege of appearing before the Senate or one of its committees and I hope I can be of some assistance.

I may add to what your chairman has just said that I had been surprised to find that in some quarters there were some doubts as to the constitutional validity of certain aspects of this bill. With this in mind I have produced a brief paper, which I call "Bill C-172: An Answer to Constitutional Objections", which I gave to the clerk this morning, and I do not know whether it has yet been made available.

The Clerk of the Committee: It is being printed.

Senator Langlois: Is this the same document as we have?

The Deputy Chairman: No. This is an additional one to which he is referring now.

Senator Langlois: If it is the one the witness is going to discuss this morning we should have a copy of it.

The Clerk of the Committee: It is being printed and it will be available in a few minutes.

The Deputy Chairman: You have a copy of his original brief.

Professor Scott: This is a supplementary answer to certain doubts that have been entertained, which you may consider at leisure. Indeed, I need not even discuss that at all unless you happen to be particularly interested now.

I will address myself to the points of my brief. By and large I think the bill is not a bad one at all. In fact, I think it is quite skillfully drafted. No one engaged in drafting a piece of legislation would have produced exactly the same bill. I myself might have been a little more liberal on some points in favour of concurrent rather than exclusive jurisdiction, but I do not think that is necessarily very serious, provided one is careful, it seems to me, to make sure that counsel are not faced with two courts enjoying exclusive jurisdiction in cognate areas and finding that they are not quite sure whether they should sue in one, or they are quite sure but turn out to be wrong and have then to start at the bottom of the legal process again, after perhaps limitation of time has run out. Quite a few of my proposals are addressed to this issue and there are a few other points.

Perhaps I will start with my proposed section 17(6), which is to be found at page 2 of the brief. This is a general provision similar to provisions found in the legislation of various provinces, not least the Province of Quebec, to allow the impleading of persons substantially involved in the case incidental to the principal matters litigated. This is particularly important in Crown proceedings, as I think can be seen in situations such as this. The Crown proceeds against one of its debtors under the bill; the Crown proceeds against a garnishee under the bill; in each case it can obtain judgment, but as between the debtor and the garnishee it does not seem to me possible for the court to give judgment, so that while the garnishee may be made to pay the Crown, he has not a conclusive answer, certainly not *res judicata*, against his own creditor who is, of course, the Crown's debtor. That is one sort of situation.

Another situation might arise, for example, where I am a passenger in a car that has a collision with a government vehicle. I sue the Crown under the bill in the

Federal Court; I sue the Crown's driver under the bill; that is probably possible under the bill if he is taken to be an officer of the Crown and so on. What I cannot do is sue my own driver in the same proceedings, so that I will have to conduct separate proceedings at considerable expense in another court over the same matter, pay for the same evidence to be taken twice; conduct, in other words, two separate trials. Indeed, the Federal Court may say that my driver was responsible and dismiss my proceedings in the Federal Court, whereas the provincial court may say, "The Crown driver was responsible. Go sue in the federal court". I may get a dismissal in both cases, each on the ground that the other was at fault. This is, of course, a necessary consequence of forcing two related claims to be tried in different courts.

The Deputy Chairman: This is where you would want to join a third party?

Professor Scott: This is where third parties are joined.

I therefore set out on page 2 the proposed subsection (6) of clause 17. In the event that anyone might take objection to this, in the supplementary brief, which you will get shortly, I submit that this is, in my opinion, constitutionally valid, at least arguably constitutionally valid. The only case that might be thought to oppose this can, in my view, be either distinguished or said to have been subsequently overruled, in principle at least, by the Privy Council. So much for third party proceedings.

Clauses 18 and 28, on judicial review of the acts of public officers, have, of course, been those that have given rise to the most widespread interest in this bill, not merely because they give judicial review to the Federal Court on most of the traditional prerogative remedies and other forms of relief, but because they exclude the jurisdiction of the provincial superior courts. This is an area where, as I say, I would have been just as happy to see concurrent jurisdiction, but I do not think that this is very serious. I believe it is perfectly reasonable to adopt the other view; I think the Government has thought that it would like to see exclusive jurisdiction here, and that seems to me a fair policy, and it would then be reasonable to make this work as well as possible.

Under the Government scheme two sorts of difficulties arise, in my view. One is the sort of conflict that can arise between the Federal Court of Appeal and the Trial Division of the Federal Court, because the Federal Court of Appeal is given exclusive jurisdiction in some of these cases of judicial review, and the trial division in others, and it is not absolutely clear at all times where proceedings should be instituted. Therefore, in my view it would be desirable to amend clause 28, as I indicate at the bottom of page 2 of the brief, so as to ensure substantially this: that if an application is commenced in the Federal Court of Appeal, which has exclusive jurisdiction over these applications, for relief against certain federal tribunals where the challenge is on certain grounds, where the application is made for review to the federal Court of Appeal, then the federal Court of Appeal has all the jurisdiction also of the Trial Division in the event that it should turn out that the application is unsuccessful on those exclusive grounds on which the Appeal Court has jurisdiction.

The Appeal Court attracts to itself the jurisdiction of the Trial Division so that it may deal with the entirety of the issues that arise, but also so that it be allowed to refer any issue to the Trial Division for trial; so you will not have a situation where counsel has applied to the Federal Court of Appeal and finds his case dismissed because the proper kind of review he should have asked for was an injunction or a prerogative writ in the Trial Division; whereas, if the proceedings start off in the Trial Division and it turns out to be one of those cases proper for the Federal Court of Appeal, it seems to me that the Trial Division should have power to order the proceedings to be continued by the Court of Appeal as proceedings of the Court of Appeal; in other words, to refer them back and forth according to the jurisdiction, so that you do not get dismissals on grounds of jurisdiction, having taken proceedings in the wrong court. This is a consequence of having divided up, if you like judicial review into the hands of two exclusive parts of the Federal Court itself. But, there are also certain conflicts which can arise between the exclusive rights of review of the Federal Court of Canada and those of the provincial courts. I have adopted, at the bottom of page 3 and at the top of page 4, a set of clauses which have substantially the effect of preventing a situation where a case begun in the wrong hierarchy of courts will be dismissed, let us say, by the Supreme Court of Canada in order that it should be commenced down below in the other hierarchy of courts. In my view, if nobody objects to the jurisdiction of the provincial court, or the objection is overruled, then the provincial court should be allowed to hear the proceedings, notwithstanding that it might have been a case which would rightly have been in the exclusive jurisdiction of the Federal Court.

I think some senators may be familiar with a curious pair of cases which I believe were decided in the 1940s, involving the then Minister of National Health and Welfare, Mr. Claxton, where complaints were made that he was denying some doctor the narcotics he required. Proceedings were started in the provincial Superior Court which dismissed them on grounds that it should have been heard in the Exchequer Court, and when he began proceedings of a slightly different character in the Exchequer Court, they were dismissed by the Exchequer Court on the grounds they should have been tried in the provincial Superior Court, or at least not in the Exchequer Court.

At all events, in my view, the marginal cases should be left to the provincial courts. Where they say they have jurisdiction, and whether or not they do, it ought to be enough at least to found the jurisdiction in the circumstances.

I also suggest as part of the scheme something similar to what exists in Quebec as between different courts in the province; that is to say, where one court finds itself without jurisdiction it refers the record to the other court to be continued therein as proceedings of the other court. Instead of having a dismissal outright you have a reference to the record to the competent court.

I propose that, when the Federal Court dismisses proceedings and refers the record to the provincial court, the provincial court be left to decide for itself whether the

proceedings should be continued as its own. It may think that this Act is authority enough—I do—and it may order accordingly. If it does not think it has sufficient authority, then, in that case it will get authority from its own legislature. At all events, I propose that there be a scheme whereby, instead of having dismissals outright, you could transfer the record to the properly competent court.

My next proposal, the clause for which you will find at page 5 of my draft, allows the Trial Division to have jurisdiction in certain sorts of federal cases for what can reasonably be called federal cases which do not come within the present scope of its jurisdiction. For example, if today you wish to take a *quo warranto* against a member of a Privy Council as being incapable of holding office, under the present scheme this could not be done in the Federal Court of Canada, because his office is created by the British North America Act of 1867 and not by any Act of the Parliament of Canada. Similarly, there are pre-Confederation offices of various kinds. I have one or two in mind and I do not want to provoke any litigation in the case in question. The case I have in mind is a pre-Confederation office and it is not at all clear whether the officer in question is a federal officer or a provincial officer. He appears to be treated as being a federal officer. In my view, cases on pre-Confederation law should be allowed to the Federal Court, and, similarly, such British statutes extending to Canada as are still in force in Canada and are under federal legislative jurisdiction to amend since the Statute of Westminster; in other words those subject to repeal by the Parliament of Canada. I would allow in all these cases a concurrent original jurisdiction Trial Division.

My second to last proposal is to be found at page 6 of the brief. Here is a case where you can see the jurisdictional problems quite well. A soldier may be taking, let us say, habeas corpus proceedings on the grounds that he is being illegally detained in a military jail, which may be in Germany. His contention is, by law, that he has ceased to be a member of the armed forces or it may be that he was illegally transferred abroad because he didn't have the obligation to go abroad. He is denying that he is, in contemplation of law, a member of the Canadian Forces serving outside of Canada. Yet, as the clause of the bill now stands he seems to me to be in a position of having to allege that he is a member of the Canadian Forces serving outside Canada in order to have the jurisdiction for the habeas corpus to be available to him in order that on the habeas corpus proceedings it should be held that he is not, in contemplation of law, a member of the Canadian Forces serving outside Canada. If he got the habeas corpus as the law now stands and if it should be decided that he was not, in law, a member of the Canadian Forces serving outside Canada, the dismissal would have to be for lack of jurisdiction. In other words, the merits of the case could not be decided and the court could not make an order on it. The writ would be dismissed for lack of jurisdiction because, under the decision of the court, there would have been no jurisdiction to try the case at all, he being not a member of the Canadian Forces serving outside of Canada. I suggest that a provision be made similar to those I proposed for elimination of jurisdictional conflicts earlier in the form I have given on page 6.

One minor matter—less important, perhaps, at present than it might become when federal authority may be more exercised abroad—is the problem of the process of the Federal Court of Canada to issue abroad. Wherever you may say that the federal Government is in fact exercising jurisdiction abroad, the present provision, in clause 55(1) of the bill allows the jurisdiction to extend to places where legislation enacted by the Parliament of Canada has been made applicable.

In fact the action may be executive action and not legislative action and there may be common law cases where the superior courts would be quite entitled to exercise jurisdiction. I suggest that clause 55 of the bill be amended to allow what I have suggested at the bottom of page 6 of my draft, that is to say, allow the process to run to any place where the superior courts at Westminster might have run. I gave you a case called *Ex parte Mwenya*. That had to do with an African protectorate but in the history given there you will see for example on one occasion a writ of habeas corpus was issued into Canada in connection with an escaped slave from the United States by the name of Anderson.

While I think that at common law the process of superior courts of dominions might not be able to issue outside the dominion, that of the superior courts at Westminster could in fact run in certain cases; and I think that we could leave to the judicial authorities the right to say where outside Canada the process of the Federal Court could properly run.

That, sir, concludes my resumé of my brief. If you would care to ask me any questions about it, I would be glad to reply.

The Deputy Chairman: Honourable senators, you have heard a detailed and thorough explanation of the brief as presented by Professor Scott of McGill University. Are there any particular questions which honourable senators should like to direct to Professor Scott on his brief?

Senator Flynn: I suppose it would be in order for Mr. Maxwell to let us have his reaction to the proposals made by the witness.

The Deputy Chairman: How would you like to proceed now? Would you like to ask Mr. Maxwell certain questions or would you like him to deal generally with the main points of the brief of Professor Scott? What is your wish?

Senator Flynn: I think he should deal with the points raised by Professor Scott, in the order in which he has presented them.

The Deputy Chairman: Is that the wish of the committee?

Hon. Senators: Agreed.

The Deputy Chairman: Mr. Maxwell, you have the floor.

Mr. D. S. Maxwell, Deputy Minister of Justice and Deputy Attorney-General: Thank you, Mr. Chairman.

Honourable senators, the first point which Professor Scott made in his oral presentation dealt with the matter of pleading third parties in Crown proceedings. This is one of the tortuous areas of the Federal Court structure. It is a matter that has caused us a great deal of concern in the Department of Justice. Certainly, if it were thought that it was open to the Parliament of Canada to deal with a total subject matter, that is to say, claims between subjects over which or in respect of which the Crown, the Parliament of Canada, cannot legislate, we would have done so. But we did not believe that there was constitutional power to do that. Indeed, we think it has been authoritatively decided to the contrary and this is why we refrained from putting that sort of provision into this bill.

I understand there is an additional paper prepared by Professor Scott dealing with constitutional issues. I have not really had a chance to read it. I simply wanted to say to honourable senators that this is the view upon which we have proceeded. We think it is right and therefore I would feel, personally, that my advice would have to be that a provision along the lines proposed by Professor Scott would be *ultra vires* the Parliament of Canada.

The next point that Professor Scott dealt with was the relationship between the Trial Division of the Federal Court and the Appeal Division. He is concerned, as a number of people have been concerned, about how in fact those two courts are going to function together. You commence a proceeding in the Trial Division, let us say, and then you are told that there is no jurisdiction there, that you properly should have proceeded in the appeal branch of the court. I for my part do not believe that there is any serious problem in that regard because, as I conceive this statute working in fact, there will be rules of practice, that will prevent referrals from one branch to the other, to deal with that kind of problem.

I might refer honourable senators to clause 46(1)(b) which permits the judges of the court to make rules "for the effectual execution and working of this act and the attainment of the intention and objects thereof." It is a very broad power and I frankly do not believe that there is any problem in this regard at all.

When you start concerning yourself with how the Federal Court is going to function, in relation to the various superior courts in the country, of course there may be some problems there. They are difficult to discern at this stage. Personally, I think we need some more experience, if there are problems. We have added a good deal of concurrent jurisdiction to the Federal Court in this matter, for example in the subject of aeronautics. I do not really see how there will be any great problem. If there is concurrent jurisdiction, then of course you can proceed in either court. This bill has been criticized by some because we have given increased concurrent jurisdiction. On the other hand, I think Professor Scott's view of the matter is that he would like to see more concurrent jurisdiction and less exclusive jurisdiction. That is another point of view. We have tried to take exclusive jurisdiction where the problem involves an attack on the exercise of federal statutory powers, we feel that that is the kind of matter that should be dealt with in the federal tribunal to the exclusion of the provincial tribunal for the simple reason, of course, that you have ten superior courts in this country at the provincial level and it is rather onerous and difficult to have a single federal authority being subjected, in theory and sometimes in practice, too, to a jurisdiction that is so multiple—ten possible tribunals, all separate and distinct, able to supervise the one federal board, such as the Canada Labour Relations Board or some other board. Indeed, any exercise of federal statutory powers. That is why we moved in the direction of exclusive jurisdiction when dealing with the supervisory power.

But in other areas we think that there is a proper role for a concurrent jurisdiction, and we have used that with regard to aeronautics, limitation with regard to promissory notes and bills, and works and undertakings extending beyond the jurisdiction of a province and so on.

On the question of the Canadian forces abroad, I want to say that provisions of this bill in this regard are really a continuation of provisions that have been in the law for quite a long time now. It is an extraordinary jurisdiction, because it is, of course, extraterritorial. One would not expect to legislate extraterritorially in an unrestricted way. If you are going to legislate extraterritorially you have to do it in reference to something about which you can legislate properly, such as, for example, the Canadian Armed Forces. To take Professor Scott's example of the person who contends that he is not a member of the forces, I frankly do not know on what basis we could possibly justify legislating on that subject. If the man is a member of the forces and is being improperly incarcerated, I would say that, yes, that is a proper thing for us to legislate about. But if he is not a member of the forces, then I should have thought that any remedy he might have would have to be a remedy found within the legal framework of the place where he is being incarcerated, and I just do not think that would be an acceptable approach to take in federal legislation.

Again, on the matter of extending the jurisdiction of the processes of the court in the way in which Professor Scott has suggested, I frankly feel that it is unlikely that Canada is going to attempt to spread its dominion in a sort of colonial fashion without having some statute of Parliament authorizing this. I think the British analogy is interesting, but I do not think it is relevant in our case.

Of course, it is true that Rhodesia was a protectorate of Great Britain, and the case that he cites deals with that situation. It is true that for many years the British courts did deal with situations arising in the United States—the famous case of Penn and Baltimore was one, and there were many others; but in these times I just do not think that it is relevant, necessary or, indeed, desirable to extend the jurisdiction of this court in the way in which he would recommend. I frankly think that that is not relevant.

I do not know that I have left out anything. If I can help any of the senators with regard to what Professor Scott has proposed, I will be glad to do so.

The Deputy Chairman: Honourable senators, are there any questions you wish to ask Mr. Maxwell relating to the views expressed by Professor Scott? If not, perhaps

Professor Scott would like to make a brief comment on what Mr. Maxwell has said about Professor Scott's brief and the points raised in it. I do not wish to get a controversy going between you two, but I think I should give you the right of reply, and perhaps that will be it.

Professor Scott: As regards the constitutional objections to third party claims, I am not convinced, as I said, that the question is quite as settled as Mr. Maxwell might think. I would suggest, why not put it in and let the courts decide it. Perhaps Mr. Maxwell may be tempted, if I offer to represent him without fee in the Supreme Court, to uphold this.

Mr. Maxwell: I am going to hold you to that.

Professor Scott: I am perfectly willing to be held to that. I will ask for my expenses, but no more, if you want to put that in and see. It does not seem to me that the Parliament of Canada must immediately shrink every time anyone says "constitutional objection". I certainly know that the legislatures of the provinces are not taking that attitude but are legislating left, right and centre in every description of matter which all kinds of authorities have said are exclusively federal, including, just to take one example, divorce and the capacity to remarry after divorce.

So far as rules of practice being enough to eliminate conflicts between divisions of the court, I would just say that the act speaks of exclusive jurisdictions in the Federal Court Trial Division and in the Federal Court of Appeal. While rules of practice can go very far, I cannot see them as being justified in varying in any way that which the Act has said; and, if the Act says there are two exclusive jurisdictions, then it seems to me that that is the end of the matter and nothing that the rules of practice can say can vary that. In fact, I thought about the breadth of that clause before I made these proposals, but it seemed to me that one should eliminate any possible jurisdictional conflict.

My problem with respect to the member of the forces is that this is not a case where any Tom, Dick or Harry is suing for habeas corpus in a Federal Court of Canada. In this case of the person is *de facto* a member of the Armed Forces. Indeed, Mr. Maxwell in his bill speaks of alleged federal tribunals and so on, persons allegedly acting as authorities, and in this case the Canadian Forces are purporting to keep the person in as a member of the Canadian Forces. That is the basis of the constitutional jurisdiction. He is apparently, and *de facto,* a member of the Canadian Armed Forces; but in law he says he is not —not validly—a member of the Canadian Forces. It is, of course, true that, whenever anyone acts illegally, he is not a public officer, you may say, in some ways, but a common wrongdoer, a common tort-feasor; and the objection to federal jurisdiction based on his being not actually a member of the Armed Forces but only a *de facto* member would extend to federal jurisdiction over any kind of judicial review where the public officer acts *ultra vires* and is therefore simply an individual wrongdoer.

My proposal on the subject of extraterritoriality of process is not in fact to allow the Federal Court simply to go extending its process out of the country by itself whenever it feels like it, but merely to review executive action which may have been taken outside the country; where, for example, someone is being detained outside the country in connection with deportation, or something like that, and where there is actual federal action outside the country; and this is simply to allow the courts to follow the Crown in the same way that the Americans meant when they spoke of the constitution following the flag. In other words, does the constitution follow the flag? Here the question is, do the courts follow the Crown? My suggestion for this extra territorial process is that the judicial jurisdiction be allowed to follow executive action.

Actually, I am not as unsympathetic—I will just add this—to the exclusive jurisdiction as Mr. Maxwell may think, but what I think is necessary is this; if you have exclusive jurisdiction you should add the sort of thing I propose to prevent conflicts. If you want exclusive jurisdiction, then you force conflicts, and if you force conflicts it seems to me that you have the responsibility to eliminate them.

Senator Flynn: Mr. Chairman, as far as this argument of the witness saying that because the Act confers exclusive jurisdiction to the Appeal Court and the Trial Division, that this would prevent a court from adopting any rule for the referral of a case which would have been introduced in the wrong division, I must say I cannot follow his argument. The exclusivity provided in the Act is not as between the Appeal Division and the Trial Division but with respect to any other court. The Trial Division shall have exclusive jurisdiction, that is exclusive with regard to the other superior courts of the province in some cases, and furthermore it says it has concurrent jurisdiction with the other superior courts. I mean the exclusivity here has no reference to the Appeal Court, and I cannot see why there should not be a rule that if you start in the wrong division—let us say in the Appeal Court, for example—the Appeal Court would not refer the matter to the Trial Division or the Trial Division would not refer the matter to the Appeal Court.

Professor Scott: The problem is subsection (3) of section 28. That reads as follows:

> Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

Senator Flynn: It has no jurisdiction to entertain, I agree, but at the same time the same thing applies to the Trial Division. But why should there not be a provision that when the Trial Division finds it has no jurisdiction to entertain a proceeding, it could refer it to the Appeal Division? Would you say that it is entertaining jurisdiction just to refer a matter to the proper court?

Professor Scott: Well, it is not so much that. It is that the whole decision becomes subject to its exclusive jurisdiction even when, for example, there are other grounds on which it may wish to exercise the jurisdiction than those permitted by clause 28(1) which are limitative.

There might be other grounds in the matter. In other words, I think that two cognate forms of review should be in the same hands, and if they are not in the same hands, it should be clear that whoever's hands they come to can either deal with it or refer it to somebody else.

Senator Flynn: This may be just a matter of clarification, but I am not convinced there is really a bar there to a referral by any court to the other court.

Professor Scott: Why not make it explicit, then? Because the proposed section makes it very clear that there is.

Senator Flynn: Maybe our own legal advisor would like to comment on that. What do you think, Mr. Hopkins?

Mr. Hopkins: I would be inclined to agree with Mr. Maxwell that a great deal could be accomplished under, I think, 46(1)(b) to soften any apparent hardship in the actual law as stated here procedurally. It appears to be largely unlimited so far as the procedure of the courts is concerned and it would apply both to the Appeal Division and the Trial Division.

Mr. Maxwell: If I might interject here for a moment, I should point out that the scheme of the rules that clause 46 contemplates is that there will be rules governing both the Trial Division and the Appeal Division, and, of course, all the judges in both divisions make all the rules. These things are not going to be worked out in water-tight compartments; they will be worked out having in mind, of course, that there may be some difficulties to the practitioner that the rules will have to deal with. We are conscious of the fact that there may be the odd case where somebody will start his proceeding in the wrong division but certainly if that case gets off on the wrong foot it will be referred to the right division. We are dealing here with one court having two branches; we are not dealing with two separate water-tight tribunals, and the rules will be a unified code of rules dealing with both.

Senator Connolly (Ottawa West): In a case like that, if a proceeding was started in the wrong division, Mr. Maxwell, you would contemplate the rules' providing that the division in which it was started could refer it to the other division.

Mr. Maxwell: Yes.

The Deputy Chairman: That is the idea.

Senator Flynn: If it is the Court of Appeal, there is no problem, and if it is the Trial Division and there is an error, then it is subject to review by the Appeal Division.

Professor Scott: What if it is a case where there is a ground for review which could go to the Federal Court of Appeal and then under clause 38 the whole decision is put outside the Trial Division's jurisdiction because a ground could be made under clause 28, but what you happen to want to do is to attack it on some other ground or apply for some other kind of relief than the Federal Court of Appeal can grant? Because it is allowed only a few kinds of relief, not an injunction, for example. If a decision can be attacked on any of the grounds in clause 28, then it must go to the Court of Appeal on an application, and the Court of Appeal cannot give an injunction. Nor in principle can it refer it to the Trial Division because it is within their own jurisdiction under clause 28.

Mr. Maxwell: In answer to that question, I have the greatest difficulty in visualizing the situation where you would want relief beyond the right of review. Where there is a right of review to the Court of Appeal, it is the broadest kind of review that I know of in terms of the law that now exists, and certainly the Court of Appeal does have jurisdiction to deal with it under clause 28, I cannot imagine why that would not be wholly adequate for the purpose of an attack on a federal board or something like that.

Professor Scott: Could they give an injunction?

Mr. Maxwell: They would not need to. They would refer it back to the tribunal or the court with directions. This would be irrelevant.

Professor Scott: They are threatening to proceed in the future, perhaps,—an officer threatening to commit a tort.

Mr. Hopkins: Well, could not the Trial Division issue an injunction?

Mr. Maxwell: I have some difficulty in visualizing a situation which would produce a great problem here. If you are talking about somebody exercising statutory powers under a federal statute, I frankly feel that if there is jurisdiction in the Court of Appeal to deal with it, it seems to me that that would be the end of it as a practical problem and I just cannot imagine any further relief being required.

Professor Scott: Not a *mandamus*, not an injunction?

Mr. Maxwell: No, definitely. If the problem is one where they are refusing to exercise jurisdiction—if that is the situation, then I think you are under your *mandamus* provision or perhaps your injunction provision. But if you are dealing with a tribunal that has seized or has taken jurisdiction and has done something wrong in the course of it, then I think it is your right of review that you would want and, indeed, I cannot imagine you wanting anything else, because the Court of Appeal then has full power to deal with the matter and to send it back to the tribunal, with directions. You cannot assume that people are not going to comply with what the court has done.

Senator Connolly (Ottawa West): In the face of section 18, which deals with prerogative writs and includes injunctions and *mandamus*, which also was mentioned, is it not perfectly clear, Professor Scott, that an application for an injunction or a *mandamus* could be brought, without question, in the Trial Division?

Professor Scott: No, the problem is this, that where the decision of the tribunal is in some way infected with any of the grounds listed in section 28, it then comes within

the exclusive purview of the Court of Appeal. When it comes before the Court of Appeal they can review and set aside that order, but the jurisdiction of the Trial Division in *mandamus* and in injunction proceedings is at an end, because once it comes under section 28(1) the whole decision is excluded from section 18. Section 28(3) says:

> ...the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

It is the whole decision of the tribunal which is withdrawn from the purview of the Trial Division. Mr. Maxwell, of course, is not willing to go so far as to say that anybody can issue an injunction in that case. He thinks it is not necessary, nor can ever be necessary—nor *mandamus*, nor any of these other things. I am not sure.

Mr. Russell Hopkins, Law Clerk and Parliamentary Counsel: Surely, that would be the choice of the litigant? If the litigant wants an injunction and considers that to be the appropriate remedy, why would he not go to the Trial Court?

Professor Scott: He would, but his case would be dismissed. Suppose his ground were section 28(1)(a), he would be told that because his ground was section 28(1)(a) he is put in the Court of Appeal by section 28(3), and that the Court of Appeal has exclusive jurisdiction and all they can do is review and vary—all they can do is review and set aside.

Mr. Hopkins: But if the litigant simply seeks an injunction before the Trial Division—leave the Court of Appeal out of it.

Mr. Maxwell: I think Professor Scott is postulating a situation where the Court of Appeal has dealt with the matter and perhaps quashed the decision and sent it back to the tribunal, and the tribunal in some way or another is refusing to comply with the direction of the Court of Appeal.

If you postulate that kind of unlikely situation, I feel reasonably confident that that kind of problem could be dealt with by way of injunction or what-have-you, because, quite frankly, they would be acting wholly illegally and would be flying in the face of an order of the Court of Appeal.

Senator Connolly (Ottawa West): Mr. Maxwell, perhaps you would explain this to us further, then. Here is a case, in your example, where the Trial Division has done something which the Court of Appeal finds to be not within its competence, or to be wrong. It seems to me that Professor Scott is saying that the Court of Appeal simply says that it is wrong and reverses the decision. So far am I right? Then it refers it back to the Trial Division. Is Professor Scott saying that the Trial Division, which can deal with prerogative writs under section 18, cannot deal with them because the argument to be made in favour of issuing the writ is contained in section 28?

The Deputy Chairman: Section 28(3).

Professor Scott: The argument is section 28(1) and (3).

Senator Flynn: Do you mean that if I apply for an injunction under section 18 and it is refused and I go to the Appeal Division and the judgment is quashed, the Appeal Division cannot say the injunction should be issued?

Professor Scott: That is correct, because all they can do is review...

Senator Flynn: It says:

> The Trial Division has exclusive jurisdiction...

And the bill also says, in section 27(1):

> An appeal lies to the Federal Court of Appeal from any
> (a) final judgment,

And the judgment of the Appeal Court will, of course, correct the first judgment and issue an injunction.

Professor Scott: But it can only do what the Trial Division could have done, and the Trial Division would have had no right to issue any injunction because the ground of complaint of the litigant was the ground under section 28(1), and all grounds under section 28(1) can be made the subject only of application to the Court of Appeal to review, vary or set aside.

Senator Flynn: That is the review of the decision made by any body other than the Trial Division.

Professor Scott: That is right—boards, tribunals, anybody else.

Senator Flynn: So it does not apply to the original trial jurisdiction of the Trial Division under section 18; it is something else?

Professor Scott: The point is, if you have an act of a federal tribunal which is infected with any of the defects listed in section 28, then that can be made exclusively the subject of an application to the Court of Appeal, and nobody, neither court, can ever issue an injunction, *mandamus, quo warranto* or anything else.

Senator Flynn: But the problem is not there. Just try to imagine what kind of decision you would want the Appeal Court to review. Is it something decided by the Tax Appeal Board?

Professor Scott: I would use any situation where a minister, for example, or any other authority is simply threatening to do something.

Senator Flynn: "Threatening"?

Professor Scott: Or has issued a notice, perhaps, saying that unless I comply with "A", "B", and "C", this is going to be done. I may wish to do more than review, vary or set aside some order. I may want some sort of prerogative relief and, in my view, the prerogative relied should always be available.

Senator Flynn: Suppose a decision of the minister is quashed by the Court of Appeal and they say that the minister should not have done that?

Professor Scott: Well, that will not prevent the minister going on to my land if he feels like it.

Senator Flynn: But I have a remedy, of course.

Professor Scott: Do you?

Senator Flynn: I could come back to the Trial Division and obtain a writ of injunction.

Senator Connolly (Ottawa West): I cannot myself visualize that, if the Court of Appeal should say that the Trial Division should proceed along a certain line, you would need a *mandamus* to get them to do it. I do not think the courts work that way. Assume that the Trial Division, for example, will say, "All right, the Court of Appeal in this case has said that we should proceed along these lines." Even if the grounds are, say, section 28(1) and you base your argument on section 28(1)—I am asking a question here, although I seem to be making a speech—in that instance will the Trial Division not be able to proceed having been so directed by the Court of Appeal, or does the exclusive jurisdiction in section 28 that is conferred on the Court of Appeal prevent the trial Division from acting?

Senator Flynn: It is an entirely new case. The Appeal Division has quashed a decision, and the tribunal under it does not act accordingly.

The Deputy Chairman: So you are starting anew in the Trial Division.

Senator Flynn: So you need a new remedy, and you ask for an injunction or a *mandamus*.

Mr. Maxwell: I think you have to distinguish firstly between the decision that deals with the question of right. For example, is a minister entitled under some statute to hold Mr. B in custody, or is he entitled to go on somebody's land. As a condition of doing that act he may well have to make some decision of a judicial nature. He makes that decision, and somebody is aggrieved by it, and attacks it. The matter goes to the Court of Appeal, and the Court of Appeal says: "No, that was a wrong decision", and they quash it. The minister then says: "I do not care what the Court of Appeal says. Notwithstanding that decision, I am going to do it anyway." At that point you are not trying to quash a decision; you are trying to control an illegal act.

The Deputy Chairman: Yes, you are starting all over again.

Senator Flynn: Mr. Chairman, may I ask a question in respect of a point that has not been raised, and which may not be too important? I wonder if Mr. Maxwell would tell us why the act gives jurisdiction to the Court of Appeal in respect of any interlocutory judgment, whether it decides the question at hand or not. It seems to me that you could delay a final judgment by appealing any insignificant decision.

Mr. Maxwell: Yes, that has been the subject of some comment in other places, Senator Flynn. Frankly, we felt, in the initial stages of this operation, that we should do this. We find that the Federal Court is functioning very expeditiously these days, and we do not believe it will result in any undue holdup. We also feel, since there are virtually no decisions on practice in the Federal Court, that we ought to get some. This is something, however, which will be watched, and it may be that some restrictions should be built into provision eventually, but I feel that it is worth a trial initially to see how it functions. This is my own view, but I think it will work.

Senator Flynn: I am satisfied with this on the record.

Senator Langlois: Mr. Chairman, I should like to go back to Professor Scott's submission, entitled "An answer to constitutional objections". Unfortunately, I have not had time yet to read it completely. I would like him to tell us if he has commented in this paper on the jurisdiction given by clause 22 to the Federal Court in matters such as claims arising out of contracts of carriage in ships, and also in matters of claims arising out of contracts of marine insurance. If he has not done so I would like to have his views on this.

Professor Scott: Well, what I have done is to deal generally with the matter. I have taken the view that wherever there is legislative authority there is the possibility of judicial authority. Furthermore, there is also, in my view, more incidental jurisdiction than has perhaps been admitted. My own view would be that the question in the first place is whether the general subject matter were one of federal legislative authority, so that it would turn on the particular subject matter involved—navigation and shipping, trade and commerce, and so on. The second question would be whether a reasonably conducted litigation should decide the related matters. In my view, Parliament can have litigation which is one substantial whole dealt with as one substantial whole by the Federal Court of Canada.

That is my view on the matter. Frankly, while I have not considered each and every head of authority, my general impression is that this bill is well within federal legislative jurisdiction and, in my view, my proposals are also. It seems to me that some of the objections have been a trifle captious and even factitious.

Senator Langlois: Am I to understand that you do not feel, in regard to claims arising out of a contract of carriage in ships, that a distinction should be made as between the carriage of goods of an exclusively provincial character and the carriage of goods of a national character?

Professor Scott: The point there is this, that the exclusive provincial powers do not embrace navigation and shipping—not even intraprovincial shipping. You will note that the federal Parliament has a Bills of Lading Act on the statute books. Now, the federal Bills of Lading Act purports to deal with bills of lading generally, and it makes no distinction whether the bill of lading is in respect of inter or intra-provincial shipments. This, so far as I know, has never been challenged in the some eighty years that it has been on the statute books. I think it was put on the statute books under the Attorney-Generalship of Sir John Thompson. In my view these can reasonably

be said to be matters of trade and commerce because they are commercial documents, and matters of navigation and shipping generally. My impression, subject to anything that honourable senators might think to the contrary, is that this would be *intra vires*.

Mr. Hopkins: It is simply concurrent jurisdiction.

Professor Scott: Yes, this is concurrent jurisdiction, apart from anything else.

Senator Langlois: What about marine insurance claims? We have no marine insurance act in Canada that I know of, and the only legislative provisions I know of that deal with marine insurance are those contained in the Civil Code of Quebec.

Professor Scott: As regards Quebec, yes, but the point is that the Civil Code of the Province of Quebec is a pre-Confederation Act, and is partly under federal and partly under provincial legislative jurisdiction. Under Section 129 of the British North America Act all pre-Confederation statutes and pre-Confederation common law and everything else lies as to repeal in the same position as new legislation.

For example, if there is an eighteenth century English statute in force in some province, or a nineteenth century Statute in force in another province made before Confederation, then all of these are subject to amendment according to the respective division of powers. So, the question as to judicial competence becomes, in my view, simply one of whether the Parliament of Canada has either primary or ancillary legislative jurisdiction over marine insurance, if they think fit to exercise that.

Senator Flynn: If they have not do you suggest that any pre-Confederation laws can be considered as federal law and *intra vires* of Parliament because it would be ancillary? Are you not going a little too far there?

Professor Scott: No. The point is that the courts, when they are given an area of jurisdiction to entertain a certain class of matter, have to entertain all the valid law enacted on the subject, whether it be common law or statute law. The Privy Council said so in a long series of decisions on the provincial divorce courts.

Senator Flynn: When Parliament has done something since Confederation then, of course, that is so. If it amends a provincial statute which was in force at the time of Confederation, then I agree with your thesis, but if it is a matter which has not been touched since Confederation and which falls within the domain of property and civil rights—because an insurance contract is certainly within the category of property and civil rights . . .

Senator Langlois: There is the *Parsons* case.

Senator Flynn: A pronouncement by Parliament would be necessary in order to make it ancillary. The problem of shipping can be dealt with apart from that of marine insurance.

Professor Scott: Then you are challenging the existence of federal . . .

Senator Flynn: I am not challenging anything; you did.

Professor Scott: No, I did not challenge it; I rather thought I had supported it.

The point is whether the Parliament of Canada could legislate on the subject matter if it so wished. If it could and wished to do so then they could create a court to administer not only what they themselves enact but all other law, common law on the subject.

Senator Flynn: By saying that the Federal Court has jurisdiction over marine insurance you say that this would make the provincial provisions relating to marine insurance ancillary powers falling within the . . .

Professor Scott: No, I say that what is in the Civil Code or any other pre-Confederation enactment is not automatically provincial law. For example, the provinces enacted divorce acts before Confederation.

Now, the point is that if Parliament could legislate on a subject, then it can create a court on that subject. If it can create a court on the subject then it can create a court to administer the law on the subject, whatever that law may be. In other words, they do not have to just tell them to administer federal statutes; they may administer common law also.

Senator Flynn: But this is a very subtle way of saying that provincial marine insurance laws are ancillary to shipping, by giving jurisdiction to a Federal Court.

Professor Scott: The point is are they provincial laws in the case in question? Just because it is in the Civil Code does not make it provincial law in itself.

Senator Flynn: In itself it is property and civil rights. If you legislate in shipping you may find it necessary to legislate in insurance, but you have not done so for 103 years.

Professor Scott: I am not expressing an opinion as to whether marine insurance is valid subject matter for federal legislation. I am saying that if it is, then a court can be created to administer that area, whether or not Parliament has enacted any statutes on the subject.

Senator Langlois: Has the Parsons case not settled this problem as far as insurance is concerned?

Professor Scott: As far as general contracts of insurance are concerned.

Senator Langlois: Yes, on a particular trade.

Professor Scott: If, for example, there were a question of insuring atomic energy installations and Parliament was legislating on that, it would not mean that where Parliament has other legislative power this does not extend to insurance in those areas.

Senator Langlois: The Parsons case has made no such distinction.

Professor Scott: The point is that other cases have decided other things; there is not only the Parsons case.

Senator Langlois: To which cases are you referring?

Professor Scott: I mean that where any case decides that a given matter is under federal legislative jurisdiction, the Parsons case does not mean that contracts of insurance in that area cannot also come thereunder like other property and civil rights. For example, the Bankruptcy Act continues policies of insurance in favour of the trustee in bankruptcy. That is because it is federal authority.

Senator Langlois: It is not the same principle at all.

Senator Flynn: Would you not suggest that the act would be *intra vires* in giving jurisdiction on marine insurance if Parliament ever legislated validly?

Professor Scott: If they could legislate validly with respect to it.

Senator Flynn: Well, if they do legislate validly with respect to it.

Professor Scott: No, I would say they can create a court if they could, because the Privy Council says that the jurisdiction is good at least when it is in relation to:

> ...actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion.

In other words, if they could legislate, then they can create a court because laws of Canada, as Laskin points out...

Mr. Hopkins: If I may interject, the built-in safeguard, which I am sure was inserted deliberately by Mr. Maxwell and his associates, specifically limits it to the jurisdiction of the Parliament of Canada by including the requirement relating to any matters coming within the classification of navigation and shipping. If it does not, there is no apparent jurisdiction.

Senator Flynn: The debate remains open; it does not settle the problem.

Senator Connolly (Ottawa West): Is Senator Langlois concerned about the removal of cases involving marine insurance or shipping because in Quebec they are treated in the Civil Code and decisions made under it? Is he concerned about the assumption of this jurisdiction by the Federal Court?

Clause 22 does not give the Trial Division exclusive regional jurisdiction; but concurrent. I would assume that the remedies under the Civil Code that have been available heretofore will continue to be available.

Mr. Hopkins: That is right.

Senator Connolly (Ottawa West): They are not interfered with. Is Senator Langlois concerned by the fact that there might be confusion?

Senator Langlois: Yes, indeed.

Senator Connolly (Ottawa West): And that an action might be taken in the Federal Court rather than before the Superior Court. Does that create a problem?

Senator Langlois: It does, because we make no distinction between the contracts of carriage which are exclusively provincial and those which are national in character. I think this distinction should be made.

Senator Connolly (Ottawa West): You do not have to rely on the property and civil rights section.

Senator Langlois: No; as far as a marine contract is concerned, I rely exclusively on the Parsons case, which has decided that the federal authority has no jurisdiction in contracts of insurance.

The Deputy Chairman: Mr. Maxwell, would you like to express an opinion on this point?

Mr. Maxwell: The constitutional jurisdiction of Parliament with regard to marine insurance is certainly not determined in any way by this bill. We have proceeded on the assumption that Parliament could, if it so wished, enact a marine insurance code.

Now, it has not done so; we feel that in the absence of that type of statute provincial legislation dealing with marine insurance and insurance generally is perfectly valid and, indeed, will remain valid as we see it until there is conflicting valid federal legislation, which there may or may not be.

However, we feel that the substantive rights created by provincial legislation and insurance contracts can be enforced in the Federal Court. We think it is desirable that it be open to litigants to bring in the insurance companies if necessary and have insurance issues tried in the Federal Court together with questions of liability in marine matters.

We consider it unsatisfactory that people have to go to two different courts, to a Federal Court in one instance and then for the insurance issues arising out of that action, to another court. This is all we are trying to do in this area. Whether or not there will ever be a federal marine insurance code is, of course, a question I could not even talk about; I do not know, I have no idea.

Senator Langlois: Are we not putting the cart before the horse there?

Mr. Maxwell: I do not think so. At least, not the way I see it. As I say, implicit in this legislation is the assumption that Parliament could enact such a code if it wished to do so.

Senator Langlois: But it has not.

Mr. Maxwell: It has not done so.

Senator Langlois: We should wait until it is enacted before we create a tribunal.

Mr. Maxwell: I am not so sure. For example, I think it is reasonably clear—I believe it to be clear anyway—that Parliament could enact a contributory negligence act dealing with certain areas of crown law and responsibility. It has not done so. Because it has not done so, it relies on the contributory negligence acts of the provinces, and

it has been held quite authoritatively that those claims can be enforced in the present Exchequer Court where it arises in Crown litigation.

Senator Flynn: Because the Crown is involved.

Mr. Maxwell: That is right.

Senator Flynn: That is something else.

Senator Langlois: That is something quite different.

Senator Flynn: Do you have in mind here on this subsection any claim arising out of or in connection with contractors' marine insurance, which would really mean when it comes under federal legislation?

Mr. Maxwell: No. What we visualize here is that if someone suffers a loss that is covered by insurance, that is governed by provincial law because there is no federal law, we feel that claim could be brought in the Federal Court and it would be unnecessary to split his action between the Federal Court and, let us say, the Superior Court of Quebec.

Senator Flynn: You are satisfied that valid objection could not be raised to the jurisdiction of the court?

Mr. Maxwell: Let me put it this way. That is the assumption on which this legislation is written. We may find that somebody will attack it. As a matter of fact, I would be surprised if it were not attacked. I would also be surprised if we did not succeed. However, one has to make these judgments.

Senator Langlois: And one has to pay for them. That is exactly what I am objecting to. An insured could be taken to the Federal Court by the underwriters; he would have to fight it to the Supreme Court to find out if this tribunal has jurisdiction, and we are asking one of the litigants in that case to bear the cost of this fight before the court.

Mr. Maxwell: I think that would depend on the legal advice he gets.

The Deputy Chairman: It would depend how good the lawyer is.

Senator Langlois: You cannot prevent it anyway.

Senator Flynn: It is difficult to forecast the final result of any case. I have lost good cases and I have won bad cases.

The Deputy Chairman: Honourable senators, since there are no more questions to Professor Scott, on behalf of the committee I should like to thank Professor Scott for coming to Ottawa and appearing before this committee, and for having put a great deal of time into the preparation of two briefs. We are indeed grateful to him for his interest in this piece of legislation and the research work he has done to support the two briefs that were presented to this committee. Thank you very much for appearing.

Professor Scott: Thank you, gentlemen.

Senator Langlois: Mr. Chairman, are these briefs going to be printed as part of our proceedings?

The Deputy Chairman: I should like to ask the committee to give permission to have the two briefs presented by Professor Scott printed as an appendix to our proceedings.

Senator Langlois: I so move.

The Deputy Chairman: Is that agreed?

Hon. Senators: Agreed.

(*Note:* The two briefs, entitled "Proposals for Amendments to an Act respecting the Federal Court of Canada" and "Bill C-172: An Answer to Constitutional Objections" appear as appendices "A" and "B" to these proceedings.)

Senator Connolly (Ottawa West): Mr. Chairman, is it contemplated that we might finish this bill today?

The Deputy Chairman: I was about to raise this point. I was in telephone conversation with Mr. Gerity from Toronto.

Senator Connolly (Ottawa West): He called me, because I was the sponsor of the bill. That is the Canadian Bar Association. I referred him to you and the committee clerk. I did not refer him to the deputy because I understood he had been talking with the officials.

The Deputy Chairman: I think the best explanation can be given the committee by Mr. Maxwell, who has been dealing with Mr. Gerity and other members of the committee set up to present proposals on this bill. Perhaps Mr. Maxwell could explain the situation to us.

Mr. Maxwell: Originally when we started to work on this bill the Canadian Bar Association established a small committee of admiralty experts to deal with the admiralty side of the provisions. That committee consisted of Mr. Gerity of Toronto, Mr. Arthur Stone of Toronto and Mr. Jean Brisset of Montreal. The committee met with an expert we had retained, Mr. Mahoney...

Senator Connolly (Ottawa West): That's a good name.

Mr. Maxwell: A good man too.

Senator Langlois: Irish enough for you.

Senator Connolly (Ottawa West): Oh yes.

Mr. Maxwell: The committee met with him on a number of occasions. We considered the recommendations they made. We adopted some of their submissions and rejected others. The impression I and Mr. Mahoney had was that we had pretty well satisfied the committee about what we had done in this bill by way of changing it round to meet their requirements. As a matter of fact, I was reasonably satisfied from my discussions with Mr. Stone, who was chairman of the committee, that that was so. However, the other day we received a communication from Mr. Gerity asking what we had in fact done about their submissions. I do not know whether he had not gotten down to studying the bill in its revised form or

not; I rather thought perhaps that must be so. In any event, Mr. Mahoney is meeting with Mr. Gerity this morning in Toronto, and I expect that that meeting will probably satisfy Mr. Gerity about our intentions and what we have done. I cannot speak for Mr. Gerity, of course.

Senator Connolly (Ottawa West): I think this is very good, because the impression I got was that Mr. Gerity felt that the work done by the C.B.A. committee was ignored.

Mr. Maxwell: No.

Senator Connolly (Ottawa West): Obviously from what you say I was wrong about that.

The Deputy Chairman: It has not been ignored.

Senator Connolly (Ottawa West): The fact that the department has seen fit to consult with him about the provisions of the bill, and perhaps about their suggestions, is all to the good. I would think that perhaps we should not finish the bill this morning, but should wait until we find out the result of these conversations.

Senator Langlois: In view of what Senator Connolly has just said, I think we would be well advised to postpone the conclusion of this bill until another sitting, until we hear further about this. I suggest you contact Mr. Gerity and find out if he is satisfied and invite him to come here. We should leave our committee open to all who wish to make representation.

The Deputy Chairman: There is no problem about that. I have been in touch with Mr. Gerity. As a matter of fact, he called me this morning just prior to my appearance in this committee and he asked me if I had anything new to report to him about whether the representations of the Canadian Bar had been incorporated in the bill. I told him I was in touch with Mr. Maxwell and that certain recommendations of the committee of the Canadian Bar had been incorporated into the bill and that other provisions had been rejected. I also spoke to him about Mr. Mahoney meeting with him this morning, and he said he was waiting momentarily to hear from Mr. Mahoney, that they were to meet this morning and discuss the bill as it now stands and to determine to what extent the recommendations of the committee of the Canadian Bar had been incorporated into the bill.

We have been in close contact with Mr. Gerity. If he wants to appear before the committee we will be glad to hear him. Anybody will be given every opportunity to appear before the committee. No one has been shut off or shut out from appearing or presenting any views before this committee on this bill. Mr. Gerity certainly cannot claim that he has not had the full co-operation of Mr. Maxwell and the Justice Department officials in relation to this bill, and I want to put this on the record so that it is there permanently and clarified. He said he would contact me later on this afternoon, following his meeting with Mr. Mahoney. If at that time he is still of the opinion that he wants to appear before this committee, we will invite him to appear and we will hear him.

Senator Langlois: That is why I made the suggestion that we should postpone consideration this morning.

The Deputy Chairman: I wanted to make this explanation first and I intended to make it even before you raised your point.

Senator Connolly: Mr. Chairman, is the suggestion then that we are about to adjourn, because I had a question that I wanted to raise. Perhaps if you want to take a little time the committee might care to sit for another 10 or 15 minutes.

Senator Langlois: As long as you care to sit.

Senator Connolly: I do not want to hold the committee up.

Senator Langlois: We are not in a rush to leave.

Senator Connolly: Mr. Maxwell, a number of times people have talked to me about federal boards, commissions and tribunals, using their own expertise and evidence, even after long hearings where evidence has been submitted by interested parties and there has been cross-examination. Sometimes when the hearings have been completed the federal boards, on their own, gather new evidence which they consider to be appropriate and valid evidence and they proceed to come to a decision and to write a judgment based to a large extent upon that new evidence or at least affected by that new evidence.

I think the last example was a case where some lawyers who had an interest on behalf of clients before the National Energy Board found that, following the hearings, the Energy Board had new evidence and, based on that new evidence, they proceeded to write a judgment that might not have been written at the conclusion of the hearings. There was no opportunity for cross-examination on this new evidence. This particular case, as I recall it, had to do with an evaluation of gas reserves in western Canada and the Canadian requirements. I think in this case there were revised estimates submitted by the Ontario Hydro, and without any cross-examination or reopening of the hearings the board proceeded to write a judgment based on the new figures.

That led me into a number of other things that had been mentioned to me since I explained the bill. I must say that I did not attempt any detailed explanation in the Senate such as we are getting here. The question really comes down to whether or not section 29 of the bill is in fact necessary. I wonder if I could illustrate this, Mr. Chairman, referring to the Railway Act. Section 53 of that act allows an appeal with leave to the Supreme Court of Canada from the Canadian Transport Commission on a question of law or on a question of jurisdiction. Mr. Chairman, what I have tried to do is make a little memorandum for my own information here and I am going to refer to that in order to save the committee's time. The Jurisdiction of the Trial Division of the Federal Court in respect to appeals under section 53 of the Railway Act is ousted by clause 28(1) and (3), which I think are pretty clear, and also by clause 30 of the bill we have before us, although clause 30, subsection (2) may

give the Trial Division jurisdiction in certain special cases. Clause 18 of the bill we have before us does not affect the appeal allowed by section 53 of the Railway Act. I direct your attention to clause 28, subparagraph (1). It says:

> Notwithstanding section 18...

These are the words which I would like to emphasize...

> ...or the provisions of any other Act,...

which would include the Railway Act.

> ...the Court of Appeal has jurisdiction to hear...

an application. I am skipping places in subsection (1).

> .. the Court of Appeal has jurisdiction to hear... an application to review and set aside a decision or order...

made by a federal board, commission or other tribunal. It goes on to say:

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

That is the first case. It seems to me that Mr. Maxwell said—perhaps it was in the house committee—that the example that I gave when I started this line of questioning might be overcome by the use of that subsection. Perhaps I could stop here, even though I want to continue, and ask Mr. Maxwell whether, in his view, from now on, under clause 28(1)(a) the federal tribunals and boards are to be found by the rules of evidence?

Mr. Maxwell: No, Senator Connolly, that would not be my view and I think that if that were the result it would be a very serious one. Indeed, my feeling would be that if we enacted a law requiring all the tribunals to follow the rules of evidence, we would probably conclude ultimately that we should give the matter to the courts and abolish the tribunals, creating a few more courts. At least, that would be my rather strong feeling towards it.

If I could now deal with what I think was the point you were coming to, you talked about the board, after the event, collecting additional evidence and making a finding of fact, as I understood it, and that the person that you would represent felt it was an erroneous finding based upon that. I say to you, of course, that if it is not erroneous, I do not think there is any basis for a complaint. But if the tribunal—which is not bound by the rules of evidence, and indeed that is one of the justifications for having a special tribunal, to start with—if they so conduct their affairs that they take into consideration information and evidence that is erroneous, and they do it without a chance, off the record, apart from a person being given a chance to cross-examine or deal with it, to prevent that sort of error—then in my view that is the very sort of thing that paragraph (c) of sub-clause (1) of clause 28 deals with:

> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Senator Connolly: "Material before it", in this case—the board might say that the material before it forces it to go to that extreme. You could visualize a situation where there was some doubt as to whether or not the material before it was valid.

Senator Flynn: I think you are right when you say that they might apply, because I think you could have a case where a board would have, in a way, proceeded *ex parte*, which is a principle of natural justice, and if you can prove that the result from that is that there is a prejudice resulting from it. As you say, if you collect outside evidence and it is wrong, and the result is a prejudice to the party involved, I think (a) would apply, "failed to observe a principe of natural justice...".

Senator Connolly: Would Senator Flynn go so far as to say that there might be doubt cast upon that outside evidence?

Senator Flynn: You need to be able to prove that there is prejudice. If the board found something, outside of the hearing, which is true, which you cannot contest, I do not think you would be able to obtain a judgment that would reverse the decision of the board; but if you prove that what they collected, this evidence they collected outside of the parties being present, was wrong...

Senator Connolly: Or doubtful?

Senator Flynn: Or doubtful, I think you could have added to it in order to make the board decide otherwise—I think then the appeal court would feel justified to apply paragraph (a) of clause 28 and quash the decision.

Mr. Maxwell: I agree, Senator Flynn. I think your remedy would exist within the four corners of that clause, whether you base it on paragraph (a) or on (c).

Senator Flynn: Or on (c), yes.

Mr. Maxwell: It seems to me that a combination of those two provisions covers the waterfront.

Senator Connolly: I am happy to have two eminent authorities like Senator Flynn and Mr. Maxwell reassure me on that point. May I go on?

An Hon. Senator: Are you leaving section 28, senator Connolly?

Senator Connolly: No, I am leaving clause 28. I do not call it "section" until it is in an act. I call it "clause" while it is in a bill. Am I right?

Mr. Maxwell: You are right.

Senator Connolly: I remember having this debated in the Senate one day and it taught me that. Now, clause 28(1) deals not with the standing section 18 or with the provisions of any other act. The bill, coupled with paragraphs (a), (b) and (c) of clause 28(1), would appear to give the Federal Court of Appeal at least as wide a jurisdiction as section 53 of the Railway Act confers upon the Supreme Court of Canada. The Supreme Court of Canada can hear an appeal on a question of law or jurisdiction under section 53. Clause 28(1), with those three subparagraphs, seems to be that wide.

Mr. Maxwell: I would say, Senator Connolly, that they are a good deal wider. That would be my view of the matter. I think the appeal to the Supreme Court of Canada under the Railway Act is really a fairly narrow one, it is a question of law or jurisdiction, which again is another question of law. I do not think the Supreme Court of Canada would entertain the sort of examination...

Senator Connolly: Did I say a question of "law or fact"? I meant a question of law or jurisdiction.

Mr. Maxwell: In my view that is a much narrower one.

Senator Connolly: I would have thought so, too. To re-affirm the intention to confer jurisdiction on the Federal Court of Appeal, in appeals taken under section 53 of the Railway Act, Schedule B in this bill, at page 62, amends section 53 of the Railway Act itself, by substituting the words "Federal Court" for the words "Supreme Court" or "Supreme Court of Canada" as the case may be. Here really is the nub of my problem. Why in these circumstances is clause 29 required? If I can summarize it, it reads in part this way:

> Notwithstanding sections 18 and 28, where provision is made by an Act of the Parliament of Canada for an appeal to the Court,...

That is, the Federal Court...

> to the Supreme Court,...from a decision...of a federal board..., that decision...is not...subject to review...except to the extent...provided for in "that" Act.

Which means, not this bill but the act which gives the right of appeal, and in this case, in this example, it is the Railway Act.

Now, I say, even though clause 28 may broaden the grounds for appeal from a federal board, and I added in my memo that it may be intended that they should be broadened, and Mr. Maxwell already seems to confirm that—clause 29 still would appear to restrict the grounds of appeal, say under section 53 of the Railway Act, to such matters and procedures as have hitherto applied, as have hitherto prevailed. It would seem to me that not only the statutory provisions are preserved...

Mr. Maxwell: They are.

Senator Connolly: ...but as well the decisions that have been made under those statutory provisions. In this circumstance, would it be desirable to remove clause 29 so that you would not have these restrictions; and if this were done, what would be the result, in Mr. Maxwell's view.

Mr. Maxwell: The best way to answer you, Senator Connolly, is to explain the philosophy behind this proposal, what we are trying to do here. We started off with the view that we ought not to disturb any existing rights of appeal that existed in a multitude of federal statutes. The only change we decided to make was that we would take the jurisdiction initially from the Supreme Court of Canada; and, if you will recall my remarks of today, we did that because we feel the Supreme Court of Canada has been given an unconscionable burden in this area. And we would put those rights of appeal in the new Federal Court of Appeal. So what you then have to start with is a large number of appeals from various kinds of tribunals to the new Federal Court of Appeal. But those appeals are almost invariably on a question of law or jurisdiction.

So we have not really changed substantive rights at all. The substantive right of appeal we are keeping intact, and that is the philosophy of this bill. We recognize, however, that those rights of appeal are not always very satisfactory, because it is very difficult to get a court, which is entertaining an appeal on a question of law or a question of jurisdiction, to examine and see precisely how the tribunal has conducted its affairs. That is not the sort of thing that you normally get.

So we felt that in addition to the rights of appeal we would provide a right of review, and what you really have is these two remedies joining, coming together in the new Federal Court of Appeal.

In the case of the National Energy Board, for example, that you mentioned earlier, you would have with regard to anything that happened before that board two possible remedies; but they would be to the one tribunal, namely, the Federal Court of Appeal. That would be a right of appeal that has existed for some time, but in addition you would have a right of review. You could pursue one or both at the same time before the same court, as you wish.

Senator Haig: Before the same court?

Mr. Maxwell: Yes, the Federal Court of Appeal.

Senator Connolly (Ottawa West): If you took out clause 29, would you not have all that you say the bill purports to give?

Mr. Maxwell: Well, clause 29 is there for other purposes. For example, there are remedies that go to the Governor in Council that we do not feel really you can give to the courts.

Senator Connolly (Ottawa West): I appreciate that.

Mr. Maxwell: They are there for broad political purposes and that sort of thing. Clause 29 really is there to spell out the structure that I have just tried to explain. We are not interfering with rights of appeal. They are preserved in their fullness by clause 29. If you cannot get your problem before the court with that right of appeal, then you can follow your right of review, and that is simply what clause 29 is there for. It explains or elicits that philosophy.

Senator Connolly (Ottawa West): I noticed in line 29 and line 30 of clause 29 that you made an amendment in the House of Commons and it is underlined.

Mr. Maxwell: Yes, that is right.

Senator Connolly (Ottawa West): I had the greatest of difficulty trying to understand why those words were inserted. They are the words "to the extent that it may be so appealed".

Mr. Maxwell: Now, Senator Connolly, if I can tell you about those words, I had been having some discussions with Mr. John O'Brien of Montreal about this matter, and oddly enough John O'Brien was concerned about the very statute you are referring to, namely, the Railway Act, because that is a very peculiar statute. Not only is there a right of appeal to the Supreme Court, which will now be the Federal Court, on a question of law and jurisdiction, but there are also other powers.

Mr. O'Brien wrote to me saying that there was the right of appeal to the Governor in Council. I wrote back to him and said that I did not agree with him. There is no right of appeal. But there is a statutory power in the Governor in Council to do all sorts of things. He said, at least as I understood him—and I should not really be speaking for him, but it is odd that the point should come up in the course of your question—he said that for years lawyers had been talking about this as a right of appeal. Indeed, he referred me to some cases where that sort of language seems to have been used. I said that I felt that that is loose language and that there is not really a right of appeal at all. That is why those words as such were put in.

Senator Connolly (Ottawa West): Were you thinking primarily of the application to the Governor in Council in rate cases?

Mr. Maxwell: Normally what happens on those applications to the Governor in Council is that they are dealt with on a policy basis. They are not dealt with, really, on a legal basis at all, because, of course, if there is a legal question the proper course is to put it before the court. The Governor in Council deals with those problems on a broad basis of policy.

Mr. O'Brien was concerned that if this was an appeal to the Governor in Council that then really there would be no jurisdiction. He was concerned that this review jurisdiction might be ousted. And I told him that I do not regard it as an appeal, that the statute does not say that it is an appeal, but that it simply confers a power upon the Governor in Council to reverse. Indeed, the Governor in Council can act of its own motion without anybody bringing anything to it.

So those words were added just, we thought, to put it beyond argument that that is not an appeal within the meaning of Clause 29. It is a right in the Governor in Council which is an overriding right. It does not matter what the right is, really; the Governor in Council can deal with the problem as a matter of policy.

Senator Connolly (Ottawa West): And those underlined words, then, simply preserve that right to go to the Governor in Council in that case?

Mr. Maxwell: No. They do not preserve that right. But, in my view, they preserve the right to go to the courts to review, notwithstanding that the Governor in Council can, as a matter of policy, reverse the whole thing, ultimately, if it wishes to do so.

You see, if it could be argued that there was a right of appeal to the Governor in Council within the meaning of this thing, then there would be no right of review, and that is what we are trying to avoid.

I do not know whether I have satisfied you or not, Senator Connolly.

Senator Connolly (Ottawa West): It is a very complicated subject. I still wonder whether Clause 29 really does anything for you.

The Deputy Chairman: It does not hurt, in any event.

Mr. Maxwell: I think it does something, yes. It shows how the rights of appeal that exist in a number of federal statutes relate to the right of review, and without that I do not think you would ever be able to figure it out. Maybe you can't anyway.

Senator Connolly (Ottawa West): You would not have the review, if you did not have clause 29, you say?

Senator Flynn: No.

Mr. Maxwell: You need clause 29. As I say, it is in there for two or three different reasons. One is that if there are appeals to the Governor in Council given by an act, then I would doubt very much that as a practical matter there is any point in taking your case to a court, because it is going to be dealt with as a matter of policy anyway.

Senator Connolly (Ottawa West): You might have both.

Mr. Maxwell: Well, in the Railway Act you do have both, but, of course, the Railway Act provision is not an appeal, if one examines the language of the Railway Act. At least I say it is not an appeal. Mr. O'Brien, who is a very distinguished counsel, is dubitante about it, but largely, I think, because of his long experience in the railway field. Apparently people talk about there being an appeal under that statute, although speaking for myself I would not use that term at all.

Senator Langlois: Mr. Maxwell, I wish to draw your attention to the language used in the French version and the English version of 28(c), which to my mind is quite different and I would like you to draw this to the attention of your translators. Where we have "perverse" in English, it has been translated as "absurde". There is quite a difference between the two terms. A thing can be absurd without being perverse and vice versa. Then "capricious" has been translated as "arbitraire". Again you have two totally different meanings, and this throws a different colour on the right of review given there.

Senator Connolly (Ottawa West): You might have a better appeal in French than in English, or vice versa.

Senator Langlois: Yes, and it is much easier to prove absurdity than perversity.

Senator Flynn: We always say that when we lose an appeal—the judgement was absurd.

Mr. Maxwell: I can tell you this much, a great deal of time was spent by our linguists on the translation of this, and I am frank to say that I could not really say whether they have done a proper job or not. But I do have an assistant here, Madamoiselle Belisle who might be able to add some clarification on that.

Senator Langlois: Through you I would suggest to Madamoiselle Belisle that in French we have "pervers" for perverse.

Madamoiselle Denis Belisle, Special Assistant to the Deputy Minister, Department of Justice: But the meaning is not the same, senator. We spent about four hours translating the words because they were key words, and I checked the translation with several translators. We checked several dictionaries, and we found the best translation for "perverse" in English was "absurde". If you check in several dictionaries, you will find it so. "Perverse" in English does not have the same connotation and does not mean "pervers" in French. It has a slightly different connotation in English. This is a trick that the English language and the French language have, you have words that are quite similar. They are almost spelled the same but the colouring of them has a different meaning. There is nothing immoral about a "perverse" decision in English, whereas there is in French.

Senator Flynn: Would "perverse" equal "illogique"?

Mlle. Belisle: "Absurde."

Senator Flynn: I mean in French "de façon illogique". "Illogique" would appear to me to be be a better word than "absurde".

Mr. Hopkins: "Perverse" in English has a moral implication.

Senator Flynn: Well, "pervers" in French has a moral implication. "Absurde" has no moral implication.

Mlle. Belisle: The same job was done with respect to the word "capricious" and the best translation according to all the dictionaries we have, and we have a complete set of them, is "arbitraire". I can assure Senator Langlois that we spent at least four or five hours on this.

The Deputy Chairman: Well, I would be willing to accept that.

Senator Connolly: The other day we had another statute here in which the word s-e-i-g-n-o-r-i-al was used. I questioned it on the ground that it seemed to me that in the Civil Code it should have been spelled s-e-i-g-n-e-u-r-i-a-l, and this was accepted. The change was accepted and it did not need an amendment.

Mr. Hopkins: Just to complete that particular story, senator, it was found that in the Civil Code they used the word "seignoral" and not "seigneurial". The Department of Justice said that in the Oxford English Dictionary the preferred spelling was "seignoral" and not "seigneurial". And therefore, as Senator Connolly says, a change was made in the statute. And, as he said, it did not need an amendment.

Senator Langlois: May I ask Mlle. Belisle if they have discussed this problem with Professor Laurence, a linguist in Montreal?

Mlle. Belisle: No, we did not. We have very good translators. But I did check it out with several lawyers to see the exact meaning in the cases, in the words and phrases and everything, so it is not just a dictionary work. It was also a case of checking it out in several cases.

Mr. Hopkins: Both the English and the French have to be read together, and between the two of them I think the situation will be clear.

Senator Langlois: You are not supposed to do that any more.

Mr. Maxwell: I must say I agree with what Mr. Hopkins has just said. I am reasonably certain that between the English and the French here we have covered the waterfront. If there is a difference, I hope it is not too radical a difference. I do not believe there is. But it is a difficult problem because of the different shades of meanings these words can have.

Senator Flynn: In any event, as it widens the scope of appeal it should be all right.

Senator Connolly: We had a problem like this on Bill C-4, if you remember, and Senator Giguère came up with either a French word or an English word—I don't remember which—and it seems to me we are going to have this many times, particularly in bills of this character, and I think the department is glad to see us think about these things, and certainly we want to do what we can to make it sure. But I think Mlle. Belisle has covered the waterfront.

Senator Langlois: Mr. Chairman, I don't want to cast any doubt on the good work done by Mlle. Belisle.

The Deputy Chairman: Can we consider the work on this bill has been completed subject to whether or not Mr. Gerity wishes to appear before this committee?

Senator Flynn: Yes.

Senator Connolly (Ottawa West): Or his committee of the C.B.A.

The Deputy Chairman: Well, he is the contact man with us.

Senator Langlois: There seems to be a misunderstanding between Mr. Gerity and Mr. Mahoney.

The Deputy Chairman: That is right. Mr. Gerity undertook to contact me and Mr. Bouffard here following his meeting with Mr. Mahoney. If he decides that he wishes to appear before the committee, then we will arrange a

date to hear him, and I shall notify the committee as to the date. Now, if Mr. Gerity decides he does not wish to appear before the committee, have I then the authority to report the bill without amendment?

Some Hon. Senators: Agreed.

Senator Flynn: If you don't see any problem of procedure, then I don't mind.

The Deputy Chairman: Then it all depends on whether Mr. Gerity wishes to appear or not.

Senator Flynn: Do you think, Mr. Hopkins, there is a problem in doing that?

Mr. Hopkins: There is never a problem unless it is created.

Senator Flynn: But maybe because of the small number here?

The Deputy Chairman: They should be here.

Senator Connolly (Ottawa West): Mr. Chairman, you protect yourself on this. If you think another meeting of the committee is required, then you summon it.

The Deputy Chairman: You leave it in my hands, then?

Hon. Senators: Yes.

The Deputy Chairman: Mr. Maxwell, we thank you for coming to assist us and we shall advise you if we need you further on this particular bill.

The committee adjourned.

APPENDIX "A"

Proposals for Amendments to "An Act Respecting the Federal Court of Canada". Bill C-172 of the House of Commons of Canada as Reported to the House of Commons 21 October 1970. Stephen A. Scott, November 8, 1970.

1. It had been hoped to prepare a thorough study of the matters dealt with by this Bill. The speed of its progress through the House has unfortunately made this impossible. Nevertheless it is important to deal with a few of the problems most readily apparent.

2. Serious injustice is possible whenever two related matters must be dealt with in two different courts. With the best will in the world proceedings may turn out to have been taken in the wrong court. Taking new proceedings after a dismissal for lack of jurisdiction can be extremely costly, futile, or even impossible; it will in any event involve delay. Furthermore, two sets of proceedings, with consequent expense and legal complication, may have to be taken over one matter which should be litigated as a whole. These problems are all much aggravated when it is at the appellate stage, perhaps even in the Supreme Court, that the lact of jurisdiction is determined. Parliament has a responsibility to see that these problems are kept to a minimum.

3. Under the present Bill conflicts may arise not only between federal and provincial courts' jurisdiction, but also between the jurisdiction of the Trial Division and that of the Federal Court of Appeal under section 28.

4. We do not think that the Bill would have been the worse for making concurrent rather than exclusive the jurisdiction of the Trial Division as regards Crown proceedings and "Extraordinary remedies" (sections 17 and 18). But if it is to be exclusive, Parliament should deal more specifically with certain consequential jurisdictional problems.

5. In proceedings under section 17 we think that a plaintiff ought to be able to implead in the same proceedings, in addition to the Crown or its officers, all other relevant parties, and that the latter ought to be able to implead third parties, so that the entire matter can be settled in a single proceeding. We therefore propose the addition of sub-section (6), which we think constitutionally unobjectionable, to section 17, as follows:

> "(6) In any proceedings governed by this section, any person may be impleaded as defendant or third party to try any claim which arises from the same or a related source, and all parties to the proceedings shall be granted the relief to which they are respectively entitled."

6. Jurisdiction under sections 18 and 28 gives rise to particularly serious problems.

7. The first is the conflict between the jurisdiction of the Trial Division and that of the Court of Appeal. They are made mutually exclusive (s. 28(3)); yet it will often be unclear whether the jurisdiction of the Court of Appeal is available (because, for example, the judicial or quasi-judicial character of the tribunal may be open to question). Yet, as the bill stands, proceedings taken in the wrong court must fail. What is more, where the Court of Appeal *does* have jurisdiction [having it is sufficient; it need not be invoked] on any of the grounds listed in section 28, the whole "decision" which is the object of review is in its entirety put outside the Trial Division's jurisdiction under section 18, and not the less so when the attack is on other grounds, or the application is for other kinds of relief, than are permitted to the Court of Appeal by section 28.

If the two cognate jurisdictions are to be kept in separate hands, provisions should be introduced to eliminate the consequences of conflicts. *We propose the following:*

That the period at the end of sub-section (3) of section 28 be deleted, and that the following be added thereto:

> " ; and
> (a) the Court of Appeal shall then have all the jurisdiction of the Trial Division but may direct that Division to try any issue; and
> (b) the Trial Division may order proceedings pending therein to be continued, whenever they appear to be governed by this sub-section, as proceedings of the Court of Appeal."

8. Sections 18 and 28 also create difficult conflicts with the provincial courts. In effect, section 18 ousts their jurisdiction in favour of the Trial Division in a variety of cases. But the boundaries of the Trial Division's jurisdiction cannot be so clearly defined that one will always know in advance where to sue; yet to sue in the wrong court is, as the Bill stands, fatal. It may not be clear, for example, whether the authority (who may be an individual person with a variety of functions) is, or purports to be, acting as a federal or provincial authority: indeed, to find out by what right a person claims to act one may have first to take the proceedings and await an answer. One may have therefore to go deeply into the merits in order to decide what should be a preliminary question of jurisdiction. But it is not right that the prerogative or other remedies by which jurisdiction is to be tested should themselves be encumbered with jurisdictional difficulties. It is not reasonable that such proceedings should be dismissed—it may be in the Supreme Court of Canada—because they were commenced in the Federal Court rather than in the provincial courts, or vice-versa.

We suggest a two-fold solution. First, marginal cases ought to be allowed to remain in whatever jurisdiction the proceedings were commenced. Second, provision should be made for transfer of proceedings where jurisdiction is declined. We repeat in this context the proposal made in paragraph five above respecting the impleading of additional defendants and third parties.

We accordingly propose:

That the words "actual or alleged" be inserted before the words "federal board, commission or other tribunal" wherever these words occur in section 18; and That section 18 as so amended be renumbered as subsection (1) of section 18, and that additional subsections be added to section 18 as follows:

"(2) Subsection (1) does not exclude the jurisdiction of any other court to hear and determine on the merits proceedings to which no objection has been made on grounds of jurisdiction, or to which objection has been made but overruled."

"(3) A court which declines jurisdiction by reason of subsection (1) may order the record of its proceedings to be transferred to the Trial Division, which may order that the proceedings be continued as proceedings of the Federal Court, and may make such orders as the interests of justice may require."

"(4) When the Federal Court dismisses proceedings for lack of jurisdiction under this section it may order that the record be transferred to any court which appears to it to be a court of competent jurisdiction, and such other court may order the proceedings to be continued as its own and make such other orders as the interests of justice may require."

"(5) Subsection (6) of section 17 of this Act applies to proceedings under this section."

9. Section 2(g) so defines "federal board, commission or other tribunal" as to exclude from judicial review persons acting, or purporting to act, under so much of the common law and pre-Confederation statute law as lies under federal legislative jurisdiction. The same is true of miscellaneous legislation of the United Kingdom Parliament since Confederation which may be held to extend to Canada as part of the law thereof.

Proceedings thereon—for example, a quo warranto challenging persons holding pre-Confederation statutory offices under federal or apparent federal jurisdiction—can, as the Bill stands, only be taken in the provincial courts. Yet there seems to be no reason why, given the general tenor of the Bill, such proceedings should be excluded from the competence of the Federal Court, or why a determination that the office is, for example, provincial, should result, not in a determination of the merits, but in a dismissal for lack of jurisdiction.

There remains, secondly, also the "extraordinary remedies" (as the Bill calls them) against persons not acting under an Act of the Parliament of Canada, but directly under the *British North America Act* itself. It is not unknown, for example, for a quo warranto to be brought against a Privy Councillor: R. v. Speyer; R. v. Cassel, [1916] 1 K. B. 595; [1916] 2 K. B. 858. Such proceedings must, as the Bill stands, be brought in the provincial courts only. There seems to be no reason to exclude them from the jurisdiction of the Federal Court, given the tenor of the present Bill.

The legislative authority of Parliament to confer the two foregoing kinds of jurisdiction rests, we suggest, not merely on the enumerated heads of federal legislative authority, but also on the general jurisdiction with respect to the peace, order and good government of Canada, the whole coupled with section 101 of the *British North America Act, 1867*.

While suggesting that the Federal Court be given the foregoing types of jurisdiction, we can see no reason to exclude them from the provincial courts. Indeed, if the Federal Court is, as we suggest, given jurisdiction therein, and if, contrary to our suggestion, this jurisdiction is made exclusive, it will become necessary to vary our draft subsections (2) and (3) above to make them mention not only subsection (1) but also our draft subsection (6).

We propose:

That section 18 be further amended by the addition thereto of the following provisions as subsection (6) thereof:

"(6) The Trial Division has concurrent original jurisdiction in cases which would fall within subsection (1) were section 2(g) of this Act so read that the words "an Act of the Parliament of Canada" included:

(a) the *British North America Act, 1867*, its amendments from time to time, and any order, rule or regulation made under any of them;

(b) So much of the common and statute law as is continued subject to the legislative authority of the Parliament of Canada by section 129 of the *British North America Act, 1867*, or by any enactment or instrument extending that section, or the rules of law therein, to any part of Canada; and

(c) any Act of the Parliament of the United Kingdom, and any order, rule or regulation made thereunder, not within paragraph (a), enacted since the first day of July, one thousand eight hundred and sixty-seven, extending to Canada as part of the law thereof, and subject to the legislative authority of the Parliament of Canada."

10. Similar difficult jurisdictional conflicts arise also under subsection (5) of section 17. A court should in principle be able to decide easily at the outset of its inquiry whether it has jurisdiction. Yet the very object of the inquiry under section 17(5) may be to decide a controversy whose very merits turn on the question whether the person who is the subject of the proceedings is, or is not, in contemplation of law, a member of the Canadian forces, or whether he is serving outside Canada. He may be challenging, for example, the validity of his induction or the renewal of his term of service. He is put in the dilemma of contending that he is a member of the Canadian forces serving outside Canada in order to get the jurisdiction to issue the writ necessary to vindicate his contention that he is not a member of the Forces, or not serving outside Canada. And if in the end the Court decides the question in the negative, this, as section 17 stands, produces no result on the merits, but only a dismissal for lack of jurisdiction. Even the very question whether the person was a member of the forces, or was serving abroad, might well be relitigated so far as

any substantive rights turned upon them—there being no determination, therefore no res judicata, on the merits, but only on the jurisdiction.

We suggest the following:

That subsection (5) of section 17 be amended by the deletion of the words "any member of the Canadian Forces serving outside Canada", and the substitution therefor of the following:

> "any person who is, or who is alleged for purposes of jurisdiction to be, a member of the Canadian Forces serving outside Canada; but this does not exclude the jurisdiction of any other court to hear and determine the merits of proceedings to which objection on grounds of jurisdiction either has not been made or has been overruled; and where such a court declines jurisdiction, it may order that the record be transferred to the Trial Division, which may order that the proceedings be continued as proceedings of the Federal Court and may make such other orders as the interests of justice may require".

11. As there may be situations, however unusual, where the authority of the Crown is exercised abroad without legislative provision (see cases cited in Ex parte Mwenya, [1960] 1 Q. B. 241), it may be desirable to add to subsection (1) of section 55 the following:

> "or to which, at common law, the process of a superior court enjoying mutatis mutandis the powers of the superior Courts at Westminster may run".

12. Though the problem is much less acute in the case of concurrent than of exclusive jurisdiction, it may often be unclear until the end of the proceedings whether, in law and in fact, the subject-matter of the litigation was strictly within the heads of concurrent jurisdiction. Take the example of bills and notes. The merits of much litigation on this general subject are concerned with whether the instrument which gives rise to the proceedings exactly fits within the complex and stringent definitions of bill of exchange and promissory note. This may be seen in such recent cases as John Burrows Ltd. v. Subsurface Surveys Ltd., [1968] S.C.R. 607; Toronto-Dominion Bank v. Parkway Holdings Ltd., [1968] 1 D. L. R. (3d) 716; and Range v. Corporation de Finance Belvédère, [1969] S.C.R. 492. In the two latter cases, the proceedings, even assuming that the Crown had been party, (see s. 23), probably would as the Bill now stands have been dismissed for lack of jurisdiction had they been taken in the Federal Court. Yet it was only in the Supreme Court of Canada that the instrument in the Range case was held not to be a promissory note.

The restriction of section 23 to bills and notes cases in which the Crown is party doubtless drastically reduces the importance of the particular illustration given. But the problem is equally applicable to the other heads of concurrent jurisdiction. We suggest that, when the matter is open to enough doubt that no one takes objection to the jurisdiction of the court, and the judge before trial does not dismiss the proceedings *proprio motu* for lack of jurisdiction, or he actually sustains his jurisdiction,—that this is basis enough for the Trial Division to hear and determine the case on its merits. Such principles are no novelty in the definition of judicial jurisdictions. Is it not usual to give a court, for example, jurisdiction where the plaintiff claims, say, five hundred dollars, rather than jurisdiction where the plaintiff is entitled to five hundred dollars, (which would mean a dismissal for lack of jurisdiction only, where, after trial on the merits, the award was four hundred and ninety-nine)? We would apply these principles to the definition of Exchequer Court jurisdiction.

We propose the following:

That section 26 be amended by the addition of the following:

> "(3) The jurisdiction of the Trial Division under sections 20 to 26 of this Act extends to hearing and determining on the merits proceedings to which no objection has been made before trial on grounds of jurisdiction and which have not been dismissed before trial *proprio motu* by the Trial Division on grounds of jurisdiction, and also proceedings to which objection has been made but overruled.
>
> "(4) When the Federal Court dismisses proceedings for lack of jurisdiction under those sections it may order that the record be transferred to any court which appears to it to be a court of competent jurisdiction, and such other court may order the proceedings to be continued as its own and may make such other orders as the interests of justice may require."

APPENDIX "B"

Bill C-172: An Answer to Constitutional Objections by Stephen A. Scott

1. Federal Court Jurisdiction at Law and in Equity

Suggestions have been made in some quarters that Bill C-172 may be *ultra vires quoad* jurisdiction in relation to all causes of action not founded directly on federal statutes. On this reasoning the Federal Court could entertain no proceedings for enforcement of rights at common law or in equity, even in areas of federal legislative jurisdiction, as, for example, industrial property (clause 20 of the Bill).

Such objections should not go unanswered. In the first place it must be pointed out that it is very easy indeed to convert a right of action at law or in equity into a statutory right. One simply enacts to the effect that "there shall be a remedy under this Act in every case where a remedy would be available at common law or in equity", and one is then left with an undeniably statutory right of action, which even the objectors admit, can then be confided to the jurisdiction of the courts of Canada. Surely, then, looking at the matter as one of principle, the distinction thus put forward is too trivial to form the line of demarcation of constitutional authority. Looking at the authorities, the result seems the same. Laskin says, *Canadian Constitutional Law*, 4th ed., 1969, p. 817

> ' "Laws of Canada" must also include common law which relates to the matters falling within classes of subjects assigned to the Parliament of Canada',

and describes as "extravagant" the argument that Parliament cannot empower courts of Canada to hear and determine cases arising on pre-Confederation law within its legislative authority (p. 819):

> "This flies in the teeth of s. 129 of the *B.N.A. Act* and of the well-known and established line of cases governing its application"...

Anglin, J., speaking for a majority of the Supreme Court of Canada in The King v. Hume; Consolidated Distilleries Ltd. v. Consolidated Exporters Corporation Ltd., [1930] S.C.R. 531 at 534-5, contrasts "laws enacted by the Dominion Parliament and within its competence" with "the whole range of matters within the exclusive jurisdiction of the provincial legislatures". Matters within federal legislative jurisdiction are obviously not in the latter category; they are either in the former or not contemplated in the learned judge's comments at all. The Privy Council, indeed, speaks in Consolidated Distilleries Ltd. v. The King, [1933] A.C. 508 at 522 of "actions and suits in relation to some subject matter, legislation in regard to which is within the legislative competence of the Dominion" as being within the permissible competence of the courts of Canada.

Indeed, it would seem that if the distinction suggested were well founded, clause 18 also, giving the Court jurisdiction to grant extraordinary remedies, would equally be open to the same objection. Where, for example, is the substantive federal Act giving injunctive relief? Clause 18 itself merely gives jurisdiction to issue injunctions where there is a substantive right thereto, something which must be decided *ab extra;* yet clause 18 is not thought to be constitutionally objectionable, and, in the light of Three Rivers Boatman Ltd. v. Conseil canadien des Relations ouvrières, [1969] S.C.R. 607, could not be thought so, even if one did not accept that (as suggested at p. 618) Parliament's legislative jurisdiction was exclusive with regard thereto.

2. Suits by the Crown and Third Party Proceedings

The Consolidated Distilleries decisions do however create difficulties of another kind. The remarks of the Privy Council may be thought to cast a degree of doubt in the permissible scope of what is now clause 17(4) of the Bill:

> " (4) The Trial Division has concurrent original jurisdiction
>
> (a) in proceedings of a civil nature in which the Crown or the Attorney-General of Canada claims relief . . .'."

The well-known dicta of the Privy Council in Consolidated Distilleries Ltd. v. The King, [1933] A.C. 508 at p. 521-2, begin with what is not a statement of their Lordships' reasons but a report of counsel's argument against jurisdiction:

> "It was suggested that if read literally, and without any limitation, that sub-section would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be *ultra vires* of Parliament as one not covered by the power conferred by the Parliament of Canada conferred by s. 101 of the British North American Act."

Lord Russell of Killowen for the Board then continues:

> "Their Lordships, however, do not think that sub-section (d), in the context in which it is found, can properly be read as free from all limitations. They think that in view of the three preceding sub-sections the actions and suits in sub-section (d) must be confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be *ultra vires,* and the present actions appear to their Lordships to fall within its scope."

Of these remarks two things must be said. First, they profess only to construe the section and to uphold it as construed—not to rule on the constitutional validity of any wider provision. Indeed their Lordships explicitly say at pages 520-21:

> "The point as to jurisdiction accordingly resolves itself into the question whether the language of the Exchequer Court Act upon its true interpretation purports to confer the necessary jurisdiction ...

> Their Lordships are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by S. 30, beyond what is necessary for the decision of this particular case. Each case as it arises must be determined in relation to its own facts and circumstances."

Second, it was unnecessary to consider the possible constitutional basis of a wider jurisdiction.

On the principle of the matter, it is difficult to see why rights of the Crown, say, under a bond given even at common law, or in monies had and received to its use, or arising from the conversion of its chattels, should not, equally with its rights in land, be "public property" within section 91(1A) of the *British North America Act*, 1867, and within section 101 as being "in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion," the Privy Council's phrase quoted above. Indeed, in assessing the scope of jurisdiction appropriate to a court of crown claims, as it must have appeared to the British Parliament which in 1867 enacted sections 91(1A), 101 and 129 of the *British North America Act*, one may usefully refer to the history of the English Exchequer, whose development supports a jurisdiction far wider than the jurisdiction here contended for.

Third party proceedings present more difficulty. In The King v. Hume; Consolidated Distilleries Ltd. v. Consolidated Exporters Corporation Ltd., [1930] S.C.R. 531 it was held that, where the Crown sued a defendant on certain bonds, the jurisdiction of the Exchequer Court did not extend to claims by the defendant by way of indemnity over against third parties.

The statute there in question did not however purport in terms to give any such jurisdiction; it was only the rules which were invoked for that purpose. It is submitted that the decision is binding authority only as to the jurisdiction of the Exchequer Court under the Act of 1927 and the rules made thereunder.

Nevertheless, certain remarks of Anglin, C.J.C. for the majority of the Court comment on section 101 of the B.N.A. Act, and these, though not strictly necessary to the decision, weigh against a general third party jurisdiction here contended for.

The answer to such objection is two-fold. First, the reasoning of Anglin, C.J.C. seems to be precisely that which led to the decision of the majority of the Supreme Court of Canada in Winner v. S.M.T. (Eastern) Ltd. and A.-G. Can., [1951] S.C.R. 887, decisively rejected by the Privy Council on appeal in A.-G. Ont. v. Winner, [1954] A.C. 541 which held, contrary to the Supreme Court, that a single business undertaking could not be severed, for constitutional purposes, into two, one interprovincial and the other intra-provincial.

The Privy Council said (at p. 581-2):

> "No doubt the taking up and setting down of passengers journeying wholly within the province could be severed from the rest of Mr. Winner's undertaking, but so to treat the question is not to ask is there an undertaking and does it form a connection with other countries or provinces, but can you emasculate the actual undertaking and yet leave it the same undertaking or so divide it that part of it can be regarded as inter-provincial and the other part as provincial.
>
> "The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking."

So likewise here, it is submitted, when the principal litigation is substantially and fairly within the competence of courts of Canada, Parliament must equally be entitled to empower the same courts to decide incidentally thereto all matters which a reasonable legislator would consider a single whole and as such appropriate for simultaneous determination as a whole. The question is not whether some of the issues might have been severally triable here or there, but whether those issues, as they did arise, were in the circumstances parcel of litigation fairly begun in a court of Canada.

There is indeed nowadays scarcely a page of provincial legislation on civil procedure that does not testify to the reasonableness of trying third party issues as part of the principal proceedings and in one court.

Not the least of such provisions may be found in the Quebec Code of Civil Procedure, 13—14 Eliz. II, S.Q. 1965, C. 80; thus under Art. 172 the defendant may

> "in the same proceeding constitute himself cross-plaintiff to urge against the plaintiff any claim arising from the same source as the principal demand, or from a related source."

By Article 216:

> "Any party to a case may implead a third party whose presence is necessary to permit a complete solution of any question involved in the action, or against whom he claims to exercise a recourse in warranty."

By Article 34:

> "When, in answer to an action before the Provincial Court, a defendant makes a claim which itself would be within the jurisdiction of the Superior Court, the latter is alone competent to hear the entire case, and the record must be sent to it at the diligence of the parties."

The second answer to such objections lies in the very terms of section 101 of the B.N.A. Act. It is desirable

from time to time to give some attention to the Act itself, and not only to what has been said about it. The additional courts contemplated therein must be "Courts for the better Administration of the Laws of Canada." So long as the court's heads of jurisdiction are fairly and squarely within the "laws of Canada", it cannot be that the court ceases to be within s. 101 merely because, for the better administration of those laws, it is allowed some additional incidental jurisdiction. It is not unreasonable for Parliament to believe that its laws are better administered when the subject is not forced to have recourse to another court, with the certainty of expense and the possibility of delay and conflicting judgments, on a matter which could fairly be considered parcel of the principal matter of litigation.

Queen's Printer for Canada, Ottawa, 1970

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT
1970

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman
The Honourable E. W. URQUHART, Deputy Chairman

No. 3

WEDNESDAY, DECEMBER 2, 1970

Third and Final Proceedings
on Bill C-172,
intituled:

"AN ACT RESPECTING THE FEDERAL COURT OF CANADA"

REPORT OF THE COMMITTEE

(Appendices and Witnesses:—See Minutes of Proceedings)

23183—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

*Ex officio member

(Quorum 7)

Orders of Reference

Extract from the Minutes of Proceedings of the Senate of Monday, November 16, 1970.

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 Lamontagne, P.C., for the second reading of the Bill C-172, intituled: "An Act respecting the Federal Court 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 Connolly, P.C., moved, seconded by the Honourable Senator Kinnear, 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

23183—2

Minutes of Proceedings

Wednesday, December 2, 1970

(3)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:30 a.m.

Present: The Honourable Senators: Urquhart (*Deputy Chairman*), Burchill, Cook, Croll, Eudes, Fergusson, Gouin, Haig, Hayden, Hollett, Langlois, Macdonald (*Cape Breton*), McGrand and Prowse. (14)

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

On Motion of the Honourable Senator Langlois it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee resumed consideration of Bill C-172, intituled: "An Act respecting the Federal Court of Canada".

The following witnesses were heard in explanation of the Bill:

Mr. D. S. Maxwell, Deputy Minister of Justice and Deputy Attorney General of Canada;

Mr. John Mahoney, Q.C., Special Counsel to the Department of Justice.

On Motion of the Honourable Senator Langlois it was ordered that the Letter and related appendix received from Mr. Francis Gerity, Q.C., Toronto, Ontario, as well as "A Brief from the Bar of the Province of Quebec to the Government of Canada on Bill C-172" be printed as appendices to these proceedings. They appeared in the proceedings as Appendices "A" and "B" respectively.

After discussion and on Motion of the Honourable Senator Macdonald (*Cape Breton*), it was Resolved to report the said Bill without amendment.

At 11:30 a.m. the Committee adjourned.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Report of the Committee

Wednesday, December 2, 1970

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-172, intituled: "An Act respecting the Federal Court of Canada", has in obedience to the order of reference of November 16, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Earl W. Urquhart, Q.C.,
Deputy Chairman.

Minutes of Proceedings

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Wednesday, December 2, 1970

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-172, respecting the Federal Court of Canada, met this day at 10.30 a.m. to give further consideration to the bill.

Senator Earl W. Urquhart *(Deputy Chairman)* in the Chair.

The Deputy Chairman: Honourable senators, you will recall that at our last meeting on November 26, we completed our review of Bill C-172 with the exception of representations we were awaiting from Mr. Gerity of Toronto. Mr. Gerity does not wish to appear before our committee, but wrote a letter to our Clerk, dated November 26, 1970. He attached an appendix, which contains restated portions of a letter to Mr. Maxwell, the Deputy Minister of Justice and Deputy Attorney General of Canada, dated March 16, 1970.

Perhaps we could have this correspondence incorporated into our proceedings.

(*For text, see appendix.*)

We have Mr. Maxwell with us again this morning. Since a copy of Mr. Gerity's letter and the appendix was distributed to all honourable senators, I presume that you are familiar with their contents.

Perhaps Mr. Maxwell could introduce Mr. Mahoney to honourable senators and deal with Mr. Gerity's representations.

Mr. D. S. Maxwell, Deputy Minister of Justice and Deputy Attorney General: Thank you very much, Senator Urquhart. Honourable senators, at the outset I wish to observe that Mr. Gerity's letter to the Clerk of the Committee dated November 26, 1970 is, as I understand it, written on his own behalf and not on behalf of the Bar committee of which he was a member. We have had extensive dealings with this committee.

I have with me Mr. Mahoney, who has been our special adviser with regard to the admiralty side of this particular bill. Since he has carried out most of the discussions with that Bar committee and, indeed, reported to the Canadian Bar itself with regard to this matter in Halifax, I think he is in a better position that I to deal with Mr. Gerity's letter.

Mr. J. Mahoney, Special Counsel, Department of Justice: Honourable chairman, first of all I should explain the status of the Bar committee. The committee of the Bar Association was set up at the 1969 meeting of the Bar in Ottawa. It consisted of Mr. A. J. Stone of Toronto, Mr. Jean Brisset of Montreal and Mr. Francis Gerity of Toronto.

The purpose of the committee was to form a liaison with the department and myself in relation to advice to the department respecting the revision of shipping laws. In this case their attention was given particularly to that part of of the revision dealing with the repeal of the Admiralty Act which, of course, is accomplished by this bill.

The committee was of a very informal nature. It was not recognized formally by the department, but its function was simply to enable us to deal with three prominent members of the Admiralty Bar without having to go to the Admiralty Bar generally for advice on technical matters relating to the admiralty in the bill.

In its functioning, I met with the committee on several occasions, and indeed the advice of the committee was incorporated in the early drafting of this bill, so that even though the liaison was of an informal nature I think I should assure honourable senators that there was a considerable input into this bill by the committee. I feel that should be made clear so that there will be no misunderstanding; this particular committee of the Bar Association, and the individual members of it as well as the members of the Bar generally, had even more opportunity than is usually the case to make their feelings known on this bill.

The last meeting of the committee took place early in April of last year. The purpose of that meeting was simply to tie together some of the loose ends and to make any final suggestions that had to be made before the bill went to the Commons. At that time the committee made four recommendations. I should add, even prior to that copies of the bill as it had been presented in the House of Commons were distributed, as honourable senators know, very widely to the members of the Bar, and we had received quite a number of comments from individual members of the Bar as well, so at the meeting in April we took into account those individual comments as well as the comments of the committee of the Bar Association.

The four points that were raised by the committee were considered then within the department, and two of the four were the subject of amendments that were put forward by the honourable Minister of Justice in the Commons committee. Those two, which I will deal with first, related to clause 22(2) paragraphs (d) and (g). These amendments were simply a clarification of the original bill in order to emphasize, in paragraph (d), that the claim for damage caused by a ship included a claim for loss of life or personal injury. This had been intended in the original draft, but the comments from a number of members of the Bar made it clear that there was some misunderstanding of it.

Senator Hayden: At the present time, before this bill may become law, what is the position, and where is your right to be exercised if there is a death by reason of negligence in the operation of a ship.

Mr. Mahoney: Do you mean before this bill becomes law?

Senator Hayden: Before this bill passes into law.

Mr. Mahoney: That is under the existing Admiralty Act?

Senator Hayden: That is right.

Mr. Mahoney: There is similar provision in the existing Admiralty Act, and so far as loss of life is concerned under the fatal accident provisions of the Canada Shipping Act, in conjunction with the jurisdiction under the Admiralty Act, so there is not any change there. What has been done in this bill is to clarify and set out in much greater detail the distinct heads of jurisdiction of the Federal Court on its admiralty side.

In the Admiralty Act, as honourable senators know, the jurisdiction is fairly generally stated, and stated in a rather confusing manner in that section 18, which deals with jurisdiction, sets out some general heads of damage and then refers to a schedule to the Admiralty Act, which schedule is in fact section 22 of the Supreme Court of Judicature Act of the United Kingdom of 1925. That section, which was adopted as a schedule to the Admiralty Act, sets out further heads of jurisdiction, and there is some duplication with section 22.

Senator Hayden: But if this present bill does not take away any rights, it may detail them but it does not take them away, and plus your section 4, which carries through the original jurisdiction under the statutes existing before this bill comes into force, you say:

> The court of law, equity and admiralty in and for Canada now existing under the name of the Exchequer Court of Canada is hereby continued. . . .

Therefore, if you are going into detail, unless you specifically destroy some right, every right that exists at that moment flows into the new court.

Mr. Mahoney: Yes, this is true.

Senator Hayden: The same court under the new name. Is that not right?

Mr. Mahoney: Quite so.

Senator Hayden: Then what is the worry about whether you are too specific or not specific enough?

Mr. Mahoney: I do not think there is any worry about that so far as this committee or Mr. Gerity is concerned. I did want to point out the two changes that were made in the bill as a result of the final recommendations of the committee, and this was one of them. It is simply a clarifying change.

The other is also a clarifying change, and it is contained in clause 43(8). Again in the original draft it was intended that this subsection should cover multiple ship collisions, and it was felt that the word "ship" would include the plural, as it no doubt would, but the comments we received from the Bar made it clear that there was some misunderstanding of this, so that section was amended to make it quite clear that the action for collision included action for damages in multiple ship collisions. Those were the two changes that were made, not just as a result of the meetings with the Bar, but also as a result of comments that had been received from a number of other sources.

Senator Hayden: I take it you call them clarifying because actually they do not change the law?

Mr. Mahoney: This is quite right. They make no change whatever in the law, but there was a fear that there might be misapplication by the Bar or misinterpretation by the court in that they were not completely clear.

As to the recommendations that were made by the committee, but which were not carried on by the department, the first one was with reference to clause 2 paragraph (b). This brings up a point that was raised a few moments ago about the carrying on of the past jurisdiction of the court. Clause 2 paragraph (b) contains a definition of Canadian maritime law. This phrase "Canadian maritime law" is a new phrase in the legislation that was not referred to in the act and, therefore, it is a new piece of phraseology, although the purpose of it is to define in general terms the jurisdiction which the Admiralty Court had under the Admiralty Act. That section has to be read or should be read in conjunction with section 42 which section simply carries on the past jurisdiction of the court.

Senator Hayden: What is the objection, the use of the word "Canadian"?

Mr. Mahoney: The objection, sir, is really to the use of the linked words, "Canadian, maritime and law" and essentially Canadian. The basis of the objection which has been made here is that this may impose some limitation on the court. This was a point which was not discussed at the last meeting with the committee because it had been discussed on a number of occasions before. It was certainly my opinion at that time and still is that while Mr. Gerity had put forward this point of view that it was not one which was supported by the other members of the committee. At the final meeting of the committee all that was discussed was that we could put forward to the department a proposed change to take out the words "Canadian maritime law" and use the words "admiralty law" instead.

In the discussions which followed that meeting it was felt that this was a very good description of the jurisdiction of the court and that it should be retained as it was. The point of this definition really is to make completely certain that the Federal Court retains all aspects of admiralty jurisdiction which it has had in the past and while the jurisdiction of the court has been broadened and clarified in this bill it was felt that we should make it abundantly clear that any ancient head of jurisdiction which had been lost in the process of time was still retained by the court.

Senator Hayden: May I ask you a question? Is there not some quibbling on this definition of Canadian maritime law? After all, all it purports to do is to carry forward any applicable law under the Admiralty Act or any other statute and as it may be altered or changed under this bill.

Mr. Mahoney: This is quite right.

Senator Hayden: Am I missing something?

Mr. Mahoney: I do not believe so, sir. I felt that it was clear and the committee of the Bar, as a whole, also felt it was clear. My point was that the jurisdiction of the Admiralty Court and the jurisdiction of this court can be traced back through quite a large number of statutes, both Canadian, as well as statutes of the United Kingdom going back into the eighteenth century. Rather than detailing all of this it was felt that a definition of Canadian maritime law was a desirable feature of the bill so it was put in this way. Quite honestly, I do not believe that it will impose any restrictions on the courts, certainly the use of the term Canadian in relation to maritime law. It would not impose a restriction because the court may have reference to foreign law and often does, but that foreign law is not assertive but merely persuasive. Once it has been referred to and adopted by the court then it becomes Canadian law and as such is applied by the court in future cases. I do not believe that this section will raise any problem whatsoever.

The fourth and final point which was raised in the committee is dealt with by Mr. Gerity in the appendix to his letter. This is the second page of that appendix and I am deliberately skipping a point he raised which I will come back to later. The point I want to discuss for a moment now is the very last one in his appendix. This relates to section 46, paragraph (ix) on page 27 of the bill. Under this section the court may make rules governing the appointment of nautical assessors and the trying or hearing of a cause or other matter wholly or partly with the assistance of assessors.

The committee of the Bar Association felt, from practical experience in the past cases, that this rule should include some restriction which would make the questions put by the court to the assessor and the answers of the assessor a part of the record of the court. This is a practical consideration and all of the members of the committee felt that it should be so and indeed other members of the Bar had made the same sort of comment. However, there was no question that section 26, the general rule-making power, does give the court power to make a rule saying exactly that. The court can do it in its rules if it wishes to and if it put the recommendation of the Bar Association into this paragraph would it, in effect, be a restriction on the rule-making power? None of the other paragraphs contained restrictions. Section 46 is a generally worded section which gives the court a fair degree of amplitude in making and changing rules and this seems to be a very desirable way of doing it. It was for this reason that we felt no restriction should be placed on that rule.

Senator Hayden: What is the duty of the assessor?

Mr. Mahoney: His duty is simply to assist the judge in answering technical questions.

Senator Hayden: If you make the questions and answers part of the record and then get into an appeal, what is the basis of the appeal–the reasons for judgment of the judge? What if he has misinterpreted what the assessor has said to him?

Mr. Mahoney: This certainly could impose a complicated feature. While it may well be that the rules relating to assessors may need some clarification by the court I strongly feel that restriction should not be imposed in the statute itself.

Mr. Maxwell: If I may project, I think perhaps I have the same difficulty as Senator Hayden, because I think there is a good deal of confusion in the minds of some people about what assessors are supposed to be and how they are to function. Certainly the words that are underlined in Mr. Gerity's letter, in my view, do not make any sense at all. He obviously had something else in mind because who is to put the questions to whom? I can only assume from what I have been able to learn from people who know more about admiralty practice than I do and I do not know much, that it must be questions put by the judge to the assessor. In my way of thinking it would be a rather curious sort of proceeding to have that form part of the record. I would assume they would have to be regarded as witnesses. I think there is a great deal of confusion.

Senator Hayden: If that is going to happen then counsel for all parties should have the opportunity to examine and cross-examine so as to clarify.

Mr. Mahoney: It might be added that the usefulness of the assessors to the court might be severely restricted. It is for this reason that recommendation was followed.

I would like to return to the point raised by Mr. Gerity at the bottom of page 1 of his appendix and at the top of page 2. The reason I dealt with this is that these two points he has raised were not part of the recommendations of the committee at the last meeting. They were points which had been disposed of much earlier in meetings with the committee and therefore I deal with them in a different manner.

The first suggestion which he makes, and made earlier as well, is a proposed change, or new rule (x):

> rules providing for consular notice where the nature of the action and the national character of the ship indicate such necessity.

He refers there to the present rule 47(a) which does contain that requirement in some instances in the case of foreign ships, those instances being particularly matters of possession, wages, and this sort of thing.

Again it did not seem to fit into the general nature of section 46 that this sort of specific rule making power need be put in section 46. It is something which can be done under the general rule making authority, if necessary.

I would like to point out in addition that whether or not there is such a rule in the appropriate cases the Canada Shipping Act does contain provision for notice to consuls in the case of actions brought against foreign ships in certain cases, so there is statutory authority provision for this.

Senator Hayden: That statutory provision is effective, is it not?

Mr. Mahoney: Yes.

Senator Hayden: It can be used for all the purposes that are covered in this memorandum.

Mr. Mahoney: Indeed. The present rule 47(a) is a genuine rule of the court in the sense that it is for the convenience of the court, but it is not a substantive provision. A substantive provision is contained in the Canada Shipping Act and presumably will continue to be contained in any successor to the Canada Shipping Act.

Senator Hayden: It is procedural, is it not?

Mr. Mahoney: Yes. The second one is perhaps more important. Mr. Gerity has listed it under suggested paragraph (y). This relates to the procedure for the arrest of a sister ship. It was made clear, not only to the committee but to the Bar Association generally at the 1969 convention that in considering overall revision of certain laws it was not proposed to put the rules for the arrest of a sister ship, or the substantive provision for the arrest of sister ships, into any successor to the Admiralty Act. It was proposed that this sort of provision would be contained in the Canada Shipping Act or in some successor legislation.

Just to clarify the meaning of the sister ship provision, these are provisions which first came to be adopted by a number of maritime nations around 1955 or 1956 as a result of an international conference. They simply allow, in appropriate cases, for the arrest not just of the ship which has done the damage but of any other ship owned at the same time by the same owner. It is simply an extension of the right of arrest and it is a desirable feature and all the members of the Bar agree that it is a desirable feature.

The reason I go into the past detail about this is that, in spite of the fact that it was made quite clear that we did not propose to deal with it in this statute, almost every written comment that we received on the bill mentioned this particular point, that the sister ship provision had not been included. I think the answer is the same now as it was earlier, that these are substantive provisions, that they are better off in another statute than they are in the strictly procedural rules. They have no real place in a statute which relates almost entirely to jurisdiction, and certainly they would not have a place in a rule making statute, because it would really mean enacting substantive law in that rule making statute and enacting it in a very difficult way, subject to all sorts of future changes which would not be subject to parliamentary scrutiny. So for these reasons we felt this was not the place to put it.

Senator Hayden: I was going to say that we have a reputation here in the Senate for being very concerned about giving anybody below the status of Parliament the right to enact substantive law.

Mr. Mahoney: I think, sir, that is really the key to the objection here that if any such provision were contained in the rule making statute it would be wide open to all sorts of objections and this is a very serious subject which involves possibly ratification of an international convention.

Senator Hayden: Which might not be approved?

Mr. Mahoney: Which might not be approved and therefore this is simply not the right place to deal with it. The Bar had been assured that at some point in the general revision of shipping laws this matter will be dealt with, because it is a desirable feature.

Senator Hayden: I suppose the purpose of arresting or having authority to arrest a sister ship is really to enforce the provision of security at an early date. Otherwise the assets may disappear from the jurisdiction of the court.

Mr. Mahoney: That is basically it. It gives one added power to arrest to an existing power.

Senator Cook: The ship that does the damage might be all smashed up or destroyed.

Senator Hayden: That is right. There may not be much value left there.

The Deputy Chairman: And the Canada Shipping Act, Mr. Mahoney, is presently under revision?

Mr. Mahoney: That is right.

The Deputy Chairman: And you are connected with that revision.

Mr. Mahoney: Yes. These are all the comments I had to make on the letter and on the relationship with the committee, but I will be happy to try to answer any other questions on the admiralty provisions, if any honourable members have questions?

The Deputy Chairman: Honourable senators, are there any further questions?

Senator Hayden: I do not like to do all the talking, but I would like to say that as one member of the committee I do not feel there is anything in the submissions to the committee which would make us concerned about making changes in the bill which is before us now.

The Deputy Chairman: Is that the general opinion of the committee, honourable senators, that the representations made by Mr. Gerity would not provoke any change in the bill as it is presently before us.

Hon. senators: Agreed.

The Deputy Chairman: Thank you very much, Mr. Mahoney. I want to thank you very much for appearing this morning before our committee and for giving such an informative and detailed analysis of the submissions that have been made by Mr. Gerity and for answering these submissions to the complete satisfaction of the Legal and Constitutional Affairs Committee. Thank you very much.

Honourable senators, in addition to the representations received from Mr. Gerity, you also receive a photo copy of a brief from the Bar of the Province of Quebec. That is the second thing we have to deal with. Mr. Maxwell will deal with this brief. We circulated the brief yesterday to all members of the committee and I presume that you are familiar with the contents of the brief.

Honourable senators, would you rather have Mr. Maxwell deal in a general way with the brief, or are there specific questions which you would like to address to him?

Senator Hayden: Perhaps Mr. Maxwell will refer to the various points.

Mr. Maxwell: Thank you very much, Senator Urquhart. This brief deals with a number of matters, only some of which represent constructive criticism of the bill.

The first point is the suggestion in the brief that perhaps we are premature in reducing the retirement age of the judges of this new court. That, of course, is a question of policy which I suppose can be argued both ways. They point out that people are living longer now than in the past. While that is no doubt true, people are also generally retiring a little earlier, at least in most circles.

I think the Government was highly motivated to reduce the retirement age. This is to be a travelling court, throughout the country, both Trial and Appeal Branch. That sort of extensive travel is harder on people than that involved in some of the other courts which do not travel quite so far. However, that is a question of policy and I cannot say much about it. I think most people feel it is a move in the right direction.

The Deputy Chairman: There is no question about that.

Mr. Maxwell: Secondly, they raise the question of the oath of office, which appears in clause 9 of the bill. The brief suggests that it might be removed. I may say that this was considered at one stage. We decided against removing the oath of office. Most people felt that a person taking a statutory office should be prepared to give some sort of public undertaking that he is prepared to carry out properly the duties and functions attached to that office. If he is not prepared to do that, one might question whether or not he should be appointed at all. We did not prescribe a form of oath in this case. It is a fairly flexible provision and it would appear to me at least to be quite reasonable.

Senator Hayden: What is the difference between an oath of office and the formal acceptance of the appointment?

Mr. Maxwell: I do not know exactly what they have in mind. I would presume that they would simply file a letter saying they accept the appointment which, I suppose, must by implication carry with it an undertaking to perform the duties of the office. Speaking for myself, and this again may be a matter of cosmetics, I would think there must be some virtue in a person taking office undertaking to perform the duties and functions of that office.

Senator Prowse: Is not the oath of office actually formal acceptance of the office?

Mr. Maxwell: That would be so, of course.

Senator Hayden: Having regard to the procedures which I understand are followed I do not think the appointment would be made unless there were first an indication that the person being considered would accept it.

Mr. Maxwell: Normally, for example, a person appointed to the judiciary indicates his acceptance and there is a subsequent oath of office before he functions as a judge.

Senator Langlois: Does this brief not confuse the whole hypothesis of the oath of allegiance?

Mr. Maxwell: I think you may be right, senator.

The next point, which is laboured to some considerable extent, is the constitutional aspect. This committee has already heard some discussion of this. As a matter of fact, Professor Scott when he was here last week discussed this problem and, indeed, took a completely different view of the constitutional position than is taken in this paper. Its suggestion in a nutshell is that Parliament cannot confer jurisdiction to deal with a cause of action on a Federal Court unless it has in fact enacted some kind of substantive law in relation to it.

The issue turns on the meaning of the "laws of Canada" as that expression was found in the British North America Act. Speaking again for myself, I am of the view that this matter is determined and decided by a case which is in fact referred to in the brief. It is that of Consolidated Distilleries Limited, found at page 11 of this translation, where there is a passage quoted from Lord Russell of Killowen with regard to what is presently section 30, subsection (d) of the Exchequer Court Act.

I think that the writer of this brief recognizes that this case does appear to decide the question that he is putting in issue. He simply seems to suggest that there may be some doubt with regard to it. My submission is that there really is no doubt about this proposition. However, even if there were I should have thought that we would be unduly chary if we did not confer this jurisdiction where we feel it ought to be. In that case it could be challenged if desired. I feel that the matter is really beyond argument at this stage basically because of the Consolidated Distilleries Limited case.

Page 15 of the brief seems to agree with the provisions of the bill which gives review jurisdiction to the new Federal Court. The fourth paragraph reads:

> We do not believe we have to challenge the constitutionality of these two sections, taking for granted the constitutionality of the acts governing federal bodies.

The next point related to appeals to the Supreme Court of Canada, at page 16. The brief seems to take no objection to that set of provisions. A good deal of this brief seems to be basically in support of the contents of the bill.

At page 18 the brief appears to agree with the contents of the bill respecting place of sittings.

At page 19 the brief seems to question the provision of the bill giving the court jurisdiction with regard to bills and notes. I am not certain that they are aware of the fact that we have modified that clause, which is 23, so as to restrict the jurisdiction to cases where the Crown is a party to the proceedings. That was a change that we made in committee in view of some of the criticism that had been raised with respect to this jurisdiction being given to the Federal Court. That that restriction would substantially meet the point.

The document seems to agree with the provisions with respect to prescription. It makes a comment on page 19, I guess it is, about the disclosure provisions respecting government documents and the public interest, (clause 41) although I do not think their comment is really very critical. They recognize that basically what we are trying to do is to clarify some rather confused law on the subject of the

production of documents that are perhaps not to be disclosed because of some public interest.

They make comment on the French text, which I have looked at. I am not really an authority on the French text, but it seems to me that while there is a small difference in the actual word for word translation, on balance it does not make any difference in the total meaning of the context as I conceive of it. We, of course, are not now necessarily translating word for word. We used to translate word for word, which sometimes produced undesirable meanings in one language or the other.

Now, therefore, we are trying to get the right meaning in both languages, whether or not they are actually word for word translations. In short, we are trying to have two versions that mean the same thing regardless of whether or not the words are literally translated.

Moving along, they seem to support what we have done about commencing proceedings against the Crown.

There is another comment, on page 21, about certain evidentiary provisions that we have included. They agree with the substance of the provisions we have included. Again they take issue with the translation. Here again, as I have looked at this translation it seems to me that it does not matter that they are not literally translated; in my submission that does not really change the result. I think they mean the same thing whether there is a literal translation or not.

Gentlemen, I am not sure that there is anything in the balance of the paper that is really deserving of great comment. I do not see anything that can be taken as critical of the provisions of the bill as they are written.

The Deputy Chairman: So generally you would say the brief supports the bill?

Mr. Maxwell: It would seem to, subject to certain exceptions that I have mentioned. I think the bill is generally supported.

Senator Hayden: It is a useful commentary.

Mr. Maxwell: Yes.

Senator Hayden: And I think they should be thanked for sending it.

The Deputy Chairman: Oh yes, indeed.

Mr. Maxwell: The one final matter that I suppose I should mention–

The Deputy Chairman: Before we dispose of this brief, perhaps we should record that we are indebted to the Bar of the Province of Quebec for their exhaustive analysis of and well written brief relating to Bill C-172, and perhaps a letter should go forward from the committee thanking them for their interest in this piece of legislation.

Honourable senators, the third and final matter has to do with the memorandum I received last evening from Senator John Connolly, who is the sponsor of this bill. A copy of that memorandum was distributed to all honourable senators this morning.

I should like to ask Mr. Maxwell if he would deal with the points raised by Senator Connolly in that memorandum.

Mr. Maxwell: I did not want to do that Mr. Chairman, because this relates to a matter Senator Connolly raised at the last session. It is a sort of follow up to the discussion we then had. I think Senator Connolly has fooled me to some extent, because he phoned me yesterday and said he was going to put the question in writing because he could not be here. I understood what the question was and said I would be quite happy to make some further comment about this problem. However, he did not tell me he was going to ask me to do some digging, which I have not really got around to doing. That is on the second question. That catches me somewhat off guard this morning.

However, to go back to the real question, which is how the provisions of the Railway Act function, perhaps I should just mention to honourable senators that under the provisions of that act there is a right in the Governor in Council–the act does not say appeal–the Governor in Council can in effect reverse, indeed on its own motion, or on an application made by the interested person, any judgment or order of the commission. In addition to that power in the Governor in Council–I am going to call it a power because in my view it is not an appeal as this would be ordinarily understood by most lawyers, although I think lawyers who have been dealing with this area tend to regard that as an appeal, and they talk that way. At least, Mr. John O'Brien tells me that is the way they talk, and he is very familiar with this area; we have had some discussions and I am sure he is right that this is the way they talk, but it is not the way I would talk. Perhaps we are attributing loose language to people like Mr. O'Brien, but this is the sort of thing that does happen. Anyway, there is this power in the Governor in Council to reverse any judgment or order of the Transport Commission. In addition, there is an appeal–and the word "appeal" is used in the provisions of the Railway Act–to the Supreme Court of Canada on any question of law or jurisdiction, if I recall the language, which is pretty general language.

I should point out to you that the right to go to the Governor in Council is completely unrestricted; the Governor in Council can really set aside an order whether it is legal or whether it is not legal; the power is virtually legislative.

Mr. E. Russel Hopkins, Law Clerk and Parliamentary Counsel: And has done so on several occasions.

Mr. Maxwell: Indeed.

Senator Hayden: The Governor in Council can function only to the extent that he has authority to function.

Mr. Maxwell: That is right, but within the framework of that statute the Governor in Council has a very, very broad power indeed.

Mr. Hopkins: Have you got the number of the section? I have the act here.

Mr. Maxwell: I think basically the position we take is that the Governor in Council ordinarily would not reverse. I think it is

section 53. Ordinarily he would not reverse an order of the commission on the basis of a question of law.

Senator Hayden: But are we concerned about that, what he may or may not do?

Mr. Maxwell: I do not think so.

Senator Hayden: Is not it whether you shut the door on his right to do anything?

Mr. Maxwell: Yes, that is the issue. That, of course, turns on whether or not that power in the Governor in Council is an appeal. I have taken the position that it is not an appeal. If it is not an appeal, it is quite clear that the new remedy we are giving, the remedy of review, is available, along with, of course, the right of appeal to the Supreme Court of Canada; that remains intact. It will be the new Court of Appeal now, but it will remain intact. There will be the right of review. Of course, in addition to that, the overall power of the Governor in Council to do whatever he is authorized to do under that statute remains in full force.

Senator Hayden: If there is any possibility that the Governor in Council might decide that the provisions in this bill would prevent the Governor in Council from entertaining an application because it is in the nature of an appeal.

Mr. Maxwell: Perhaps it would be helpful if I read the provision in question, section 53, subsection (1) beginning with the Governor in Council:

> The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Board, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Board and upon all parties.

So you see it is a very broad power, Senator Hayden. I do not know if you were looking at that from the standpoint of new legislation whether you would like it very well. It is an extremely broad power.

Senator Hayden: If you look at section 29 in the bill it says:

> Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

Senator Cook: I notice that they use the word "appeal" and not "review".

Mr. Maxwell: That is quite so. The question, I think, which has been concerning Senator Connolly and Mr. O'Brien, if I can refer to him again, is whether this power in the Governor in Council to rescind—whether that power in section 53(1) that I have just read of the Railway Act is an appeal so as to prevent the right of the review that is conferred by clause 28 of the bill. My submission is that it is not an appeal of that kind at all. As a matter of fact, it is not an appeal at all, but a very broad power. This thing becomes manifestly clear in my view when you read later on the provision that gives the actual right of appeal to the Supreme Court of Canada. This is subsection (2) which says:

> An appeal lies from the Board to the Supreme Court of Canada upon a question of law,. . .

That is the classical language that is used to create a right of appeal. That is a right of appeal and to that extent, of course, you would not use review, but an ordinary appeal provision.

Senator Hayden: That would be a matter of choice. There is nothing to prohibit the Governor in Council from dealing with the question of law after the Supreme Court of Canada made a pronouncement.

Mr. Maxwell: Exactly. The Governor in Council, regardless of a legal wrong or right can change it. It is a matter dealing with the problem as a policy issue. That is not an appeal at all in my view in ordinary technical legal language. This is the discussion that I have had back and forth with Mr. O'Brien in Montreal and I think Senator Connolly is concerned about the same point.

Senator Cook: It could be reviewed on facts which were not argued at all.

Mr. Maxwell: Certainly. That, as I understand it, is the point of concern that is reflected.

Senator Hayden: I added the words to Senator Cook's statement "where circumstances" which might include even a change of Government.

Mr. Maxwell: It might indeed. Gentlemen, I apologize, because I did not know that Senator Connolly was going to ask me just what statutes, and I cannot recall them at the present time. I did not have time to do my homework. I cannot really give you a detailed answer to his second question. I do not really think it matters, because in point of fact, what we are doing here in clause 29 is trying to have a very general scheme that will take care of not only the existing statute law, but statute law that may well result in the future. One may quarrel with the policy of this, but where a statute does give an appeal to the Governor in Council we feel it would be improper to try to have the court review, because really under normal circumstances such an appeal is given and there are some statutes where the Governor in Council is dealing with that problem on a policy basis ordinarily and not on a legalistic basis. It is not too well equipped to deal with a dispute in parties on a litigious basis.

Senator Hayden: Mr. Chairman, has our Law Clerk expressed any view?

Mr. Hopkins: I never like to repeat anything as well expressed as has been done by Mr. Maxwell. I agree entirely. I am not expressing a view on the question of policy. The policy apparently is that if there is an appeal provided, which is properly an appeal in the statute, the review procedure is excluded.

Mr. Maxwell: To the extent it can be appealed.

Mr. Hopkins: Yes, and that is the language of the section. I expressed my views with regard to the policy question. I have often wondered why it was that the other statutes weren't amended to provide for the review procedure instead of being the alternate to the statutory provisions.

Mr. Maxwell: That was considered and it was felt at this stage of development that a lot of people would feel we were taking something away and I think we need to have a little bit of experience.

Mr. Hopkins: We do amend some of the statutes.

Mr. Maxwell: Yes. We have left the appeal. The existing appeals have been left intact. The only thing we have done is to take the appeal directly from the Supreme Court and give it to the new Court of Appeal, because we feel that the Supreme Court of Canada should not have the initial and final appeal. We feel that is at least an improper use of the Supreme Court of Canada and it is one of the reasons why we have the new Federal Court of Appeal. That is the only change we have made in the right of appeal.

Mr. Hopkins: That is a question of policy.

Mr. Maxwell: I think, Senator Urquhart, that is all I can do.

Senator Hayden: Mr. Maxwell, if you want to make what you think is clear and absolutely clear you have to have a definition of appeal in the bill, that is, an appeal does not include the procedure by which you apply to the Governor in Council.

Mr. Maxwell: You are quite right. We could have written that kind of definition to deal with the Railway Act specifically. Indeed, that ran through my mind. I felt that really we did put in some words. We talked about appeals as such and things of that sort. You may think that is not much of an improvement. I thought it was a slight improvement over what we had. I feel quite strongly that there is no problem.

Senator Hayden: The ordinary connotation of the word "appeal" would include a petition to the Governor in Council. You notice I said the "ordinary connotation" of the word.

Mr. Maxwell: Perhaps, but you have to look at this thing in the context of the section in which it appears. For example, if it simply said that someone could petition the Governor in Council then the Governor in Council could do something and then one might say it is more of an appeal than this one. This power is one that really can be exercised without anybody taking an appeal at all. One may say it is more of an appeal than this one, but this is really one that can be exercised without anybody taking an appeal at all.

The Deputy Chairman: Honourable senators, are there any further questions? Are we in a position now to report the bill without amendment?

Hon. Senators: Agreed.

The Deputy Chairman: It is agreed that the bill be reported without amendment. Mr. Maxwell, on behalf of the Legal and Constitutional Affairs Committee, I should like to express our deep appreciation and thanks to you for attending three meetings of our committee in relation to Bill C-172. Your help and assistance and guidance and your legal expertise have been of inestimable value to us in arriving at a decision on this bill. We thank you very much indeed and we are looking forward to having you on other occasions before our committee, because we feel you are a good witness, you are well informed and you certainly do your homework well.

Mr. Maxwell: Thank you very much, Mr. Chairman. I certainly look forward to coming back.

APPENDIX "A"

Francis Gerity, Q.C.,
Suite 701, 20 King Street West,
Toronto.

November 26, 1970.

Denis Bouffard, Esq.,
Clerk, Committee on Legal and
Constitutional Affairs,
The Senate,
Ottawa, Canada.

Re: Bill C-172

Dear Sir:

Further to our telephone discussion of this afternoon and to the kind offer of your Chairman, Senator Urquhart, to hear members of our committee in respect of the above-mentioned Bill, I take this opportunity to put before the Honourable Senator and his Committee some observations in the light of these discussions.

(i) The committee of the Bar consisted in the Chairman of the Maritime Law Section (A. J. Stone, of Toronto) and Maitre Jean Brisset and myself.

(ii) Some lack of clarity in communications between the Department of Justice and our Association gave rise to a misunderstanding in respect of our previous submissions going forward to the Committee of the Lower House.

Secs. 2(b) 42 and 46

At this time, therefore,

(a) Maitre Brisset and myself do not seek to avail ourselves of the opportunity given by your Chairman to appear before the Committee. Mr. Stone is currently heavily engaged in the aircraft crash Inquiry (proceeding before Gibson, J.). In effect, in view of what has been said in (ii) above we have no desire to hold up the normal progress of the Bill at this stage, but

(b) in response to the kind offer made, I append hereto some of our observations in respect to the enumerated sections of the Bill, marginally noted, in the hope that they may be of assistance at this time.

Yours sincerely,

FG:DB
Copies to:
The Honourable E. W. Urquhart
D. S. Maxwell, Esq., Q.C.
A. J. Stone, Esq.
Jean Brisset, Esq., Q.C.

APPENDIX

Restated portions of letter to Deputy Attorney General of Canada dated March 16, 1970:

"SECOND: Of the comments mentioned, and enclosed with mine of February 24, I propose now to reduce these (since a large part of them have found their way into the Bill) to the following:

Sec. 2(b)

(i) Section 2(b) – I continue to find difficulty as to the need for a section in this form, since nowhere else in the whole statute do I find any further reference to "law" save in section 3 and I have not yet lost my original feeling that the statement in this form will not enlarge the jurisdiction but tend to narrow it.

In effect, if the Federal Court of Canada, on its admiralty side, is now to have unlimited jurisdiction in relation to maritime and admiralty matters (as conferred by this statute) and such jurisdiction as was exercised by it in the past, then the only necessity that I can see in this part of the Act is a definition of maritime law, droit maritime. I have already suggested that the association of the words "Canadian", "maritime" and "law" will result in litigation as to whether that was the law applied by the court prior to the coming into force of the Act and whether after that event the decisions of the courts of the several Provinces and other countries are to be a part of it."

Sec. 42

These remarks apply equally to Section 42. This section does nothing to clarify Section 2(b) but to reinforce the objection stated.

"(iii) These being sections not previously shown to me, I turn to section 46 – Rules. I believe it desirable to include amongst the enumeration of 46 (1) (a)

(x) rules providing for consular notice where the nature of the action and the national character of the ship indicate such necessity (see present Rule 47(a)),

(y) for the arrest of a sister ship of the same ownership, as an extension of the ordinary right in rem. It was said that this was to be provided in some other statute, but frankly I believe very strongly that it should be provided in this section and so given statutory force."

"It has been kind of you to receive these several memoranda and to devote time from your heavy engagements to their consideration."

At this time we also suggest the addition of certain words to subsection (ix):

(ix) rules governing the appointment of assessors and the trying or hearing of a cause or other matter wholly or partly with the assistance of assessors, *and to make part of the record the questions put and the answers given by the assessors,* and"

APPENDIX "B"

A BRIEF

FROM

THE BAR OF THE

PROVINCE OF QUEBEC

TO

THE GOVERNMENT OF CANADA

ON

BILL C-172

An Act respecting the Federal Court of Canada

First reading: March 2, 1970

November 1970

1. *Retirement Age*

At a time when average life expectancy is increasing, is it advisable to lower the retirement age from 75 to 70, as proposed under section 8(2) of the bill?

The federal Government doubtless intends to suggest that Parliament also lower the retirement age for judges of the Supreme Court of Canada and of county or district courts. We can assume that the federal Government has similar plans with respect to the higher provincial courts, but this would require an amendment to section 99(2) of the Constitution (added by the British North America Act (1960) and brought into force on March 1, 1961), which prescribes 75 as the retirement age for judges of these courts.

At the very least, should not the federal Government preserve the present uniformity with respect to the retirement age for all the judges it appoints—in other words, wait until it is in a position to lower the retirement age for judges of higher courts before lowering that for the other judges?

2. *The Oath of Office*

(The members of the Quebec Bar are not unanimous on this point)

Are not the oath of office and the oath of allegiance outdated formalities devoid of any legal significance? The oath of office adds nothing to the obligations of the person who swears it, and is never invoked against him. Nor is it necessary to use a person's oath of allegiance against him in order to secure a conviction on a charge of treason or sedition, even under a monarchical system.

Are not these things vestiges of feudalism and of an age when such solemn undertakings had practical significance they have long since lost? One may even doubt whether they have retained any psychological or educational value to justify the waste of time and the pointless paperwork involved in administering them, and the risk of legal complications—inherent in the requirement that the oath of office be sworn.

Should not this oath be replaced by a formal acceptance of the appointment in question?

3. *The Constitutional Aspect*

1. *The jurisdiction of the Federal Court should be restricted to federal legislation (as opposed to federal legislative power that has not been exercised and matters of law that are provincial responsibilities).*

A number of provisions in the bill (like the corresponding ones in the existing Act) give the Court exclusive or concurrent jurisdiction with respect to disputes involving the federal Government or a "federal board, commission or other tribunal" (these terms being defined in the bill), or concerning matters in which the Parliament of Canada has power to legislate, *even if such disputes do not otherwise turn on any federal law or regulation.*

This is so in the case of such sections as:

Bill C-192	*Existing Act* (the Exchequer Court Act, R.S.C. 1952, c. 98)
17(1)	18(1)(a), (b), (c), (d), and (f)
17(2)	17, 18(1)(a), (b) and (h) and 19
17(3)(a) and (b)	18(1)(g)
17(3)(c)	24
17(4)(a)	29(a) and (d)
17(4)(b)	29(c)
17(5)	18(1)(j)
19	30(1)
20	21
23	(no corresponding provision)

Going into greater detail with respect to two of these examples, we would note that:

a) section 20 of the bill, in addition to granting the Trial Division of the Federal Court exclusive jurisdiction in cases of conflicting applications for patents of invention or for the registration of copyrights, trade marks or industrial designs, and in cases of applications to annul patents or to have an entry in a register of copyrights, trade marks or industrial designs made, expunged or varied, grants it concurrent jurisdiction "in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at common law or in equity, respecting any patent of invention, copyright, trade mark or industrial design"; and that

b) section 23 of the bill (which is new, except insofar as it applies to railways within a province) grants it "concurrent original jurisdiction as well between subject and subject as otherwise, in all

cases in which a claim for relief is made or a remedy is sought under an Act of the Parliament of Canada *or otherwise* in relation to any matter coming within the class of subject of bills of exchange and promissory notes, aeronautics, or works and undertakings connecting a province with any other province or extending beyond the limits of a province, except to the extent that jurisdiction has been otherwise specially assigned."

Now, there are strong grounds for maintaining that the term "laws of Canada" in section 101 of the Constitution means "federal Acts" or "federal law", which probably includes legislation enacted by the Parliament of Canada, regulations made under its authority and jurisprudence interpreting either.

Section 101 reads as follows:

"The Parliament of Canada may, notwithstanding any thing in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

«Le Parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans le présent acte, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.»

Before going any farther, let us note that the federal Government demonstrates a measure of prudence on this point by suggesting the following definition in section 2(j) of the bill:

"2(j) 'laws of Canada' has the same meaning as those words have in section 101 of The British North America Act, 1867."

«2(j) «droit du Canada» a le sens donné, à l'article 101 de l'Acte de l'Amérique du Nord Britannique, 1867, à l'expression «Laws of Canada» traduite par l'expression «lois du Canada» dans les versions françaises de cet Acte.»

In *The King* v. *Hume and Consolidated Distilleries Limited and Consolidated Exporters Corporation Ltd.*, (1930) R.C.S. 531, pp. 534-5, Anglin C. J. of the Supreme Court of Canada, having cited section 101, gives the following opinion on the question that concerns us here:

"It is to be observed that the "additional courts", which Parliament is hereby authorized to establish, are courts "for the better administration of the laws of Canada". In the collocation in which they are found, and having regard to the other provisions of the British North America Act, the words, "the laws of Canada", must signify laws enacted by the Dominion Parliament and within its competence. If they should be taken to mean laws in force anywhere in Canada, which is the alternative suggested, s. 101 would be wide enough to confer jurisdiction on Parliament to create courts empowered to deal with the whole range of matters within the exclusive jurisdiction of the provincial legislatures, including "property and civil rights" in the provinces, although, by s. 92 (14) of the British North America Act,

"The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts"

is part of the jurisdiction conferred exclusively upon the provincial legislatures".

It is significant that in the second sentence of the opinion we have just quoted, Anglin C. J. (who was speaking here on behalf of Rinfret, Lamont and Cannon JJ.) specifies federal *legislation*, not just the power to legislate. On p. 535, he states:

"While the law, under which the defendant in the present instance seeks to impose a liability on the third party to indemnify it by virtue of a contract between them, is a law of Canada in the sense that it is in force in Canada, it is not a law of Canada in the sense that it would be competent for the Parliament of Canada to enact, modify or amend it."

Thus, in the opinion of the Supreme Court as expressed in this matter, section 101 does not permit the Parliament of Canada to grant the "additional Courts" it provides for jurisdiction in matters within its competence concerning which it has not enacted laws. The "additional Courts" are distinguished here from the "General Court of Appeal for Canada" that this section authorizes Parliament to establish (and which it has in fact established as the Supreme Court of Canada). If the intention had been to permit Parliament to grant the "additional Courts" powers as extensive as those of the "General Court of Appeal", i.e., covering matters of provincial responsibility as well as federal legislation, then Parliament would simply have been empowered to establish courts with original and appeal jurisdiction for Canada, in addition to those constituted by the provinces under section 92(14). The terms used by the British Parliament in section 101 strongly suggest that it intended to limit the jurisdiction of federally-constituted "additional Courts" (in contrast to that of the "General Court of Appeal"). The necessary conclusion from this is that in the context, "laws of Canada" means only federal Acts.

Now, in interpreting section 101, it is essential to take into account two other distinctions that we believe to be universally recognized: those between

a) legislative power and its exercise, and those between

b) what is (perhaps incorrectly) called "substantive law", which creates and regulates legal rights and institutions, and judicial law, which regulates judicial procedure and jurisdiction.

Is it not perfectly legitimate – and even imperative – to suppose that Parliament in Westminster was aware of these distinctions and intended to observe them? If so, we must avoid confusing, first, the laws enacted by the Parliament of Canada ("laws of Canada") with its legislative powers, and second, its "substantive" and its judicial legislation. To return to the above decision of the Supreme Court, we are thus bound to conclude that section 101 does not permit the Parliament of Canada to extend the jurisdiction of the Federal Court to disputes (even those involving the federal Government or a federal agency) dealing with subjects within its competence, but not

with "substantive" provisions it has enacted concerning such subjects.

If we are correct, the words "at common law or in equity", for example, would have to be deleted from section 20 of the bill, as would the words "or otherwise" from section 23. The other sections of the bill to which we have referred would have to be amended so as to limit their application to disputes in connection with federal legislation.

We do not claim it is necessary for them to specify that the federal legislation in question must be "substantive". We believe this will then emerge clearly from the text. Our purpose in recalling this second distinction is to refute, in advance, any claim that provisions which, like those of the bill and of the existing Act, regulate the jurisdiction of a federal court, are "laws of Canada" within the meaning of section 101 (even if this is taken to mean only federal laws), and that it is therefore sufficient for Parliament to provide that any court it establishes will be able to hear any matter concerning bills of exchange, patents of invention, works or undertakings extending beyond the limits of a province, and so on, in order for such a court to consider itself thereby established "for the better Administration of the Laws of Canada".

Admittedly, the authorities on this question are not very satisfactory. *In re* The Board of Commerce Act, 1919, (1922) 1 A.C. 191, p. 199, 2 Olmsted 245, p. 252, the Privy Council found as follows:

> "For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter."

The question at issue was federal legislation establishing an administrative and judicial body responsible for preventing commodity hoarding monopolies and price manipulation. The Privy Council declared the legislation unconstitutional, but with regard to section 101, it made no reference whatever to the distinctions we have made between legislative power and its exercise and between "substantive" legislation and that which concerns only remedies and procedure.

In *Consolidated Distilleries Limited and another* v. *The King* (1933) A.C. 508, p. 522, 3 Olmsted 73, p. 86, in which the issue was what is now section 29(d) of the Exchequer Court Act, which corresponds in turn to section 17(4)(a) of the bill (which, however, mentions neither common law nor equity), as well as a guarantee given to the Government under – the federal Inland Revenue Act, the Privy Council found as follows:

> "Their Lordships, however, have come to the conclusion that these actions do fall within sub-s. (d), It was suggested that if read literally, and without any limitation, that sub-section would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be ultra vires the Parliament of Canada as one not covered by the power conferred by s. 101 of the British North America Act. Their Lordships, however, do not think that sub-s. (d), in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding sub-sections the actions and suits in sub-s. (d) must be confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be ultra vires, and the present actions appear to their Lordships to fall within its scope. The Exchequer Court accordingly had jurisdiction in the matter of these actions."

If the terms used here can be taken to mean that, unaware of the distinction between the legislative powers of Parliament and the legislation it enacts in the exercise of those powers, and perhaps the distinction between "substantive" and "judicial" legislation, the Privy Council found in that case that a provision extending the jurisdiction of the "additional Courts" mentioned in section 101 to cover all disputes involving the federal Government is valid with respect to disputes concerning subjects within the legislative competence of the Parliament of Canada ... (sentence incomplete – Tr.). However, in this case it was not only section 29(d) of the Exchequer Court Act that was involved, but also the Inland Revenue Act, R.S.C. 1906 c. 51, which has now become the Excise Act, and the Regulations pursuant thereto.

In *Kellogg Company v. Helen I. Kellogg,* (1941) R.C.S. 242, The Supreme Court decided that, notwithstanding its previously mentioned decision in The *King and Hume And Consolidated Distilleries Ltd. and Consolidated Exporters Corporation Ltd.*, the Exchequer Court could pronounce on a contractual question on which depended the right to a patent of invention, by virtue of the Patent Act and section 22 (c) of the Exchequer Court Act (now section 21(c), which is the same as the last paragraph of section 20 of the bill). However, the Supreme Court was very careful to point out that it was limiting itself to interpreting the relevant sections of the Patent Act and the Exchequer Court Act, without taking any

position on the constitutional question, which had not been raised. Its reservation was phrased as follows: (pages 250-1):

> "No question was raised before us or before the Exchequer Court as to the constitutionality either of paragraph (iv) of subsection 8 of s. 44 of the Patent Act, or the constitutionality of subs. (c) of s. 22 of the Exchequer Court Act. No proceedings were directed to that issue. No notices to the Attorney-General of Canada, or to the Provincial Attorneys-General, was given of any intention to raise such a point. We are limiting our judgment to the interpretation of the relevant sections of the Exchequer Court Act and of the Patent Act as we find them in the statutes. Upon the construction of these sections, we are of opinion that the Exchequer Court has jurisdiction to hear and determine the issue raised by paragraph 8 of the appellant's statement of claim and by sub-paragraphs (c) and (d) of the conclusions."

2. *The jurisdiction of the Federal Court could validly include the supervision and review of the proceedings and decisions of federal bodies.*

Section 18 of the bill gives the Trial Division of the Federal Court exclusive jurisdiction to hear and determine any claim for relief (by certiori, mandamus, prohibition or quo warranto or in any other way) against a federal board, commission or other tribunal.

Section 28 reserves for the Federal Court of Appeal the power to review the decisions of federal boards, commission or other tribunals (except for those of an administrative nature not required to be made on a judicial or quasi-judicial basis).

We do not believe we have to challenge the constitutionality of these two sections, taking for granted the constitutionality of the acts governing federal bodies.

Assuming this, sections 18 and 28 of the bill have the same effect as if they were part of these acts and their purpose is to give the Federal Court jurisdiction "for the better administration of the laws of Canada", i.e. the substantive laws governing such bodies.

Such an interpretation at least appears very tenable, and if it is well founded, we do not believe there is cause to object to the Federal court's supplanting in this way the superior provincial courts, which until now have had the responsibility for the supervision, not only of the lower courts, but also of government bodies (federal and provincial), as well as reviewing their decisions. On the claim that, according to the Confederation debates, the appointment of judges of superior provincial, district and county courts was given to the Federal Government (section 96 of the Constitution) because of or in exchange for the jurisdiction of such courts or some of them over federal bodies, the fear was expressed that the supplanting of the provincial courts by the Federal Court may lead, in Quebec, to that of the Superior Court by the Provincial Court, whose judges are appointed by the Provincial Government, and eventually lead to the relinquishing by the federal government (by a Constitutional amendment), of its right to appoint the provincial judges referred to in section 96. An encouragement to separatism can seemingly be seen there. We, for our part, see no valid reason to refuse to the Provinces the power to appoint the judges of courts instituted by them and to reorganize these courts perhaps more freely than they can now do.

4. *Appeals to the Supreme Court of Canada*

Section 31 and 32 of the bill change and simplify sections 82,83 and 84 of the present bill governing the right to appeal. To sum up, at this time only the following judgments of the Exchequer Court can be appealed to the Supreme Court.:

(a) de plano, i.e. without permission, final judgments and judgments on demurrers or points of law raised in pleadings;

(b) with the permission of a Supreme Court judge, interlocutory judgments, and only if "the actual amount in controversy" exceeds $500 or if a Supreme Court judge grants permission to appeal and if it concerns the validity of a federal or provincial Act, or a Government debt, real property rights, annual rents annuities, professional property, future rights or an important precedent for the Government or the public.

The bill proposes as a general rule the right to appeal "on a question that is not a question of fact alone, from a final judgment directing a new trial" of the Federal Court of Appeal. . . where the amount or value of the matter in controversy in the appeal exceeds ten thousand dollars". Excepted from the rule, however, are judgments of the Federal Court of Appeal revising decisions of federal boards, commissions and other tribunals in accordance with section 28 of the bill.

The bill proposes also the right to appeal to the Supreme Court with leave of the Federal Court of Appeal "where, in the opinion of the court of Appeal, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision". Any judgment of the Federal Court of Appeal would come under this provision.

Subsection (3) of section 31 of the bill provides, also, for appeal to the Supreme Court, with leave of the latter, of any judgment (final or other) of the Federal Court of Appeal.

Finally, section 31 provides for an appeal "de plano" of any decision of the Federal Court of Appeal "in the case of a controversy between Canada and a province or between two or more provinces".

We do not think that the Quebec Bar should object to this reform of the right to appeal

5. *Miscellaneous*

1. Place of sittings

Even the Court of Appeal may sit at any place arranged by the Chief Justice to suit, as nearly as may be, the convenience of the parties (subsection (3) of section 16). The Trial Division, like the present Exchequer Court, may sit "at any time and at any place in Canada". We certainly think that this gives easier access to justice and to government administrative services.

2. *Review of decisions of federal boards, commissions and other tribunals (section 18 and 28)*

The sharing of jurisdiction in this respect between the Trial Division and the Court of Appeal is not very clear-cut. Subsection (3) of section 28 assigns exclusive jurisdiction to the Court of Appeal and excludes that of the Trial Division with respect to any "application to review and set aside a decision or order".

Also, subparagraph (b) of section 18 leaves much to be desired.

5. *Bills of exchange (section 23)*

Attention should be drawn to the assignment to the Federal Court of this new concurrent jurisdiction (which extends, by the terms of clause 23, to aeronautics and to extra-provincial works and undertakings). Besides the doubts we have about the constitutional question (c.f. particularly page 3 of this brief), we are opposed to any jurisdiction over matters arising out of the Bills of Exchange Act, which jurisdiction should not be given to the court because of the difficulty of dissociating the instrument, the bill of exchange, from the circumstances of its use. (This recommendation is not unanimous).

4. *Prescription (section 38)*

We fully agree with the new provision subjecting the Government to the same limitation as those it administers.

5. *Disclosure of government documents-public interest (section 41)*

One may perhaps wonder whether section 41 places enough confidence in the court, since subsection (2) refuses to the court the power to examine a certain class of documents and to rule on the need to remove such documents from legal rules and requirements. However, we should, we think, at least be glad of the clarification, by these provisions, of the present Act. Jurisprudence has left something to be desired in this rather delicate matter.

We should point out, however, what appears to be a slight error in the French text; in the tenth line, the word "ou" should be replaced by the word "et". The English text reads: "order its production *and* delivery to the parties", where the French text reads "ordonner de le produire *ou* d'en communiquer la teneur aux parties".

6. *How a proceeding against the Government is instituted (section 48)*

We fully agree with the simplification of the procedure (originating document is simply filed with or sent by registered mail to the Registry of the Federal Court and served by an officer of the Registry on the Deputy Attorney-General of Canada).

In Schedule A, under "Redressement demandé" ("Relief Sought"), the word "demande" should perhaps be replaced with the word "réclame", since the English text has the word "claims".

7. *Evidence (section 53)*

Section 36 of the Canada Evidence Act makes applicable to "proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are *taken*". This "law of the forum" has the effect of making only the Ontario Act applicable among the provincial Acts. The fact is that proceedings before the Exchequer Court (Federal Court) are always commenced at Ottawa, and therefore in Ontario. That is perhaps what led the federal Department of Justice to propose, in subsection (2) of section 53 of the bill, a new admissibility rule which would allow the Federal Court to accept any evidence that would be admissible in a superior court of any province in accordance with the law or custom in any province. We should mention in passing that the English text reads in part" if it would be admissible in a similar matter in a superior court of *a* province in accordance with the law or custom in force in *any* province", whereas the French text reads "si, selon le droit ou la coutume en vigeur dans *une* province, elle est admissible en pareille matière devant une cour supérieur de *cette* province" (of *such* province).

Why not adopt the rule that the law of the law of the province in which the cause of action arises shall apply, as in section 38 for prescription?

We make this recommendation even though, in practice, the court will perhaps exercise the discretion conferred on it by subsection (2) so as to combine as equitably as possible the criterion of place of origin of the cause of action with that of the place in which the preliminary investigation will take place. It should be noted that subsection (2) makes a reservation that the relevant rules shall apply, ("subject to any rule that may relate to the matter").

8. *Contents of the reports of the decisions (subsection (2) of section 58)*

Subsection (2) of section 58 leaves to the discretion of the editor of the official reports, the selection of the decisions that will be published in full or in part. We recommend that such discretion be limited to the selection of those decisions that will be published in full and those of which only a summary will be published. In other words, it is our opinion that the editor should be prohibited from leaving any decision out completely.

9. *Bilingual law reports subsection (4) of section 58*

We must be glad of this legislative innovation, which follows that already made, without any law, in the Supreme Court Reports.

However, we think it would be preferable to print the French and English texts in the Supreme Court Reports on separate pages instead of on the same page in two columns.

10. *Canadianization*

We approve also of the Canadianization of the law by the elimination of borrowings from British law (law and practice of the High Court of Justice of England).

11. *Titles of the clerk and of his assistants (section 12)*

Finally, it is perhaps not without interest to note that the "registrar" of the court and his assistants will become "protonotaries" ("protonotaires").

THE QUEBEC BAR
per (Signed)

Queen's Printer for Canada, Ottawa, 1970

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 4

WEDNESDAY, DECEMBER 2, 1970

Complete Proceedings on Bill S-8,

intituled:

"AN ACT TO AMEND THE CRIMINAL CODE"

REPORT OF THE COMMITTEE

(Witness:—See Minutes of Proceedings)

23185—1

THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

*Ex officio member

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, Thursday, November 26, 1970:

Pursuant to the Order of the Day, the Honourable Senator Macdonald (*Cape Breton*) moved, seconded by the Honourable Senator Haig, that the Bill S-8, intituled: "An Act to amend the Criminal Code", 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 Macdonald (*Cape Breton*) moved, seconded by the Honourable Senator Haig, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

Robert Fortier,
Clerk of the Senate.

23185

Minutes of Proceedings

Wednesday, December 2, 1970
(4)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 11:30 a.m.

Present: The Honourable Senators: Urquhart (*Deputy Chairman*), Burchill, Cook, Croll, Eudes, Fergusson, Gouin, Haig, Hayden, Hollett, Langlois, Macdonald (*Cape Breton*), McGrand and Prowse. (14)

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

On Motion of the Honourable Senator Langlois it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill S–8, intituled: "An Act to amend the Criminal Code".

The following witness was heard in explanation of the Bill:

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

The Honourable Senator Macdonald (*Cape Breton*) moved that the said Bill be amended as follows:

1. *Page 2:* Strike out clause 4.
2. *Page 3:* Renumber clause 5 as clause 4.

The question being put on the said Motion it was Resolved in the affirmative.

On Motion of the Honourable Senator Macdonald (*Cape Breton*) it was Resolved to report the said Bill as amended.

At 12:15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Report of the Committee

Wednesday, December 2, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred Bill S–8, intituled: "An Act to amend the Criminal Code", has in obedience to the order of reference of November 26, 1970, examined the said Bill and now reports the same with the following amendments:

1. *Page 2:* Strike out clause 4.
2. *Page 3:* Renumber clause 5 as clause 4.

Respectfully submitted.

Earl W. Urquhart,
Deputy Chairman.

Minutes of Proceedings

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Wednesday, December 2, 1970.

[*Text*]

The standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-8, to amend the Criminal Code, met this day at 11.30 a.m. to give consideration to the bill.

The Deputy Chairman: Honourable senators, we have Bill S-8 before us for consideration this morning, an act to amend the Criminal Code. We have the sponsor of the bill with us, Senator John M. Macdonald. He gave a very fine analysis of the bill on second reading in the Senate chamber.

Our witness this morning is Mr. W.J. Trainor of the Criminal Law Section of the Department of Justice.

Mr. W. J. Trainor, Criminal Law Section, Department of Justice: Mr. Chairman, I wonder if I might ask your indulgence for a few minutes as I wish to discuss this matter with Mr. Maxwell before I appear?

The Deputy Chairman: Very well, we will give you five minutes. In the meantime, perhaps Senator John M. Macdonald would quickly review the bill for the members of the committee.

Senator Macdonald: Mr. Chairman and honourable senators, the chief points of this bill were explained not only in this session but when it was introduced last year. They are briefly given in the explanatory note, which shows what I had in mind:

> At present under section 280 the punishment for theft is greater when the value of what is stolen exceeds $50.

This has been in effect at least since 1954. I think that prior to that time there were many offences. Instead of a blanket one, they had an offence, for example, of destroying a hedge or stealing some things of various types. At that time there was a kind of consolidation and they drew a line as whether a theft was something over the value of $50 or under $50.

What I propose here is simply that we change that dividing line. I think it is well known that since 1954 values have changed to a great extent. At that time it might have been a serious offence to steal something of the value of $50 but today it might be a very minor offence if a person stole something of the value of $50. I think the value should be placed at $200. I must say that there was no special reason why I made that $200. Due to inflation, values have changed greatly, but I did not try to find out what would be the value today of something which was worth $50 in 1954. I think the time factor is sufficient to enable us to change the dividing line and I suggest that change in the general sections dealing with theft. I felt it would be better if we could make sure of the dividing line between what might be called a minor and a major theft, by changing the amount to, say, $200. Perhaps it would have been better to make it $500, but I am in the hands of the committee as far as that is concerned.

The Deputy Chairman: Honourable senators, this is Mr. Trainor from the Law Section of the Department of Justice, who asked for five minutes so that he could consult with Mr. Maxwell, the deputy minister.

Senator Hayden: I do not know if we are to get a general statement from him. I notice you have carried through what is in the Code at the present time "liable to imprisonment for ten years". Very often bills have come before us dealing with imprisonment for "up to ten years", indicating that ten years is the maximum. Is there anything anywhere which states the purport, whether it is a specific penalty, or that it may be applied in the range up to ten years, even though it says "for ten years".

Mr. Trainor: I do not know of any specific case dealing with these exact words, but I know that there have been a number of cases dealing with the expression "is liable to" a penalty of so many years, and the courts have already noted, in respect to that expression, that it means "up to a maximum of". Where it says that a person is liable to a penalty of a certain number of years, it seems to me that the same interpretation would be made.

Senator Hayden: Our problem is that when bills come before us—and I can recall some recently—they use the expression "up to" indicating that it is the maximum. Is this modernized thinking in the department, that they should be more specific?

Mr. Trainor: I am afraid I am not really in a position to make a comment on the view that the draftsman had taken in respect to that. I have not had an opportunity of discussing it with him, so I do not know.

Senator Prowse: This wording is no different from the wording in the original act?

Senator Hayden: What I am referring to is the wording and language used in bills more recently coming before us.

Senator Prowse: Looking at the Code, it says "liable to" and it certainly interprets it in that way. As I understand it, the only change that is being made by this bill is that the $50 figure will become $200, in the penalty section.

Senator Hayden: What I wanted to know was why we have the change in the language in the other bills now coming before us. Is it because it is a better description?

Mr. Trainor: The only thing I can say is that this must be the case, or otherwise it would not be done. Someone must have considered that this would be more explicit in that fashion.

Senator Langlois: Is there any objection, Mr. Trainor, to changing the wording to read "up to" instead of "for"?

Mr. Trainor: Perhaps before we get too far, I should make our position in the department clear, that is, that we are not taking any position really with respect to this bill, we are not opposing it, and we are not endorsing it.

Senator Cook: You are not making yourself liable for anything.

Mr. Trainor: The only thing I am doing is coming here to make myself clear before this committee and to express that view that that is our position.

Senator Langlois: Let us get to the actual section that we are dealing with. Would there be any objection to changing it to read "up to"?

Mr. Trainor: No, if it does add that amount of clarity.

Senator Hayden: I wonder if Senator Macdonald has any objection?

Senator Macdonald: No, none in the world.

The Deputy Chairman: Mr. Hopkins, would you care to comment?

E. Russell Hopkins, Law Clerk and Parliamentary Counsel: That is purely a question of policy. I understand that the only change Senator Macdonald intended was in the amounts.

The Deputy Chairman: Is that right, Senator Macdonald?

Senator Macdonald: That is correct.

Senator Cook: Would the $200 be tied to the cost of living?

Senator Hayden: Should there be an escalation?

Senator Prowse: Section 456 gives the magistrate absolute jurisdiction. In other words, if I had someone now charged with stealing something worth $199.99 I would not have a choice of electing whether I go before a judge. I am absolutely set to have my trial in the magistrate's court.

In other words, while we are changing penalties on the one hand, we are restricting jurisdiction and the remedies available to the accused on the other. He now goes before the magistrate and from there directly to the Appeal Court. There is certainly an advantage from the defence point of view at the present time, particularly in cases involving false pretenses and one or two other sections, by first of all having a preliminary hearing wherein the Crown sets out the evidence upon which it depends. This is not always the case in a magistrate's court. There is also the opportunity to observe the witnesses and discover possible weaknesses in their evidence before going to trial. This more carefully safeguards the rights of the accused.

The reason I saw for that difference in the past was that in the case of a small amount it was not desirable to put everyone to the expense and difficulty of a trial. This is the case at least in my province, where we have the preliminary hearing rather than the grand jury system for indictments.

Therefore I am very concerned about that. I am not sure that we are doing people a favour, as appears on the face of it because we are getting it down. Although an accused may be liable to a certain penalty as interpreted by the courts, in the case of a small amount this is one of the factors taken into consideration in sentencing. We do not have sentences of 10 years for thefts of $200. I wonder if section 456 restricts the rights of the accused and deprives him of something he now has? This would cover the majority of theft cases. If the accused wishes to be tried by a magistrate, he can so elect.

Mr. Trainor: I agree completely that one of the aspects of this bill is that the absolute jurisdiction of the magistrate is increased.

Senator Hayden: It is increased from $50 to $200.

Mr. Trainor: Yes, it would take from people accused of crimes in that area, between $200 and $1,000 theft or related offences, the right to elect for trial before judge alone or judge and jury.

Senator Hayden: On the other hand, the exposure is to a lesser penalty.

Senator Prowse: Not really, because it is up to five years, or ten.

Senator Hayden: No, I say the exposure.

Senator Prowse: I do not think anyone worries about that.

Mr. Hopkins: Throughout the Criminal Code and the changes in practice mentioned by Senator Hayden we are referring to the penal provisions in other statutes, rather than the specific amendments to the Code. They are usually spelled out in this form. Are they interpreted as being up to? Is that the way in fact they are interpreted?

For example, section 292, an indictable offence, is liable to imprisonment for life.

Senator Prowse: A person can be convicted of theft for sums up to half a million dollars. I have two or three in mind in which the sentences were three years.

Mr. Hopkins: What is the interpretation regularly placed upon the provision liable to imprisonment up to 14 years?

Mr. Trainor: The courts have interpreted that they are subject to a penalty of the maximum stated.

Senator Hayden: The bill on the Statistics Act which we had before us recently provided for a maximum of such and such, instead of saying to a definite number of years.

Mr. Hopkins: That is right, but this is rather the pattern of the Code.

Senator Hayden: The last revision of the Code was in 1954.

Mr. Hopkins: Am I not correct in thinking that the Criminal Code is under course of revision as a priority matter by the Law Reform Commission?

Mr. Trainor: I am told that this is so.

The Deputy Chairman: So the wording here is consistent with that in the new Code?

Senator Prowse: If it did anything it might confuse the issue and call for a real interpretation by the courts.

Senator Hayden: Mr. Chairman, I did not ask for an amendment, but an explanation for the change in language. I agree that if changes are made in some places in the Code and the language in other places left as it is a problem of interpretation is posed.

Mr. Trainor: There appear to be a few technical errors in the bill itself. The word "or" has been substituted for the word "and" in section 467, paragraph (a). I do not think the meaning is affected.

Senator Prowse: The word "or" appears in the original last section.

Mr. Trainor: It appears in the second line following subsection (a) (iii) in section 467.

Mr. Hopkins: I think that was done deliberately in order to make it consistent with the other sections in this sequence. "Or" is usually used; that was not inadvertence.

Mr. Trainor: The word "and" appears in the seventh line in the last section of the bill. I believe that should read "had".

Mr. Hopkins: That is a typographical error which does not require an amendment. I will see that it is corrected.

Senator Hayden: In sections 1, 2 and 3 you are dealing with indictable offences. All you are saying is that if the amount stolen is more than a certain amount the penalty varies, but there is on an indictable offence the right of election.

Senator Prowse: Not under $50, in section 467.

Mr. Trainor: The magistrate has absolute jurisdiction where the amount is presently under $50.

Senator Prowse: His jurisdiction is absolute; it does not depend upon the consent of the accused where the accused is charged in an information with this offence. It is an indictable offence all right.

Senator Hayden: Are we really by the change in language making that summary jurisdiction of the magistrate effective up to $200?

Mr. Trainor: That is right.

Senator Prowse: Section 467 is changed now, making it absolute. That is clause 4 of our bill.

Mr. Trainor: Clause 4, yes.

Senator Prowse: That is the one that gives him absolute jurisdiction, and this is the thing that concerns me, because it affects the other things we have dealt with; this is where the figure comes in.

Senator Hayden: We are making it a straight summary trial with no election.

Mr. Trainor: That would be the effect.

Senator Prowse: No election; you are stuck with the magistrate.

The Deputy Chairman: In the gap between $50 and $200 the magistrate has absolute jurisdiction now and there is no election on the part of the accused.

Mr. Hopkins: Whereas formerly there was.

Senator Prowse: There are times when this becomes pretty darned important. Attempts have been made to upgrade magistrates, and I think we have done pretty well, but we still have the situation, particularly in country courts, where there may be a magistrate who has no idea of the law; then you have to take his record, and he may have gummed up your whole trial, simply through ignorance.

Senator Macdonald: My contention is that we are not really narrowing it too much, and the magistrate already has jurisdiction up to $50; his jurisdiction has been narrowed because of the fact that something valued $50 at the time of this enactment was worth a lot more than $200 in dollar value today. However, on balance it remains pretty much the same.

Senator Prowse: What I am concerned about is this. If a person is convicted, it does not matter whether it is stealing 25 cents; with a conviction against him for any of these offences he loses his chance of getting bonded, or if he happens to have a job where he is bonded he loses it. I can cite the case of three fellows who went out on a bit of a spree and stole a parking meter. They ended up with suspended sentences. Two of them were milk drivers and the other was a truck driver. All three were bonded, and they lost their bonds and lost their jobs. Where those consequences flow, I do not think a person should lose the right to election. If the change in money values has extended that right to some other people, I think this is in the interests of the subject, which I believe the law should be, which I presume is what you have in mind with this bill, but I think that what you take away is far more than you give.

The Deputy Chairman: Have you anything to say on that?

Mr. Trainor: No. That is a question of policy and I do not think I should comment on it.

The Deputy Chairman: Senator Macdonald, have you anything to add?

Senator Macdonald: No, except that I think on balance he is in the same position. He loses the choice, but on the other hand the penalty to which he is exposed is so much less, so on balance he is in pretty much the same position.

Senator Prowse: I would agree, except for section 456. I am concerned because the effect of section 456 is that this narrows the rights available to an accused; it does not expand them.

The Deputy Chairman: Mr. Trainor, are you going to give us anything affirmative or positive on this bill?

Mr. Trainor: No, I am not in a position to do that.

Senator Hayden: What you are suggesting, Senator Prowse, is that even if the substance of the bill is left as it is, and has a provision respecting the amount taken being in excess of $50 and not more than $200, the right of election should remain?

Senator Prowse: As a matter of fact, I have always felt that there should not be absolute jurisdiction where such serious consequences can flow from a secondary offence.

Senator Hayden: If you did that it would not be hurting any accused person because he could elect summary trial.

Senator Prowse: If he could elect I would have no objection.

Senator Hayden: Perhaps Senator Macdonald would review the discussion we have had and propose some change.

Senator Macdonald: Would you be satisfied if we perhaps deleted clause 4 altogether.

Senator Prowse: If clause 4 were deleted all my objections would disappear.

Mr. Hopkins: It would not affect the rest of the bill.

Senator Prowse: It would not affect jurisdiction at all.

Mr. Hopkins: The subsequent clauses would have to be renumbered, which would be a simple matter.

The Deputy Chairman: Is it agreed then, that we delete clause 4 of the bill?

Mr. Hopkins: And renumber the subsequent clauses.

The Deputy Chairman: And renumber the subsequent clauses.

Senator Hayden: Does the sponsor of the bill (Hon. Mr. Macdonald) propose the deletion of the clause formally.

The Deputy Chairman: We will get him to move it.

Senator Macdonald: I move that clause 4 be deleted.

The Deputy Chairman: Is that agreed?

Hon. Senators: Agreed.

Senator Haig: Perhaps we should delete the whole bill, just on general principle!

The Deputy Chairman: Following that motion to delete clause 4, are we now in a position to report the bill with that amendment?

Senator Hayden: There is one point we have not considered. We are offering an invitation to people so that they can afford, without affecting their rights, to steal a little more money; they can steal up to $200 and not lose any rights, whereas prior to the passing of this bill they could steal only up to $50.

Senator Langlois: This is inflation.

Senator Prowse: They are still liable to five years' imprisonment, although nobody gets that much anyway, so I am not sure it makes much difference.

The Deputy Chairman: Mr. Hopkins suggests it is inflationary theft!

Is there anything further, honourable senators? Shall we report the bill as amended?

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

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 5

THURSDAY, DECEMBER 3, 1970

Complete Proceedings on Bill C-181,

intituled:

"An Act to provide temporary emergency powers for the preservation of public order in Canada"

REPORT OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

23268—1

THE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

*Ex officio member

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, Wednesday, December 2, 1970:

With leave of the Senate,

The Order of the Day to resume the debate on the motion of the Honourable Senator Martin, P.C., seconded by the Honourable Senator Smith, for the second reading of the Bill C-181, intituled: "An Act to provide temporary emergency powers for the preservation of public order in Canada", was brought forward.

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 Smith, for the second reading of the Bill C-181, intituled: "An Act to provide temporary emergency powers for the preservation of public order in Canada".

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

The Bill was then read the second time.

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

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

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Thursday, December 3, 1970
(5)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators: Urquhart (*Deputy Chairman*), Bélisle, Burchill, Connolly (*Ottawa West*), Cook, Eudes, Everett, Fergusson, Flynn, Gouin, Hollett, Lang, Langlois, Martin, Macdonald (*Cape Breton*), McGrand, Méthot, Prowse and Smith. (19)

The following Senators, not members of the Committee, were also present: The Honourable Senators: Boucher, Bourget, Cameron, Casgrain, Hays, Lafond, Laird, McElman, McLean, Macnaughton, Molson, Phillips (*Prince*).

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

On Motion of the Honourable Senator Langlois it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill C-181, intituled: "An Act to provide temporary emergency powers for the provision of public order in Canada".

The following witnesses representing the Department of Justice, were heard in explanation of the Bill:

Mr. John N. Turner, P.C., M.P., Minister of Justice and Attorney General of Canada;
Mr. D. H. Christie, Assistant Deputy Attorney General of Canada.

The following was present but was not heard:

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice.

The Honourable Senator Flynn moved that the said Bill be amended as follows:

1. *Page 5, Clause 8:* Strike out the words "is, in the absence of evidence to the contrary, proof that he is a member of the unlawful association" and substitute therefor the following:

"is, in the absence of evidence contrary to that adduced, or to the effect that he never was a member, or that, if he was a member, he ceased to belong to the said unlawful association at a time prior to the sixteenth day of October, 1970, prima facie evidence that he is a member of the unlawful association."

The question being put, the Committee divided as follows:

Yeas—3 Nays—9

The Motion was declared passed in the negative.

The Honourable Senator Flynn moved that the said Bill be amended as follows:

1. *Page 9:* Clause 15 to be renumbered as Clause 16.
2. *Page 9:* The following to be inserted as Clause 15:

15. (1) The Governor in Council as soon as as possible after the coming into force of this Act shall appoint three persons to constitute a commission under the provisions of the *Inquiries Act;* one commissioner so appointed shall be a member of the Supreme Court of Canada, one shall be a member of the Superior Court of Quebec and be appointed upon the recommendation of the Lieutenant Governor in Council of the Province of Quebec, and the third member shall be appointed upon the recommendation of the other two members, and all members shall have a knowledge of both official languages.

(2) The Commissioners who shall be called "Public Order Act Administrators" shall inquire into, report upon and make recommendations with respect to the administration of this Act and of the *Public Order Regulations 1970* and shall report from time to time and at the same time to the Attorney General of Canada, the Attorney General of Quebec, and to the Parliament of Canada and the National Assembly of the Province of Quebec.

(3) The Public Order Act Administrators shall have all the powers of a Commissioner appointed under Parts I and III of the *Inquiries Act* and shall continue as Administrators for such period after the expiration of this Act, whether by effluxion of time or by proclamation, as the case may be, as is necessary for the carrying out of their duties under this Act."

The question being put, the Committee divided as follows:

Yeas—3 Nays—8

The Motion was declared passed in the negative.

It was Resolved to report the said Bill without amendment.

At 12:15 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Report of the Committee

Thursday, December 3, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-181, intituled: "An Act to provide temporary emergency powers for the preservation of public order in Canada", has in obedience to the order of reference of December 2, 1970, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Earl W. Urquhart, Q.C.,
Deputy Chairman.

Minutes of Proceedings

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

[*Text*]

Thursday, December 3, 1970.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-181, to provide temporary emergency powers for the preservation of public order in Canada, met this day at 10 a.m. to give consideration to the bill.

Senator Earl W. Urquhart (*Deputy Chairman*) in the Chair.

The Deputy Chairman: Honourable senators, we are met this morning to discuss the Bill C-181. This bill has received wide publicity since its introduction in the House of Commons on November 2 last and I do not think it is necessary for me to give a general outline of the bill. It received second reading in the Senate yesterday, after a debate in which many senators participated. I think I can say that all honourable senators are in agreement with the principle of the bill: that is what I gathered from the debate on Tuesday night and yesterday.

There is one provision of the bill that is causing concern among honourable senators and that is clause 8. This provision has been called an evidentiary provision, others have called it the prima facie presumption of membership, and others have called it retroactive legislation. It is really the so-called retroactive aspect that has engendered the most debate on this clause.

Honourable senators, we have the Minister of Justice and Attorney General of Canada, the Honourable John Turner, present this morning. I should like the minister to address himself to clause 8 of the bill and the points which I have raised. Mr. Turner.

Honourable John N. Turner, Minister of Justice and Attorney General of Canada: Mr. Chairman and honourable senators, I wonder whether, before dealing with clause 8, I might say a few words. I am very pleased to be again before the Senate committee, as I have been on a number of occasions. I am delighted, Mr. Chairman, that the committee is being presided over by you. I recall with affection some of the other occasions I was here when Senator Phillips was helping me to pilot rather controversial legislation through the Red Chamber.

In the House of Commons we had strenuous, vigorous debate on this measure, the Public Order (Temporary Measures) Act—and that is how it should have been. I had the opportunity of glancing at the record of debate in the Senate. I note you also have had a vigorous debate—and that is how it should be.

This bill deals with those delicate issues that balance individual liberties against the security of the state. It is always a question of judgment as to how that balance should be adjusted, particularly in times of emergency, in times of stress and in times such as those in which we found ourselves six weeks or so ago and in which we still find ourselves, at a time when society is dealing with conspiratorial group violence, something unprecedented in the history of our country.

It was because of the drastic conditions that were present in parts of our country that we had to respond with drastic action, to begin with the War Measures Act, followed by the introduction into Parliament of this bill.

The purpose of the legislation now before your committee, Mr. Chairman, is to provide a more specific tool on a short-term basis to deal with the FLQ conspiracy, based in Quebec but not necessarily limited to Quebec.

The Prime Minister and I both said, when we were debating in the House of Commons, that the War Measures Act was the only piece of legislation we had available at the time for the immediate response to the crisis. It had the advantage of meeting the requirement of urgency, of surprise, and gave us the necessary flexibility in terms of a regulation making power that we needed, because we had not really determined the full contour or range of the perimeters of the situation with which we were dealing. It also gave us the flexibility at that time for dealing with the province of Quebec so that there could be a joint response to the problem.

But the bill extends the powers of investigation and the powers of apprehension of the law enforcement authorities. It extends the power of arrest, the power of detention without a charge being laid, the power of search without warrant and the suspension of bail at the instance of a provincial attorney general. Apart from the creation of new offices, those are the only departures from the ordinary criminal law of this country. In every other respect the criminal law operates as the Criminal Code says it shall operate.

The right to counsel is maintained; the right to trail by a judge and jury; all the rules of evidence that protect an accused; the overriding burden of proof being on the state or the Crown to prove guilt beyond any reasonable doubt; all the protections given to an accused and the procedural limitations put upon the Crown apply, except as I have said.

As a matter of fact, the bill makes it quite specific that the Canadian Bill of Rights does apply, except in so far as it is modified by the power of detention and the suspension of bail.

23268—2½

We felt it important to replace the War Measures Act as soon as we could. We gave a commitment to the House of Commons during the debate on the proclamation of the War Measures Act—the debate that lasted October 16 and 17—that we would bring in a bill to replace the proclamation within a month. We brought that bill in within two weeks, on November 4.

We were concerned about the potential power of the War Measures Act—a power that went well beyond the regulations that are now in force. Honourable senators should recall that the only statutory instrument now in force is the regulations published pursuant to the War Measures Act. The War Measures Act is a piece of potential legislation that is only implemented by regulations made by Order in Council and only the regulations have the force of law.

This bill is to replace the regulations and will automatically revoke the proclamation of the War Measures Act. But it ought to be clear that it is not the full measure of the War Measures Act that is actively in force having the force of law. There is no power to deport. There is no power to expropriate without due process. There is no power to seize in federal hands the ports of the country and so on. So that the potential power of the War Measures Act was not exercised, but that potential power still remains in effect. And it is because we want to withdraw that potential power that we want to revoke the proclamation. In the words that I used that the Canadian press seemed to like, it is because we want to "dormatize", put to sleep again, the War Measures Act and withdraw that tremendous potential power that we have introduced this specific piece of legislation. So the only legal weapon in force after the passage of this legislation will be this bill, if the Senate decides to approve it.

Bill C-181 is a de-escalation from the War Measures Act. It replaces the regulations now in force and it reduces the severity of those regulations. It is made specific in this bill that the bill is to apply to the FLQ or successor organizations or any other organization having substantially the same purpose and using substantially the same means to overthrow the government of Quebec or to affect the relationship of Quebec to the rest of Canada by crime or by violence. In other words, it is made quite clear that this bill cannot be abused by any provincial attorney general to meet other types of conspiratorial violence elsewhere in Canada. We wanted to be precise about that, because there could have been a temptation under the current regulations for provincial attorneys general to go beyond the scope of those regulations. It is made clear in this bill.

Secondly, the definition of the FLQ is rendered more precise. The purpose must be to overthrow government by violent means. It does not relate to an attempt to change the governmental structure in this country by persuasion or by the ballot box.

The bill shortens the period of detention before a charge from seven and 21 days as contained in the regulations to three and seven days as contained in the bill. It curtails the presumption of proof in section 8, that you mentioned, Mr. Chairman, and reduces that considerably from the regulations. It includes, specifically, the provisions of the Canadian Bill of Rights. Although I think that that is implicit in the current regulation under the War Measures Act, we have explicitly added that here.

The Government has been accused by some of its critics of adopting a rigid, uncompromising attitude in the House of Commons. I want to say that the bill is a de-escalation—quite a marked de-escalation from the War Measures Act, and we did bring it in at the earliest opportunity. Moreover, we did agree with the Leader of the Opposition (Hon. Mr. Stanfield) in respect of a Part II of the bill that we had originally contemplated and had discussed—dealing with a permanent piece of legislation that would be available to Government in the area of peacetime violence of a conspiratorial nature in the future—that that type of legislation ought to receive more review. We agreed that it ought to receive more review by Government and more review by Parliament before this Government took that position. We did that because the Leader of the Opposition assured us that, had we not, there would have been protracted debate in the House of Commons, whereas, if we abandoned that idea of the moment, he would expedite passage of this Bill in the House of Commons.

But there is no doubt about it that we in this country are going to have to consider what type of legislation we should have, if any, to deal with conspiratorial group violence in this country in the future. The Criminal Code is based on the assumption that crime is an individual matter. There are certain provisions in the Code relating to conspiracy, but, generally speaking, the conspiracy deals with a group of persons who happen to be linked to an individual crime. We are now dealing with a new phenomenon. We are dealing with group violence politically motivated, having seditious purposes. And the Criminal Code is not written primarily to deal with group crime. It is written to deal with individual crime or groups of individuals who happen to be linked from time to time in conspiracy.

That type of legislation will have to be considered by Parliament. I suggested at the time that we might want to send a term of reference to the Standing Committee on Justice and Legal Affairs in the House of Commons to discuss what type of legislation, if any, we should have and how to balance individual rights on the one hand with the rights of the collectivity on the other.

There are certain dangers to it. There are questions that will have to be decided. What should bring such type of legislation into force? Should it be permanent legislation or only legislation available to a Government by way of proclamation? What level of danger should be required? Should it be left in the hands of a provincial attorney general or should the federal Attorney General assume more control? What additional types of power should be given? Should it include additional powers of arrest, detention, suspension of bail, the power to deal with assemblies, parades and so on? These are matters which I believe Parliament as a whole is going to have to consider.

There is always a possibility that if there is a type of legislation on the books that is less severe than the War Measures Act the temptation of the Government to bring

it into force might be greater. To my mind that would not necessarily be a step forward.

In the House of Commons the Government analysed every amendment that was proposed. Those of you who have had an opportunity to read *Hansard* of the House of Commons will know that I did my best to respond to those amendments and gave reasons why we could not accept most of them. But we did accept an amendment proposed by Mr. Woolliams of the Conservative Party and Mr. Lewis of the New Democratic Party clarifying the drafting of clause 3.

But I had the responsibility of ensuring that if the law was going to be a tough law, and it is a tough law for a specific purpose and for a short term, and is not part of the permanent criminal law of this country, that that law had to work. I tried to indicate to the House of Commons that this bill really only changes the law in certain specific areas, the power of detention, suspension of bail at the instance of a provincial Attorney General, extended powers of arrest, certain presumptions of evidence, to be found in clause 8, and provided for administration by provincial Attorneys General.

This type of bill, Mr. Chairman, in ordinary times would, as I have said before, have been unpalatable to me and unpalatable to the Prime Minister. It is philosophically contrary to what the Prime Minister stands for, and is philosophically contrary to what I believe in. It is contrary to the type of legislation I have tried to introduce into this Parliament since I became Minister of Justice. However, we are not dealing with an ordinary situation and we are not living in ordinary times. The bill represents a value judgment between individual rights, on the one hand, and the rights of the state on the other. Whether we made the right judgment, I suppose only history will say. But we did what we did because we felt it had to be done.

I hope that this thrust under this Government of enhancing the rights of the individual will continue, and I want to assure this committee and the Senate that I intend to continue with our program of legal reform, to widen the personal options available to Canadians and also to open new avenues and remedies of appeal and recourse for the average citizen against his government.

Now I need not say that the Prime Minister and I realize that this is not the ultimate solution to the problems of Quebec and Canada, but you cannot solve these problems by legal responses. You try to preserve freedom under the law, and without law there is no freedom. Obviously the social and economic infrastructure, the lack of which has allowed violent conspiracy to flourish, has to be restored. Simiarly the climate of frustration on which violence feeds has to be changed. No one wants this country to return to normal faster than I do.

Now, Mr. Chairman, if you want me to deal with clause 8 before we proceed to questions, I am prepared to do that.

The Deputy Chairman: That seems to be the crux of the bill and seems to have provoked the most controversy—clauses 4 and 8.

Senator Flynn: Mr. Chairman, I think there is a problem of procedure which I think we should settle now. I was wondering whether it would be a good solution to question the Minister on problems of general application, not related necessarily to the bill itself first, and then we could proceed to question the Minister on each clause of the bill. This would make for a more positive way of questioning the Minister and dealing with the bill.

The Deputy Chairman: Are those your wishes, honourable senators?

All right, Mr. Minister.

Senator Flynn: I have a question of a general nature which is not really related to a particular clause of the bill. It was touched on by the Minister and relates to permanent legislation which he says is contemplated to deal with problems of the same nature as the one posed by the FLQ. The Minister mentioned that in the original bill, Part II, I think was intended to deal with this to some extent. He has indicated some of the problems that have been considered. Now I want to ask him whether in this Part II or in the thinking of the Government there is any idea of amending the Criminal Code to enlarge the definition of sedition or conspiracy to include certain types of acts of the FLQ that are not necessarily destined to overthrow the Government, but sometimes only to blackmail the Government into doing something. I am speaking of the association, of course; I am not speaking of somebody committing a crime which is already provided for in the Code. I am speaking of an association which would not necessarily try to overthrow the Government but which would by way of violence try to intimidate the Government and intimidate Parliament into taking administrative or legislative action.

Hon. Mr. Turner: May I respond to that, Mr. Chairman? Before doing so, may I apologize to my colleagues who are with me for not introducing them. On my right is Mr. D. H. Christie who is well known to you and who is Assistant Deputy Attorney General, Department of Justice, and then next to him is Mr. J. A. S. Scollin, head of the Criminal Section of the Department of Justice. As I say, they are both well known to you, and I am grateful to have them here with me.

In response to Senator Flynn's remarks, let me point out that we are not yet committed to any legislation at all. We do not know whether legislation is the proper response, nor do we know what type of legislation would be necessary. To my mind there is need for greater consultation with people right across Canada and perhaps for holding some public hearings before we make up our minds. I do not contemplate a permanent amendment to the Criminal Code. Any type of legislation that might be available for emergency situations should be short-term legislation brought into effect by way of proclamation for a limited period of time to take care of a specific problem and should then be self-ending or self-terminating.

I think the main difficulty is to describe what those situations are that would trigger the proclamation or who can request the action—should it be the mayor of a great city, the Attorney General of a province or should it be the federal Attorney General? What review should there

be? What disclosure to Parliament should there be? What availability for debate in Parliament should there be? What additional powers should be given? What options should be given to the various areas of government?

I suppose the definition of sedition, and there is such a definition, and a definition of intimidating Parliament, the definition of kidnapping, the definition of violent crimes in the Criminal Code itself might be sufficient. But what this bill does and what the regulations did is to increase the procedural rights of the Crown, increase the evidential and investigatory possibilities of the Crown, without which the evidence could not be obtained to lay charges of sedition, of murder, of kidnapping or conspiracy. And it is because under the ordinary Criminal Code the period of detention before charge is 24 hours, and properly so in ordinary times, because the question of bail is properly left in the hands of the judiciary and because it is impossible to give the judiciary all the information necessary to combat some types of seditious conspiracy as in the atmosphere we are now living in, that we have not changed the substance of the law. We have changed the evidentiary possibilities available to the Crown for a short-term period of time. One might argue that the substance of the Criminal Code is sufficient, but the evidentiary possibilities available under the Criminal Code to the Crown were not sufficient for this particular problem.

Senator Connolly (Ottawa West): Will not the minister agree that this legislation does, in fact, change to a certain extent, in the way he has described in his opening, the substantive criminal law, and has it not created a new offence?

Hon. Mr. Turner: It creates a new offence, that of an unlawful association. The reason that new offence is created is not only to clarify the conspiratorial nature of the FLQ—because I suppose one could argue that the FLQ was an unlawful association even before this legislation was introduced or the regulations were passed, because from what we know of the FLQ it makes it a violent, seditious conspiracy within the definition of the Code, which I will deal with when we talk about retroactivity, because one could argue that the FLQ was always outlawed and unlawful within the definition of "sedition." But the reason that the offence of being a member of the FLQ or a successor organization is in the bill is to limit and restrain the extended powers of detention and arrest, detention without bail and search without warrant, to this situation. We had to have something upon which to hang these extended procedural rights. And if we had not had the specific offence in the bill there would have been nothing in the bill to pinpoint the purpose of the extended procedural rights given to the Crown. That, primarily, is the reason for the definition of FLQ in this bill.

Some charges are being laid under the War Measures regulations, but I know that the Attorney General of Quebec and the prosecutors who are advising him, the team of prosecutors he has appointed, are attempting, where possible, to lay charges under the Criminal Code, on the basis of evidence they are able to obtain under these regulations.

Senator Flynn: I appreciate the problem of strengthening the arm of the police in given circumstances and depriving individuals of certain rights because of very serious circumstances, but my question was really whether it was the intention to define in the Criminal Code, eventually, what is an unlawful association, even if it is an association that has not as its purpose the overthrow of the Government and is using methods to blackmail the Government or Parliament, something along the lines of sections 2, 3 and 4 here, but that would apply generally throughout Canada.

Does the minister suggest this problem is already covered by being a member of an association which would use violence or blackmail the Government into making a decision or doing anything legislative or otherwise? Does the minister suggest it is already covered by the Criminal Code, being only a member? I am not saying participating in.

Hon. Mr. Turner: Being only a member of an unlawful association, as such, is not covered under the Code.

Senator Flynn: That is why I was asking whether it was intended to make an offence of it.

Hon. Mr. Turner: But there are the conspiracy sections in the Code. There is section 51 of the Code, "Intimidating Parliament or legislature.":

> Every one who does an act of violence in order to intimidate the Parliament of Canada or the legislature of a province is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Senator Flynn: But not merely being a member of an association which would do that?

Hon. Mr. Turner: Only if it is a conspiracy. All the options are open, senator, so far as I am concerned, as to what we have to do on a permanent basis to meet this type of situation in the future. We are going to need a good deal of sociological research, some criminological and penological research, and a rather sensitive understanding of what type of society we are going to be living in in the next 10 or 15 years.

Senator Bélisle: Mr. Minister, did I understand you aright a while ago, that you said this legislation is mostly to stop the FLQ overthrowing the Quebec government by violent means? In other words, this legislation could also apply to the communist Mao party?

Hon. Mr. Turner: No, sir.

Senator Bélisle: Not if they were to attempt to overthrow the government by violent means?

Hon. Mr. Turner: The purpose of the legislation is set forth, as best we could draft it—and it was an incredibly difficult drafting problem, I want to assure you—in section 3.

Senator Flynn: The preamble too was difficult.

Hon. Mr. Turner: The preamble too was difficult, senator.

First of all, the legislation is to reach Le Front de Libération du Québec:

> ...or any group of persons or association that advocates the use of force or the commission of crime as a means of or as an aid in accomplishing the same or substantially the same governmental change within Canada with respect to the Province of Quebec or its relationship to Canada as that advocated by the said Le Front de Libération du Québec,

Senator Bélisle: Do you say that the Mao communist party would not qualify as any other organization?

Hon. Mr. Turner: If there were a violent conspiracy having the same purposes as the FLQ, as set forth in this bill—namely, the overthrow by violence or the use of crime of the Government of Quebec, or the Government of Quebec in its relationship to Canada—then that would be covered. But if it were a Maoist organization in Vancouver, having no relationship to the FLQ, it would not be covered.

Senator Prowse: You would separately consider that seriously?

Hon Mr. Turner: That is conceivable.

Senator Prowse: That is another situation?

Hon. Mr. Turner: Yes.

Senator Prowse: That is the point you are making?

Hon. Mr. Turner: Yes, precisely, senator.

Senator McElman: The minister, in his general remarks looking to more permanent legislation, suggested perhaps a reference might be made to the appropriate comm ttee of the Commons. Would he look kindly upon a reference to a joint committee of the two Houses of Parliament?

Hon. Mr. Turner: I never exclude that possibility, Senator McElman.

Senator McElman: Or two separate committees operating co ncidentally?

Hon. Mr. Turner: Whatever had to be done, I would venture to say that we would not want to duplicate the work.

Senator Cook: We are a very fine group up here.

Hon. Mr. Turner: Well, I am looking forward to the reports of a number of committees of the Senate.

Senator Prowse: You would just as soon it be examined by one committee as two?

Hon. Mr. Turner: No, I always find that we are very well treated up here too, senator.

Senator Prowse: But if it were one it would save time?

Hon. Mr. Turner: Not necessarily, but I think we have to co-ordinate our efforts within the Parliament of Canada, and it is a job for Parliament.

Senator Flynn: In connection with the preamble which I was referring to, paragraph 3:

> AND WHEREAS the Parliament of Canada, following approval by the House of Commons of Canada...

—of course, the Senate was not called upon to pass upon a formal resolution to approve the decision explicitly, unanimously. I would have hoped the omission of the Senate would not be there. However, this is not my point.

> ...by the House of Commons of Canada of the measures taken by His Excellency the Governor General in Council pursuant to the *War Measures Act* to deal with the state of apprehended insurrection in the Province of Quebec...

I understand that when the War Measures Act was proclaimed the Government was under the impression that there existed a state of apprehended insurrection. At the time this legislation was introduced, or at this time now, is it still the view of the Government that we are faced with a state of apprehended insurrection? I doubt that these words really describe the situation. I wonder if they are not going too far. It is such a very bad situation, but I question describing it as "a state of apprehended insurrection." If we are dealing with only a few people who operate in isolated, separate cells, could you describe them as being able to create an insurrection in the Province of Quebec?

Hon. Mr. Turner: Let me deal with that preliminary point first because I want to assure honourable senators that there was no attempt by the Government to ignore the privileges of the Senate. Under the terms of the War Measures Act it was not necessary for the Government to come to Parliament at all, but we felt that in the circumstances we should place the regulations before the House of Commons. There was no contempt of the Senate because the War Measures Act itself does not provide for any approval by Parliament of the proclamation, although ten members of Parliament can challenge it. So, there was no attempt to infringe on the privileges of this honourable house. I want to assure you of that.

The preamble merely says that at the time the proclamation was issued in the early morning of October 16 there was a state of apprehended insurrection. This bill stands on its own feet. The preamble merely states that it is the feeling of the Government that this bill is necessary to deal with a continuing threat of grave violence represented by the FLQ. So, it is really irrelevant to our discussion as to whether a state of insurrection still exists. It would not have to exist, so I am not going to comment on that.

Senator Hays: Mr. Chairman, I should like to ask a question of the minister. It has taken a long time for the FLQ to get up the nerve to do the things they are doing, and it is just not going to disappear by April 30. If at that date you want to extend the provisions of the present bill then what is the mechanism by which this is done.

Hon. Mr. Turner: Through you, Mr. Chairman, I would say to Senator Hays that that is set forth in section 15.

Section 15 provides that this bill expires on April 30. If the Government were to feel that the threat had been successfully met before April 30 then the Government by proclamation and without recourse to Parliament could terminate the bill earlier than April 30. If, on the other hand, the Government felt the conditions prompting the introduction of this bill were still apparent and in existence as of April 30 then the Government could prior to April 30 move to extend the application of this bill by seeking a joint resolution from both houses of Parliament.

Senator Hays: But suppose that that was debated for three weeks. If something happened would it then be necessary to reintroduce the War Measures Act?

Hon. Mr. Turner: I am advised that that resolution would have to be passed first. In other words, if the resolution was not passed by Parliament by April 30 then this bill would lapse.

Senator Hays: My question is: If there is a debate which lasts for three or four weeks and in the meantime it is obvious that the Province of Quebec and the City of Montreal are still not out of trouble, would you have to reintroduce regulations under the War Measures Act?

Hon. Mr. Turner: Senator, you know, I try to avoid hypothetical questions in the House of Commons, and I think I ought to follow the same procedure here. We shall have to meet that fence when we come to it.

Senator McElman: How many extensions are possible?

Hon. Mr. Turner: One.

Senator Flynn: We received the same answer from the Leader of the Government in the Senate.

Hon. Mr. Turner: I have always accepted the wise counsel of the Leader of the Government in the Senate.

Senator Everett: Mr. Minister, I refer you to section 7(2), which states:

> No person shall be detained in custody pursuant to subsection (1)
>
> (a) after seven days from the later of the time when he was arrested or the coming into force of this Act, unless before the expiry of those seven days the Attorney General of the province in which the person is in custody has filed with the clerk of the superior court of criminal jurisdiction in the province a certificate under this section stating that just cause exists for the detention of that person pending his trial...

Is there ever a review of that just cause?

Hon. Mr. Turner: Through you, Mr. Chairman, I will say to Senator Everett that there is no review of the discretion of the Attorney General and his filing of the certificate. The Attorney General in his certificate would state that there is just cause for suspending bail, and no one can look behind that certificate. He is responsible for the administration of justice to the legislature and to the people of the province in which he operates.

Senator Prowse: That is a fairly standard principle of law, is it not? Even appeal courts ordinarily will not step in to interfere with the discretionary...

Hon. Mr. Turner: I think the whole matter of discretionary justice is something that some day Parliament is going to have to look into. There are many discretionary decisions made by the law enforcement authorities under the Anglo-American system of jurisprudence. For instance, there is the decision of whether to arrest or not to arrest; whether to prosecute or not to prosecute; whether to oppose bail or not to oppose bail; whether to lay a charge, and if so what charge; and whether to accept a plea. All of these are discretionary matters that ordinarily are not reviewable by the courts, and which depend on the good faith of the law enforcement authorities right up to the attorney general of the province or the Attorney General of Canada. The only control on that is Parliament, the legislature, and the people.

As I said in the House of Commons, review mechanisms that are not responsible in an equal way to the people perhaps are not as effective as some people would like to believe.

If an arrest is improperly made under this bill there is still the possibility of damages for false arrest. There is no doubt about that.

Senator Connolly (Ottawa West): Or an application for one of the prerogative writs?

Hon. Mr. Turner: Or *habeas corpus,* yes. *Habeas corpus* is available. In this particular instance, because of the extraordinary circumstances, the Attorney General of Quebec, I am sure, will be reviewing the individual bail applications under the War Measures regulations, and indeed under this legislation. All the arrests to date, of course, have been made under the regulations. The Attorney General of Quebec has already stated that his three-man committee under the chairmanship of Jacques Hébert have free access to all those held and, indeed, all those released, under the War Measures regulations. That was confirmed to me by Mr. Hébert personally. Mr. Hébert tells me that in the instance of any complaint that is made to his committee he refers it to the protecteur du peuple, the Quebec ombudsman, who has power under the statute. The ombudsman, I am told by the Attorney General of Quebec, also has access to anybody held or anybody released. It will be open to the ombudsman, the Attorney General of Quebec tells me, to suggest in individual cases what compensation ought to be made or what remedy ought to be given to those who may have been unjustly held under the War Measures regulations, and presumably under this bill if it is passed by Parliament.

Senator Everett: Is there any comparable situation in Canada in which a person can be detained without eventual review of the reasons for his detention?

Hon. Mr. Turner: There is eventual review by a court. A charge has to be laid within seven days, and trial has to be brought on after 90 days, so there is a review.

Senator Everett: But there is not a review of that one specific point, so far as I can tell. That detention just continues.

Hon. Mr. Turner: There is no way under the bill by which the discretion of the attorney general is reviewable.

Senator Everett: Is there any comparable situation in Canadian criminal law?

Hon. Mr. Turner: Not now.

Senator Everett: Would there be any reason for giving consideration to the filing after the expiry of this act of the reasons for the exercise of that discretion?

I am not saying to hobble the Attorney General.

Hon. Mr. Turner: The difficulty here is that the whole panoply of facts that go into the assessment of the judgment that must be exercised by a chief law enforcement officer of a province just cannot be codified.

Senator Everett: I am not suggesting, Mr. Minister, any action that would hobble the Attorney General in issuing the certificate. However, I wonder whether there would be any reason at a time after the expiry of the act for causing the Attorney General to file in those cases where he has issued the certificate the reasons that gave rise to the just cause?

Perhaps there is none; if that is so I would be prepared to let it drop. It is just a suggestion.

Hon. Mr. Turner: I cannot see the purpose of it in the present instance because, as I say, the ombudsman now has the ability to review any situation in which he feels injustice might have been done.

Senator Prowse: There are two things; you have the committee and the ombudsman.

Senator Phillips: My first question deals with a member of the Canadian forces being a police officer. I am particularly interested in this in view of what is taking place in Montreal at the present time. If a member of the armed forces is fired upon, is he authorized to return the fire?

Hon. Mr. Turner: Senator Phillips, there is nothing dealing with that in the bill. It would depend on what military command that soldier had received in the particular situation.

Senator Phillips: Yes, I realize it is not in the bill. I wonder if there have been any instructions issued in that regard?

Hon. Mr. Turner: I have difficulty enough without responding for the Minister of National Defence.

Senator Phillips: But he is being used not as a member of the armed forces, but as a police officer.

Hon. Mr. Turner: Under section 225 of the National Defence Act it is true that they have the power of a police officer. However, they do not cease to be responsible and responsive to military command.

Senator Phillips: My second question is to ask for a definition of meeting of the FLQ; what constitutes a meeting? Must there be a chairman and an agenda?

Hon. Mr. Turner: That is a question of fact that will have to be decided by a court. I suppose they would look to the dictionary definition of a meeting.

Senator Cameron: I know the matter of review is probably the most sensitive area of this whole program and you have answered part of it. I know that the Prime Minister has taken a very definite stand against any overall review board being established.

However, there is a growing uneasiness in the country with regard to the treatment of prisoners held under this act. What assurance can you give that this matter will be fully investigated?

Hon. Mr. Turner: Mr. Hebert told me on Monday that to his knowledge out of the 450 arrests, and particularly the 350 that were made in the first few days, where the problem was with that number of arrests there were problems, administrative overlap and so on, there had only been five or six cases brought to the attention of his committee, which has complete access, of rough treatment by the police. There were also five or six instances of what he called prolonged interrogation.

He has those matters in hand. On the basis of what he told me that is the limit of the maltreatment.

Senator Cameron: But along with this we think of the beating up of an officer of the Province of British Columbia some time ago, which suggests that there is a need for greater disciplinary action being taken with respect to the police.

I have heard a good deal of concern regarding the protection available to see that this does not happen.

Hon. Mr. Turner: I do not want to talk about the particular case, because that is before the courts and will presumably be dealt with by the Superior Court in Montreal.

However, what is the protection of the citizen? The protection of the citizen, first of all, has to be the good judgment and conscientious enforcement of the law, under law, by the police authorities.

Secondly, proper supervision under the Police Act so that in the case of abuse of police power disciplinary action is taken.

Thirdly, constant and immediate review by the chief law officer of the Crown within the province, the Attorney General, of police methods and the Police Act.

Fourthly, availability under law for civil redress for those who have been badly treated by the police.

However, the first reason is always going to be the conclusive one. The criminal law has to be based on an assumption that the men and women who enforce it do so to the best of their ability, as humanely and compassionately as they can, but fulfilling the oath which they take.

Now, largely this depends, of course, on the kinds of laws we in Parliament ask the plice to enforce under the Criminal Code and under the criminal law and the type

of procedures we impose on them. I think we owe it to the police forces of this country, first of all to give them public support in doing what they have to do; secondly, to ensure that the police are asked only to enforce credible, common sense laws in a credible, common sense fashion.

I am not referring to this law, but I think that some of the laws we ask the plice to enforce and some of the ways in which we ask them to enforce them, sometimes put the police in a non-credible position in current terms. That is the reason for the arrest and bail reform bill which will again be before Parliament.

We talk about review procedures and so on. The office of the Attorney General dates back to 1232 and leaves in a man responsibility to a legislature or Parliament. He is therefore reachable by the people for the general tone of his administration.

An Attorney General under the British parliamentary system must decide whether or not to institute proceedings and whether or not to administer certain aspects of those proceedings on the best judgment of the public interest, free of political considerations. In fact, Attorneys General have been dismissed by Parliament for failure to keep that in mind and can be dismissed by a vote of confidence by Parliament in this country or the legislature of any province by his failure to separate partisan considerations from the public interest as he sees them. He is not required under British parliamentary tradition to abide by cabinet decision on whether to institute or not institute prosecutions. Indeed, that can be a reason for a want of confidence by the parliament or the legislature if he does find himself so bound, and he should refuse to have himself so bound. He can consult his colleagues on an informal basis, but in the end it is his decision and he is responsible for that to the people. It is one of the reasons that I have not agreed yet to allow an attorney general to be appointed in the Yukon or the Northwest Territories, because until they have a fully responsible government where the chief prosecution officer is directly responsible to the people I do not believe that the attorney generalship should reside there, so I take responsibility, because I am reachable by the people.

Senator Cameron: I fully support the Government's use of the War Measures Act and this bill, but if there is any way of strengthening the people's confidence that justice will be done completely once a person is within the toils of the law, it would go a long way towards alleviating a certain uneasiness about treatment by the Quebec police.

Senator Cook: On the question of treatment, am I correct in thinking that if the right to conunsel is retained, and if the right to *habeas corpus* is retained, the question of possible ill-treatment would be subject to review by the courts? With the right to counsel and *habeas corpus,* could not the question of ill-treatment come before the courts and be reviewed by judicial authority?

Hon. Mr. Turner: Yes, if anyone detained can prove that he has cause of action he can obtain legal redress.

Senator Cook: And the courts could intervene to stop the ill-treatment?

Hon. Mr. Turner: Sure.

Senator Connolly (Ottawa West): There is one problem that perhaps the minister will comment on. In a federal state like ours, we have in fact eleven attorneys general, but in our constitution we have given the administration of the law to the provinces. While we may pass a criminal law here and have jurisdiction to do so, it is the provincial attorney general who is ultimately answerable, and answerable to the people, for his administration of the criminal law that we might pass.

Hon. Mr. Turner: Under the present scheme of the Criminal Code, as you have said, senator, we in Parliament are responsible for the substance of that Code and the procedure within it. But the administration or the enforcement of the Code is left to the provincial attorney general under that Code. The same is true under the War Measures regulations; the same is true under this bill. That being so, when dealing in a federal state with an independent and equal level of government, it is up to the people to whom that level of government is responsible to ensure that the content of the criminal law is properly administered. I think I will leave it at that.

Senator Flynn: Under the War Measures Act the responsibility of enforcing the regulations could be left in the hands of the federal Government, as I think was done during the war.

Hon. Mr. Turner: Yes, it could.

Senator Flynn: You mean the present regulations?

Hon. Mr. Turner: That is right. Under the War Measures Act it is true that the federal attorney general could be left with enforcement, as he was during the war. Mind you, when we talk about wartime regulations that involved detention, there are a number of very important distinctions that I think I should make to this committee briefly. First of all, in wart me, under those regulations—and we are not looking at the act, we are looking at the regulations, because it is only the regulations that have the force of law—in wartime there was detention without any necessity of a charge being laid, whereas here a charge has to be laid within seven days; there was no necessity of a trial, whereas here a trial has to be held; there was no necessity for publicity, whereas this bill and the current regulations are administered in the open publicly, under public scrutiny. That situation in wartime should not be compared with these regulations.

Senator Flynn: I agree, but you could have done the same thing.

Hon. Mr. Turner: Theoretically.

Mr. Chairman, may I just add one more thing to Senator Connolly. There is also the practical problem of the way our police forces are structured in this country. The Royal Canadian Mounted Police have contracts with eight out of ten provinces to be responsible for law enforcement. There are exceptions in certain large

municipalities in some of those other eight provinces. Under the contracts the R.C.M.P. are responsible to the provincial attorneys general. In Quebec and Ontario there is no such contract; each of those provinces has its own provincial police forces; the role of the federal force in those provinces is accessory or supplementary only. If the federal attorney general is to assume in the future direct respons bility for enforcement of any particular measure in those provinces, then obviously the control of the necessary police to buttress that responsibility would have to be arranged. Under the current circumstances it is obvious that the bulk of the police force in Quebec is provincial and municipal.

Senator Molson: I should like to ask a question about clause 6. The key to that seems to be that any owner, lessee or agent who knowingly permits a meeting of the unlawful association in the building he controls is guilty of an offence. I am wondering why that could not have been enlarged to include the leasing, the renting, allowing the use of space in that building, such as might have applied perhaps in the apartment house where known members of the FLQ were hid ng, and where, for example, I think Lortie was apprehended.

Hon. Mr. Turner: This bill is directed towards a specific association insofar as it relates to meetings, not to where people live. It is the holding of meetings towards which we are directing our attention. It is therefore not an offence to lease property to someone who may turn out to be a member of the FLQ, unless one knew that the property was going to be used for the purpose of a meeting. If it is just to be used for a husband and wife situation, a domicile, a foyer, there is nothing in this bill to catch that.

Senator Molson: I am asking why not.

Senator Flynn: Would it be covered by clause 5? If you give any assistance by allowing a person to use your apartment, that comes under clause 5.

Hon. Mr. Turner: That is correct.

Hon. Mr. Molson: I was not referring to a foyer. I was referring to an apartment that has an elastic cupboard in it, and that type of apartment which was leased to, I suppose, two or three people but actually contained, I think it was, seven.

Hon. Mr. Turner: I think clause 5 is elastic enough to catch that.

Senator Molson: Thank you. That answers my question.

Senator Phillips: As a layman in law I am a bit confused, because the minister previously told me that the court would have to decide what a meeting is, and yet he says the bill is directed towards meetings. I find it a bit confusing that we have to wait for the court to decide what a meeting is, and yet the bill is directed towards meetings, if I understood what you were saying correctly.

Hon. Mr. Turner: Clause 6 is directed towards meetings. They way our system works is that we may have the responsibility for drafting the law, you may have the responsibility for passing the law, but thank God neither of us has the responsibility for interpreting the law. We have that for the independent courts. We try to anticipate situations in proper drafting, but the interpretation will have to be left to a court. In so far as the word "meeting" is concerned, that will depend on the facts of a particular situation before the court, and in a particular case, and the court will have to determine as a matter of law whether those facts constitute a meeting within the meaning of this bill. There is no way that we can render that more precise.

Senator Casgrain: What constitutes a meeting? The FLQ operates by cells and sometimes they do not know each other. They can hold little meetings. It is the term "meeting". What would it imply?

Hon. Mr. Turner: That is again a matter of evidence and a matter of fact in a particular case, Senator Casgrain, and common sense and common understanding of what a meeting is.

Senator Macnaughton: I understand a conspiracy requires at least two people, so surely a meeting would be somewhat similar.

Hon. Mr. Turner: You cannot meet with yourself; there would have to be at least two people.

Senator Hollett: Would not the word "knowingly" take care of that situation?

Hon. Mr. Turner: That does not help define "meeting". The word knowingly applies to two things: first of all, you have to know it is a meeting, and that it is a meeting of the FL.Q

Senator Hollett: That has to be proven.

Hon. Mr. Turner: That would have to be established.

Senator Prowse: Clause 6 also includes assembly, so you catch them one way or the other.

The Deputy Chairman: Honourable senators, we have had a general statement from the minister on this legislation. We have carried on a general discuss on on a question and answer basis for the last while. Are we now ready to move on to a consideration of the c auses of the bill or a particular clause of the bill? What are your wishes?

Senator Flynn: We could proceed clause by clause, but I think we will reach clause 8 pretty quickly.

The Deputy Chairman: That was my contention in the beginning, that the most important c ause in the bill is clause 8. Perhaps we can address ourselves to clause 8.

Senator Connolly: You might be better off to assure that clauses 1 through 7 are adopted and then move on to clause 8 and any others after that.

The Deputy Chairman: Honourable senators, are there any questions or debate on clause 1 of the bill?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 2?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 3?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 4?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 5?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 6?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 7?

Hon. Senators: Carried.

The Deputy Chairman: Are there any questions on clause 8 of the bill?

Senator Flynn: After the long debate yesterday I do not intend to repeat what I said. I think the Minister of Justice knows the position I have taken, and I would rather hear from him before saying anything else.

Hon. Mr. Turner: This is a treatment I do not usually receive in the House of Commons. The first point to be borne in mind with respect to section 8, which I believe is subject to some misunderstanding, is that section 8 does not create any offence. All it does is raise an evidentiary presumption. It raises an evidentiary presumption in respect to one offence only, namely, the offence in section 4 of the bill which reads:

> A person who
>
> (a) is or professes to be a member of the unlawful association,

though it is section 4(a) which establishes the offence and section 8 which establishes certain evidentiary presumptions relating to that one offence.

First of all, it is clear that a person cannot be properly charged or convicted of being a member of an unlawful association prior to October 16. In other words, the fact of being a member of the FLQ prior to October 16 is not an offence either under the regulations or under this bill. One has to establish that there is membership in the FLQ after October 16. Section 8 just permits some evidence to be used of facts prior to October 16 to establish a situation which may or may not exist after October 16. The reason I say October 16 is that that was the date of proclamation of the War Measures Act, and under the transitional provisions those offences are carried forward into this bill.

My first submission to the committee, Mr. Chairman, is that section 8 does not provide for any retroactive or retrospective legislation. Retroactive legislation means that a person could be convicted in November 1970 or December 1970 on a charge specifically referring to conduct in October 1970, of being a member prior to October 16. That cannot be done. There is nothing retroactive in section 8. No one can be properly charged or convicted under the regulations or under this bill unless the charge specifically relates to conduct or membership after October 16, 1970.

Senator Prowse: At the time the charge is laid?

Hon. Mr. Turner: Let me continue.

Senator Everett: Could we have a clarification of the point Senator Prowse just raised? He made the statement, "at the time the charge is laid". It is my understanding that it is an offence to be a member at any time after October 16.

Hon. Mr. Turner: That is right.

Senator Prowse: The charges are all in the present tense and not "you were".

Mr. D. H. Christie, Assistant Deputy Attorney General, Department of Justice: It could be in the past, but it has to be in relation to a date after October 16.

Hon. Mr. Turner: The present begins with October 16. Now, what is the effect then of section 8? It establishes what are called in the criminal law rebuttable presumptions, presumptions of fact that can be rebutted by other evidence, but unless rebutted would tend to have evidentiary value. In other words, if the Crown adduces some evidence under either of the three headings, either that the accused at any time actively participated in or is present at a number of meetings—that means two or more meetings—or spoke publicly in advocacy of the unlawful association or communicated statements, or as a representative of the unlawful association, that would raise a rebuttable presumption. That is to say, in absence of evidence to the contrary, that would prove he was a member of the unlawful association. If the Crown brings forth this type of evidence what does the accused do? He is entitled either by way of cross-examination of the Crown's witnesses that established this evidence of his own testimony or by any witnesses he himself calls to say that these facts no longer apply.

The Deputy Chairman: Is a mere denial sufficient by the accused?

Hon. Mr. Turner: It could be, depending on the credibility of the accused. If the accused can by way of his own evidence or evidence of his own witnesses or by cross-examination of the witnesses of the Crown cast any doubt on a balance of probability then he will be acquitted. Why? Because, despite these rebuttable presumptions, the burden of proof beyond any reasonable doubt under the criminal law always remains on the Crown and if the accused is able to establish any doubt the Crown will be unable to discharge its fundamental burden of proof of guilt beyond reasonable doubt.

There is nothing new in the criminal law, in the concept of rebuttable presumptions, nothing new at all, of

placing the accused in criminal proceedings in the position where he has to adduce evidence in his own behalf, once the prosecution has established certain facts.

There is section 8 of the Narcotic Control Act, which provides that on the charge of being in possession of an illicit drug for the purpose of trafficking, the Crown need only prove beyond a reasonable doubt that the accused was in possession of a drug and then it is up to the accused to show that he was not in possession for the purpose of trafficking.

Take the Food and Drugs Act; the Customs Act, the unlawful possession of smuggled goods; the Excise Act, the unlawful possession of spirits. Why do we need these rebuttable presumptions, in law, and why do we need it here? Because there are certain offences where the possession of facts is peculiarly in the possession of the accused, where he knows the situation better than anyone else, and he had to be given a certain responsibility of discharging a limited burden of proof.

There is nothing per se objectionable in law on these rebuttable presumptions. It simply means that the Crown introduces certain facts, then the accused has a duty to cast some doubts on those facts. If he can cast some doubts on those facts, then the Crown will fail. Because the fundamental burden of proof, which is apart from this clause 8, the fundamental burden of proof in any case of criminal law, to establish guilt beyond reasonable doubt, would still apply. And it applies from the beginning to the end of the case, and it is not affected by these rebuttable presumptions.

The Ontario Court of Appeal has held unanimously, in the case of the *Queen v. Sharp* that the onus shifting provision similar to this, in the Opium and Narcotic Drug Act, does not violate the Bill of Rights, it does not deprive a person of the right to a fair hearing or deprive a person charged with an offence of the right to be presumed innocent until proved guilty. Why? Because the fundamental burden of proof beyond reasonable doubt is always on the Crown, despite these rebuttable presumptions. The same case points out that the shifted onus can be discharged by a balance of probability. What does balance of probability mean in law? A balance of the stories of the two sides and if there is a balance of probabil ty established, or a reasonable doubt established, then the Crown will not be able to discharge its primary duty of establishing guilt beyond reasonable doubt.

The Supreme Court of the United States also held that similar statutory presumptions in the United States' law are not a denial of due process within the meaning of the American Constitution, providing there is a rational connection in common experience between the fact proved and the ultimate fact which is to be presumed.

I am not going to go through the other instances in the Criminal Code where there is an onus placed on the accused to adduce evidence. But I am going to recite some of them to you. Section 162, trespassing at night; section 221, criminal negligence in the operation of a motor vehicle; section 233, kidnapping; section 253, the proprietor of a newspaper being responsible for libel, in other words, the owner of a newspaper is presumed to know what his writers are writing; section 295, possession of housebreaking instruments, if you are found at night outside my house with housebreaking tools you have to show why you have got those tools, otherwise it is presumed that you want to get into my house.

I also want to refer to the well recognized doctrine in law of proof of similar acts. If similar acts in the past establish a course of conduct, that is admissible, on past evidence, to prove a present situation. It always has been. Under that doctrine, evidence can be adduced against an accused to assist in establishing his guilt, even though the evidence relates to conduct on the part of the accused prior to the date of the offence charged in respect of which the accused has not been convicted or even charged.

I think we have to realize that, in the absence of a provision like that in clause 8, and having regard to the clandestine or secret conspiratorial nature of the FLQ and allied organizations, it would as a practical matter be impossible, apart from admissions on the part of an accused, to establish the commission of an offence under section 4(a). It would be absolutely impossible, because obviously this organization since October 16 has not been having public meetings. If we were not able to rely on some rebuttable evidence—that can be rebutted—to have some evidence on which to lay the charge, then as a practical matter it would be impossible to establish this offence at all.

I want to be fair with the committee here. In similar fact evidence, of course, the crime was always a crime throughout the range of similar facts. Here one could say, as someone said in this committee, I think, Mr. Chairman, that prior to October 16 the FLQ was not an unlawful association within the meaning of the regulations or within the meaning of the bill—except that all this bill does, in clause 3 and in clause 4, and all the regulations do under the War Measures Act, is to render in precise statutory form what is probably the case now, a fact—I would say is the case now—that the FLQ, on the basis of its communiqués, on the basis of its acts of terrorism, of kidnapping, of violence, of holding governments to blackmail, qualifies within the definition of sedition under the Criminal Code and is probably, and has always been, an unlawful association. So that is the final answer to retroactivity.

I could read that section on sedition into the record here, but I think we all know it.

Senator Flynn: Mr. Chairman, I want to make it clear that I am in complete agreement with everything the minister has said. I am not against clause 8 if it means and if it is interpreted in the way the minister has explained. My point is not there at all. I said yesterday in the House that some of the amendments that were moved in the other place which would have taken away from the Crown the possibility of proving the facts mentioned in clause 8, as having taken place prior to the date of October 16, 1970.

I have indicated that I thought it was not fair that we had to use that. But my problem may be only a problem of drafting. The minister knows, however, that even now in the press and elsewhere there are many people who have some doubts as to the way the bill is drafted, that

would make it retroactive in this sense, that where we say, "in the absence of evidence to the contrary", if evidence to the contrary means only evidence to the contrary of the facts described in paragraphs (a), (b), (c) of clause 8, then if I prove that someone in 1967 attended a meeting of the FLQ and if he cannot deny it, he is deemed—it is not only that he is deemed but the proof is that he is a member of the unlawful association today, after October 16. My point is that it would be so easy to make it clear that the "evidence to the contrary" may be evidence to the fact that prior to or on October 16, 1970 I dissociated myself from the FLQ, therefore that I was not a member of the FLQ from October 16, 1970 or at the time the charge is made against me.

That is the only point I am trying to make and that is why I moved—or, rather, I suggested yesterday that we could make it clear and we could dissipate doubts and we could reassure all those who have expressed fears—by making it clear that we authorize any accused to prove that, after the facts that are mentioned in paragraphs (a), (b), (c), he d ssociated himself from the FLQ, if he did so before October 16, 1970. The wording I was suggesting was to replace the last paragraph beginning by "is" by the words "is in the absence of evidence to the contrary to that adduced or to the effect that he never or ever was a member or that if he was a member he ceased to belong to the said unlawful association at a time prior to the 16th day of October, 1970, prima facie evidence that he is a member of the unlawful association".

So I have been told that it means the same thing. Well, if it means the same thing, why resist it, because I am sure that, if we adopt the amendment, we will satisfy those who have doubts and will satisfy those who have fears.

Senator Lang suggested that the difficulty could be overcome even by putting the words "in the absence of evidence to the contrary" at the end so that it would read:

> ... proof that he is a member of the unlawful association, in the absence of evidence to the contrary.

That would be helpful as well. In any event, one way or the other I think we should do something to remove the doubts and fears.

Even if you are right legally, even if you have all the confidence in the world that the court is going to interpret the act as you have said it will, why not be absolutely sure that it will do that exactly? Because fears have been expressed, and I think it is our duty to dissipate those fears if we can do so by a very simple amendment such as the one I have proposed. If my amendment is not acceptable to the officials of the department, perhaps the one suggested by Senator Lang is.

What I want to make clear is that the rebuttal is not one which is restricted to proving the contrary of the facts that are recited in paragraphs (a), (b) and (c). That is all I want, and I am quite sure that that is all the Minister wants, too.

Hon. Mr. Turner: Senator, I received a copy of your amendment last night and we went over it again this morning. I am convinced, and I hope I can convince you, on the basis of the advice I have received and on the reading of this section, that the section as it currently reads is perfectly clear and does what you want it to do. In other words, the words "in the absence of evidence to the contrary" not only relate to evidence contrary to paragraphs (a), (b) and (c) but also to evidence contrary to the fact that he is a member of the unlawful assoc a-tion. If a court were possessed of evidence that someone had relinquished membership in the terms that you put, or had never been a member, then, as a practical matter, surely no court would hold that the presumption would hold up.

Senator Flynn: I am not so sure about that.

Hon. Mr. Turner: Well, sir, I am sure.

Senator Flynn: You are sure, but others are not.

Hon. Mr. Turner: "In the absence of evidence to the contrary"—contrary either to the presumptions or to the membership in the unlawful association; I do not think it matters where you put that phrase; whether you put it, as Senator Lang says, at the bottom or at the end. "Evidence to the contrary"; we are talking about an offence of membership and the presumptions are to try to establish membership; and evidence to the contrary is either contrary to the presumptions or contrary to the fact of membership.

I do not think, as a practical matter, that we have a problem here.

Senator Flynn: You do not think so, but some people do. We would all be in agreement, if the act were amended as I suggest. There would be no controversy. There may be no controversy in the courts now, but there would be no controversy in the public, generally, if you accepted the amendment; because you have, implicitly, admitted that my amendment would not change the law. But at least it would clarify it for sure. If it is harmful, I am prepared to withdraw it. But if you say that it is not, I say why not accept the viewpoint of those who have some doubts and have unanimity as to the exact meaning and exact purport of this section?

Senator Prowse: With all respect, it seems to me that the amendment would restrict the rights of rebuttal that were available to an accused, because you would detail them out.

Senator Flynn: Why?

Senator Prowse: Because you would detail them out.

Senator Flynn: No. I said that "in the absence of evidence to the contrary" covers the point which is here. But I go further. I add "or to the effect that he never was a member or that, if he was a member, he ceased to be". That is clear. We add to what is already there to make it clear that somebody who already disassociated himself on October 16 or prior can prove it.

Hon. Mr. Turner: Let me bring up another point for you, Senator, if I may. It is one I just thought of. We are talking here about presumptions. Now, I have given it to you as the opinion of the department which I share—

sometimes I do not—I have given it to you as the opinion of the department, which I share, that if the words "in absence of evidence to the contrary" relate evidence to the contrary to the presumptions or relate it to evidence that he is a member of the unlawful association. But for the purpose of the presumption, suppose you were right, it is only in absence of the evidence to the contrary of those presumptions that you really need to defeat the presumptions. In other words, the section sets up three sets of facts for presumptions. If evidence to the contrary rebuts those presumptions then you are back where you started and section 8 does not mean anything, and you do not really need "evidence to the contrary" to apply to the words "member of the unlawful assoc ation". Because if evidence to the contrary is sufficient to defeat the presumptions in (a), (b) and (c), the rest does not apply, and again it is up to the Crown to prove membership. So I do not think you need it for both reasons. I do not th nk you need it because I believe those words as they read apply both to membership and to the three paragraphs. But even if they only apply to the three paragraphs, that is all you need because that defeats the presumption in section 8.

Senator Flynn: No, that is not enough.

Hon. Mr. Turner: Well, yes, because then the Crown would have to prove membership by some other way. Do you follow me there?

Senator Flynn: I have read the provisions of the Criminal Code where presumptions are created, and in none of these sections of the Criminal Code do we use the language in exactly the same way as it is here. This is an entirely new method. As you said yourself, the proof of similar facts relates to facts with respect to crimes prior to the date of the charge. And there is no decision that I have been able to find that would deal with exactly the same wording as we have here. Again, I say that it is possible, and many people have expressed this fear, that I, if I am an accused, cannot get an acquittal if I have attended a meeting of the unlawful association, and I cannot deny this fact because contrary evidence would be limited to evidence contrary to the fact that I had attended that meeting. I am not going to perjure myself to be acquitted. I want to be able to say that I attended the meeting, yes, but that, subsequently, I ceased to be a member of the association. I want this to be clear and I think this is the intention of everybody. I do not see why, if some people have doubts, even if you have reasonable assurance that the courts would give the interpretation to these words that they give to other words in other sections of the Criminal Code, I do not see why you would not accept making it clear that the point that the accused wants to make can be made.

Senator Everett: Mr. Chairman, I hope I am not misquoting Senator Flynn, but I gather you will be satisfied with Senator Lang's suggestion of putting the words "in the absence of evidence to the contrary" to the end of the section.

Senator Flynn: I think that would be an improvement.

Senator Everett: I wonder if the Minister has any objections to the resolution of the problem on that basis.

Senator Connolly: May I ask a supplementary question? Suppose that were done, would it make any change in the application and interpretation of the section?

Senator Everett: Essentially, that is my question.

Hon. Mr. Turner: I do not think so, senator.

Senator Cook: Well then, if you are satisfied that the section is all right as it is, why change it?

Senator Everett: The only point is this, if the Minister is not concerned that it changes the effect of the section, and if it satisfies Senator Flynn's argument, then I think we may have accomplished something.

Senator Hollett: I think it would be utter childishness to transfer words from one place in a sentence to another. They mean exactly the same thing no matter where they are.

Senator Everett: That is my attitude, but if it will satisfy Senator Flynn, why not do it?

Senator Cook: It means you are going to an awful lot of trouble to satisfy one person's point of view.

Senator Macnaughton: Mr. Chairman, if we change the wording as requested, does it mean that this would have to go back to the House of Commons again?

The Deputy Chairman: Yes.

Senator Langlois: Mr. Chairman, I think the crux of the matter here is that we have to make up our minds whether or not section 8 as drafted limits the right of defence of the accused to bring in evidence to discharge the burden of evidence placed against him. I do not think section 8 does limit that right of putting up a defence.

Senator Flynn: Well, that is your opinion, but other opinions have been expressed. You just tell them to go to hell. That is your attitude.

Senator Langlois: Reverting to insults, as usual.

Senator Flynn: I am not insulting anyone. You are insulting all those who do not share your views.

Senator Langlois: I am not insulting anybody. In what respect do I insult anybody? Because I do not share your views, you are insulted.

Senator Flynn: Once again we are dealing in semantics.

The Deputy Chairman: Order. We will carry this on outside with boxing gloves.

Hon. Mr. Turner: I think, in reply to Senator Langlois, that the words to which we have been referring "in the absence of evidence to the contrary" are sufficient not only to discharge the presumptions, which is the main burden of section 8, but also sufficient to open up evidence as to membership or non-membership, as Senator

Langlois says. Really, I do not see anything unclear in the bill on this particular point.

The Deputy Chairman: Any further questions?

Senator Casgrain: I just want to say that those people who are not lawyers and who cannot appreciate the fine points that the Minister has in mind may be confused, because I have been hearing people saying that the retroactivity clause is awful. So, this would clear it up. I am not, more or less, in favour of the amendment, but I am pointing out that people who are not lawyers and who are not conversant with the law sometimes get mixed up and do not understand.

Hon. Mr. Turner: In reply to Senator Casgrain, first of all fortunately lawyers are going to interpret the bill. That is why we have a legal problem. Secondly, the problem of retroactivity which has been discussed really does not deal with this particular point of Senator Flynn's. The discussion publicly has confused retroactivity of the law and retroactivity of rebutable evidence. Senator Flynn's amendment does nothing to change that. He is dealing with the substance of the evidence and not with what may or may not be retroactivity. Even if Senator Flynn's amendment were to be accepted, it will not end the public discussion that Senator Casgrain is worried about. The public discussion is based on confusion between retroactivity of substance and the admissibility of certain evidence.

Senator Flynn: Not all the debate has been about that. Only a certain part of it. Because retroactivity has been suggested to exist for the reasons I have mentioned also.

Senator McElman: Mr. Chairman, is not this question actually boiling down to whether we are here to develop law or to develop public relations. Are we not here to develop law?

The Deputy Chairman: Any further questions?

Shall clause 8 carry?

Some Hon. Senators: Carried.

Some Hon. Senators: No.

Senator Flynn: I move formally that it be amended in the way I have indicated. I move this and I have a seconder too.

Senator Connolly: You don't need a seconder.

The Deputy Chairman: Can we have the amendment? It has been moved by Senator Flynn:

> That clause 8 on page 5 of the bill be amended by striking out the words, "is, in the absence of evidence to the contrary, proof that he is a member of the unlawful association" and by substituting therefor the following:
>
> "is, in the absence of evidence contrary to that adduced, or to the effect that he never was a member, or that, if he was a member, he ceased to belong to the said unlawful association at a time prior to the sixteenth day of October, 1970, *prima facie* evidence that he is a member of the unlawful association.

That is the amendment. Are there any questions on the amendment?

Some Hon. Senators: The question.

The Deputy Chairman: Shall the amendment carry?

Some Hon. Senators: Agreed.

Some Hon. Senators: No.

The Deputy Chairman: Honourable senators, we will have to put this to a vote, and only the members of the committee are entitled to vote. I understand the Chairman has a vote.

E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Yes.

The Deputy Chairman: In the regular vote or in the case of a tie?

Mr. Hopkins: In the regular vote.

The Deputy Chairman: Will all those in favour of the amendment, please signify by saying aye?

Some Hon. Senators: Aye.

The Deputy Chairman: Those contrary will say nay.

Some Hon. Senators: Nay.

The Deputy Chairman: All right. Will all those in favour, please raise your right hand?

Now will all those opposed to the amendment, please raise their right hand? The amendment is lost. The vote is three in favour and nine against.

Senator Langlois: Mr. Chairman, you did not vote.

The Deputy Chairman: That is all right, I do not have to vote unless I want to.

All right, honourable senators, clause 8 carries.

Shall clause 9 carry?

Hon. Senators: Carried.

The Deputy Chairman: Any questions on clause 9? Carried.

Senator MacDonald: Mr. Chairman, before we move on from that, should there not be something in that clause to enable the authorities to identify the person detained under the Identification of Criminals Act?

Hon. Mr. Turner: If they are charged with an indictable offence either under the bill, senator, or under the Criminal Code, then the Identification of Criminals Act automatically applies.

Senator MacDonald: But in the first three days or in the first ten days when they are detained without being charged?

Hon. Mr. Turner: They cannot be fingerprinted unless they are charged.

The Deputy Chairman: Anything further on clause 9?

Shall clause 9 carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall clause 10 carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall caluse 11 carry?

The Deputy Chairman: Shall clause 12 carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall clause 13 carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall clause 14 carry?

Hon. Senators: Carried.

Senator Flynn: Mr. Chairman, before we come to clause 15, there has been some discussion as to the problem of review of the decisions of the Attorney General to detain without bail any person by issuing a certificate, and other problems also related to the very special powers that are given in this bill.

It has been suggested that it was the exclusive responsibility of the Attorney General of the province to apply the law. As you say, in this act, the way it is drafted, it is so; but, in any event, this is temporary law, this is an act about which the Parliament and the Government of Canada has special responsibility. It is not exactly like the application of the Criminal Code, which is permanent law and which does not present the same problems as a temporary and exceptional law such as this one.

I would like to propose that there be some kind of review, and I have here an amendment to submit to the committee which would be enacted as clause 15, necessitating the renumbering of clauses 15 and 16. I am offering copies of the amendment for distribution to the members of the committee.

Clause 15 would read as follows:

15. (1) The Governor in Council as soon as possible after the coming into force of this Act shall appoint three persons to constitute a commission under the provisions of the *Inquiries Act;* one commissioner so appointed shall be a member of the Supreme Court of Canada, one shall be a member of the Superior Court of Quebec and be appointed upon the recommendation of the Lieutenant Governor in Council of the Province of Quebec, and the third member shall be appointed upon the recommendation of the other two members, and all members shall have a knowledge of both official languages.

(2) The Commissioners who shall be called "Public Order Act Administrators" shall inquire into, report upon and make recommendations with respect to the administration of this Act and of the *Public Order Regulations 1970* and shall report from time to time and at the same time to the Attorney General of Canada, the Attorney General of Quebec, and to the Parliament of Canada and the National Assembly of the Province of Quebec;

(3) The Public Order Act Administrators shall have all the powers of a Commissioner appointed under Parts I and III of the *Inquiries Act* and shall continue as Administrators for such period after the expiration of this Act, whether by effluxion of time or by proclamation, as the case may be, as is necessary for the carrying out of their duties under this Act.

Mr. Chairman, I might add that the minister has referred to the committee headed by Jacques Hébert, but this committee, of course, has no official status, it has no power. It may be in a position to refer matters to the ombudsman, but the ombudsman of Quebec is a person over whom this Parliament and federal Government have no authority whatsoever.

The second point I want to make is that it seems to me that since we are going to have to decide in four months, possibly, whether we should continue this act in existence, until then we should be in a position to have reports from a kind of committee that would enable Parliament to make a better judgment as to the necessity of continuing the act in existence after April 30, 1971, if it should be the recommendation of the Government at that time.

The Deputy Chairman: Mr. Turner, would you like to reply to that?

Hon. Mr. Turner: I dealt with it in some fasion earlier on, Mr. Chairman. Of course, the Government has made its position clear in the other place.

As Senator Flynn recognized, the administration of the enforcement of the provisions of this bill is, as in the case of the Criminal Code, left to the provincial Attorney General, whichever provincial Attorney General is seized of the matter—in this case, primarily the Attorney General of Quebec.

The Attorney General of Quebec has appointed a committee. I agree it is a non-statutory committee, but it is a committee in being. It has been given complete access by the Attorney General of Quebec to interview anyone detained or released under the War Measures Regulations and, presumably, under this bill. That committee has been interviewing; that committee has been receiving complaints; that committee has been making public reports; that committee has been submitting complaints to a legally constituted body called Le Protecteur du Peuple, or ombudsman, under the statutory law of Quebec.

The Prime Minister of Quebec has stated that he would be absolutely opposed to a statutory addition providing for a review committee, because he would consider that to be a reflection upon the action of a government under a federal state. The Prime Minister of Canada has agreed with that.

I just say to the members of the committee that I think in these circumstances we must treat this provincial government as we would any other provincial government, as being worthy of trust in administering this legislation with fairness, justice and compassion.

Senator Prowse: They are answerable to their own people.

Hon. Mr. Turner: And, after all, they are answerable to the people living in Quebec.

Senator Casgrain: I belong to Civil Liberties, and I have seen Mr. Hébert, and agree with what the minister has just said. I think they are trying to give a legal aspect and recognition legally to the committee that has been named. I do not yet know what the procedures are, but I know there is work being done on that.

Senator Flynn: Are they satisfied with the present status?

Hon. Mr. Turner: They are satisfied with the fact that nothing is being withheld from them and that no obstacles are being put in their way. Mr. Hébert told me that personally on Monday.

Senator Flynn: I agree that there is no obstacle, but I do not know about agreeing with the ultimate result of the action of the ombudsman.

The Deputy Chairman: Honourable senators, this amendment was read by Senator Flynn, the mover, and has been distributed to all the members of the committee, so I presume I will not have to read it again.

Senator Langlois: It has not been distributed to all the members.

The Deputy Chairman: Well, many of them were circulated. Perhaps further copies could be circulated. May we take it as having been read?

Some Hon. Members: Question!

The Deputy Chairman: Are we ready to vote on this amendment? All those in favour of the amendment, please raise their right hand.

All those against the amendment, please raise their right hand.

The amendment is lost by a vote of 3 to 8.

The Deputy Chairman: Shall clause 15 carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall the preamble carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall the title carry?

Hon. Senators: Carried.

The Deputy Chairman: Shall the bill pass?

Senator Flynn: Mr. Chairman, just for the record I should like to say that Senator Hays raised a relevant point with respect to clause 15.

Mr. Minister, if there is a filibuster in the House of Commons—of course, we never have such things in the Senate, as you know—you could be in a position where your resolution would not be adopted before April 30, 1971 and the act, therefore, would lapse, thus putting the Government in a very difficult position. I am wondering if thought has been given to providing that the resolution should come to a vote after one day, or something like that. It may appear to be a silly thing to put into an Act of Parliament but, after all, if you need a decision by Parliament then a few obstructionists should not be allowed to prevent the will of Parliament from prevailing. There is a great danger of the act lapsing simply because someone prolongs the debate beyond April 30, 1971.

Hon. Mr. Turner: Mr. Chairman, if I may speak to that I should like to say, firstly that I suppose it would be incumbent upon the Government to introduce such a resolution in time. Secondly, I think one has to assume that both houses of Parliament would act with responsibility at that time. Thirdly, we have always tried to avoid curtailing the privileges of either house and the procedures of either house by statute. I think we rely upon the members of the Senate and the House of Commons to discharge whatever statutory duty may be incumbent upon them.

Senator Flynn: Possibly another group of words could be found that would provide that once a resolution is introduced the act continues into force until the resolution is voted down.

Hon. Mr. Turner: The difficulty with such a provision is that we could introduce the resolution and never bring it forward for debate.

Senator Connolly (Ottawa West): The answer, I suppose, is that you do not want to legislate closure.

Mr. Chairman, I do not suppose there would be any objection if this resolution were independently considered by the Senate and dealt with prior to consideration by the House of Commons.

Senator Flynn: There is nothing to prevent our doing that.

Hon. Mr. Turner: I am not sure whether it is possible to have a resolution go through simultaneously or jointly. A resolution is not like a bill.

Senator Connolly (Ottawa West): I do not think there is any question about that, but quite apart from other considerations do you not think that this is major Government policy, and it normally should be handled primarily by the House of Commons, although there is nothing to prevent the Senate from dealing with it in advance of the House of Commons.

Hon. Mr. Turner: Except that presumably the resolution would have to originate with the Leader of the Government. However, I prefer to place myself in the hands of both houses at the time if the occasion arises.

The Deputy Chairman: Honourable senators, shall the bill pass without amendment?

Hon. Senators: Agreed.

The Deputy Chairman: Shall I report the bill without amendment?

Hon. Senators: Agreed.

The Deputy Chairman: Mr. Turner, on behalf of the Standing Senate Committee on Legal and Constitutional Affairs I should like to thank you very much for appearing before the committee this morning and spending two hours of your valuable time with us in giving a very vivid and accurate explanation of the clauses of the bill which have engendered considerable debate not only in the Senate but in the House of Commons. We feel that you have done an excellent job in explaining the controversial clause, and we hope that your explanation before this committee will find its way to the public, and allay any fears that the public may have as to some of the features of clause 8 which have been advocated and espoused in the debate on this bill.

Hon. Mr. Turner: Mr. Chairman, on behalf of Mr. Christie, Mr. Scollian, and myself, I thank you. I should like to say that I always appreciate the courtesies that are extended to me on this side of the building. I hope that the next time I am called before you it will be to deal with a happier piece of legislation.

The committee adjourned.

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

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 6

WEDNESDAY, APRIL 28, 1971

Complete Proceedings on the following Bills:

Bill S-3, "An Act to amend the Government Property Traffic Act"

Bill C-218, "An Act to amend the provisions of the Criminal Code relating to the release of accused persons before trial or pending appeal".

REPORTS OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

23270—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

*Ex officio member

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, Thursday, October 29, 1970:

Pursuant to the Order of the Day, the Honourable Senator Carter moved, seconded by the Honourable Senator Bourque, that the Bill S-3, intituled: "An Act to amend the Government Property Traffic Act", be read the third time.

After debate,

In amendment, the Honourable Senator McDonald moved, seconded by the Honourable Senator Smith, that the Bill be not now read the third time but that it be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

Extract from the Minutes of the Proceedings of the Senate, Tuesday, April 6, 1971:

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Prowse, seconded by the Honourable Senator Gelinas, for the second reading of the Bill C-218, intituled: "An Act to amend the provisions of the Criminal Code relating to the release of accused persons before trial or pending appeal".

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

The Bill was then read the second time.

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

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

Robert Fortier
Clerk of the Senate

Minutes of Proceedings

Wednesday, April 28, 1971.
(6)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 3:00 p.m.

Present: The Honourable Senators: Urquhart (Deputy *Chairman*), Connolly (*Ottawa West*), Cook, Haig, Lang, McGrand, Methot, Prowse, White and Willis. (10)

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

The Committee proceeded to the consideration of Bill S-3, intituled: "An Act to amend the Government Property Traffic Act".

On Motion of the Honourable Senator Haig it was Resolved to report as follows:

> "The Committee recommends that the Bill not be proceeded with further in the Senate in view of the following letter received on March 23, 1971, by the Deputy Chairman from the Honourable Arthur Laing, P.C., Minister of Public Works:
>
> > 'It would be appreciated if you could report to the Senate Legal and Constitution Affairs Committee that the Department of Public Works does not wish to proceed further with the subject bill because of various technical problems which have recently come to light involving municipal provincial and federal relations'."

The Committee then proceeded to the consideration of Bill C-218, intituled: "An Act to amend the provisions of the Criminal Code relating to the release of accused persons before trial or pending appeal".

The following witnesses, representing the Department of Justice, were heard in explanation of the Bill.

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

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice.

The following was present but was not heard:

Mr. Albert Béchard, M.P., Parliamentary Secretary to the Minister of Justice.

On Motion of the Honourable Senator Willis it was Resolved to report the said Bill without amendment.

On Motion of the Honourable Senator Haig it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

At 3:40 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Reports of the Committee

Wednesday, April 28, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred Bill S-3, intituled: "An Act to amend the Government Property Traffic Act", has in obedience to the order of reference of October 29, 1970, examined the said Bill and now reports as follows:

The Committee recommends that the Bill should not be proceeded with further in the Senate in view of the following letter received on March 23, 1971, by the Deputy Chairman from the Honourable Arthur Laing, P.C., Minister of Public Works:

> "It would be appreciated if you could report to the Senate Legal and Constitutional Affairs Committee that the Department of Public Works does not wish to proceed further with the subject bill because of various technical problems which have recently come to light involving municipal, provincial and federal relations." (Letter attached)

Respectfully submitted.

Wednesday, April 28, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred Bill C-218, intituled: "An Act to amend the provisions of the Criminal Code relating to the release from custody of accused persons before trial or pending appeal", has in obedience to tht order of reference of April 6, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Earl W. Urquhart,
Deputy Chairman.

Minutes of Proceedings

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Ottawa, Wednesday, April 28, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs, to which were referred Bill S-3, to amend the Government Property Traffic Act, and Bill C-218, to amend the provisions of the Criminal Code relating to the release from custody of accused persons before trial or pending appeal, met this day at 3 p.m. to give consideration to the bills.

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

The Deputy Chairman: Honourable senators, it is now 3 o'clock. Until the Minister of Justice arrives I think the committee can deal with Bill S-3, to amend the Government Property Traffic Act.

It will be recalled that the bill was sponsored by Senator Carter. It is a simple bill which was expected to have quick and easy passage through the Senate until it came to second reading, when Senator Flynn, the Leader of the Opposition, asked why it was necessary to specifically state in the bill that all the fines would be the property of Her Majesty in the right of Canada.

The question was taken as notice and second reading was given. On the motion for third reading, two days later, an amendment was moved to have the bill referred to the Standing Senate Committee on Legal and Constitutional Affairs.

We searched around for weeks and months for an answer, and were not able to get an answer as to why this bill was necessary. Finally I received a letter from the Honourable Arthur Laing which reads as follows:

> Dear Senator Urquhart:
>
> It would be appreciated if you could report to the Senate Legal and Constitutional Affairs Committee that the Department of Public Works does not wish to proceed further with the subject bill because of various technical problems which have recently come to light involving municipal, provincial and federal relations.

Senator Haig: In other words, they are going to drop the bill.

The Deputy Chairman: They are going to drop the bill, and wish us not to proceed with it any further. Is that agreed?

Hon. Senators: Agreed.

Senator Lang: Can you surmise why they ever brought it forward in the first place?

The Deputy Chairman: I think the problem involved the municipal courts and the fines.

Senator Lang: In other words, the money was going to the provinces and they were going to try and put it in their own pocket.

The Deputy Chairman: I think there was a little conflict there. They are going to leave things as they are.

Shall I report, honourable senators, as follows:

> The committee recommends that the bill should not be proceeded with further in the Senate in view of the letter received on March 23, 1971 by the Deputy Chairman from the Honourable Arthur Laing, P.C., Minister of Public Works.

And I have just read the letter, of which you have a copy.

Is that satisfactory, honourable senators?

Hon. Senators: Agreed.

The Deputy Chairman: We shall now consider Bill C-218, the bail reform bill. This bill was introduced in the Senate by Senator Prowse for the Government, and the main speech for the Opposition, was delivered by Senator Willis.

Today the Minister of Justice and Mr. Scollin, the Director of the Criminal Law Section of the Department of Justice, who is presently here, are going to answer our questions relating to the bill. While we are waiting for the minister, perhaps we can just chat informally. Chat informally and off the record.

Senator Prowse: Mr. Chairman, perhaps we can start with Mr. Collin, and ask him to answer any questions of a technical nature that we have.

The Deputy Chairman: Honourable senators, this is Mr. John A. Scollin, director, Criminal Law Section, Department of Justice. We will accept Senator Prowse's suggestion and discuss any technical questions that we have until the minister arrives.

Senator Prowse: I wonder if we could start going through the bill section by section, and if there are any questions we can deal with them. If there is anything the minister should answer, he can do it when he arrives. Otherwise we will be sitting around for some time with very little purpose.

The Deputy Chairman: Honourable senators, Mr. Scollin would prefer to deal with the bill on a question and answer basis. Is that agreeable to the committee?

Senator Cook: We do not want to go through it section by section.

The Deputy Chairman: No. It is mainly the general principle of the bill that we want to get at.

Have honourable senators any particular questions they would like to ask of Mr. Scollin, until the minister arrives, because the minister will give us a general summary of the bill and the general principle of it. I do not think it is too complicated a bill, and I think it is generally well received.

Senator Prowse: Mr. Chairman, section 445A (7) on page 24 deals with justification for detention in custody. Perhaps Mr. Scollin would tell us what the purpose of that particular subsection is.

Mr. J. A. Scollin, Director, Criminal Law Section, Department of Justice: This subsection (7) is designed as a statutory formulation of all the grounds that should be considered in relation to the question of pre-trial release.

An order of detention by the justice cannot be justified except on one or other of these two grounds. Paragraph (a), which is specified as the primary ground, is basically the real point of the bail system. That is, the securing or ensuring that the accused will attend for his trial, and attend when rekuired by the court. Some of the case law has tended to the view that this is the sole and only ground on which detention can ever be justified.

Paragraph (b) is classed as a secondary ground, and this deals with the public interest factor. You will note that the applicability of paragraph (b) only arises after a determination has been made in relation to the primary ground—that is, the attendance or non-attendance of the accused. If the justice at the bail hearing decides or has reason to believe that the accused will not attend and makes an order of detention, that is the end of the matter. Paragraph (b), in fact, only arises if the justice, having disposed of and made a determination on ground (a)—that is the likelihood of the accused's attending—has determined that ground in favour of the accused, and in effect says, "Crown, you have not shown us sufficient grounds for believing that this person will not attend", and at that point only does the justice go on to consider whether on grounds other than the question of attendance is the detention justified. You will see that that secondary ground is formulated as follows:

> —that his detention is necessary to the public interest or for the protection or safety of the public, having regard to all the circumstances including—

The reason for specifying these "includings" is really to make sure that no sort of light-hearted effort is made to consult any old public interest. The idea is that it is some serious, substantial public interest that is being consulted. In the kind of examples of public interest that are given, the bill includes "any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence involving serious harm." There is nothing conjectural about that. The fact that he might pick somebody's pocket is not to be regarded as a justification for detaining him in custody. The offence that is contemplated is a criminal offence involving serious harm or, particularly, an interference with the administration of justice.

The idea is to make a statutory formulation, allocate the importance of the two grounds, make sure that the court direct its mind basically to the question of attendance and then, only after it has determined that in favour of the accused, go on to these other considerations of the public interest.

Senator Prowse: The public interest would include a private interest, in that with regard to a person who had tried to knife somebody there might be reason to believe that if he got out he would succeed on a second attempt.

Mr. Scollin: Yes, I think this is so. One does run across these situations where a chap has attempted, for example, to kill his wife and has been unsuccessful, and the clear indications are that if he is turned loose he will try to finish the job.

I might just add that obviously it would be impratical to attempt to provide a defintion of public interest by listing a series of things. It will have to be left to the good sense of the courts, given the guidance they are given now.

Senator Prowse: Mr. Scollin, Section 445(A)(1) on page 22, provides for release on undertaking which I think basically underlines the whole bill. Perhaps you might care to comment on that.

Mr. Scollin: In line with the general philosophy of the bill, the idea is to get away from cash and property security, and acknowledgements of debt to the Queen, which are constituted by a recognizance, and to take the view that by and large a man's word that he is going to turn up should be good enough. If he gives the court this undertaking that he will turn up when he will be required, then he should be released. This is set up as a prime method of release, unless the Crown, on whom the onus is clearly cast, shows either that the detention is justified within the meaning of subsection (7) or that some other more onerous method of release, as set out in the other subsections, is justified. Unless the Crown actually shows that, then the rule should be that the accused is released on his own undertaking to turn up, and no conditions are imposed. With respect to anything more onerous than that, the general rule is that it has to be justified by the Crown.

Senator Prowse: Does this bill on the whole change, in any way, the right or responsability of the police to arrest and detain a person who has committed what we will call a serious offence—let us say armed robbery.

Mr. Scollin: Armed robbery is not one of the situations where there is a special obligation on the police, for example, not to arrest under section 436, nor is it a case where the officer in charge of the station is under a statutory obligation, as he is in section 439, to release the man. But when the matter comes before the justice under section 445A, this is as applicable in its terms to robbery as to any other offence but, of course, the more serious the offence, then perhaps the less the onus is on the Crown to show that something more than just an undertaking is desirable.

That is why, again trying to encourage release, provision has been made in subsection (4), on page 23, for the imposition of certain conditions. So that even in a charge of robbery, if the justice decides an unconditional undertaking is perhaps a little bit thin, he is then obliged to consider whether under subsection (2)(a) the man's promise tied in with conditions about his behaviour during his release is an adequate means of ensuring his attendance.

Those conditions, as set out in subsection (4), are pretty broad and the object is, as I say, to encourage release whenever possible. If in the case of robbery, for example, it appears there is a strong likelihood of the man's turning up but in the meantime the only safe measure is to have him remain within the jurisdiction, or report from time to time to the police, then conditions of that sort can be imposed.

Senator Prowse: Is there in the bill, generally, any carry-over of the proposition that the release of a person should be conditional upon payment of cash—either a cash bail or a property bail—or is it just a matter of either turning him loose or, if the public safety requires that he be kept in custody, putting him in custody. In other words, are we doing away entirely with cash bail, or monetary considerations for bail?

Mr. Scollin: As far as the actual deposit of cash security is concerned, it is only in very limited circumstances that that can be required, and then only as a last resort.

Section 445A (2)(d), on page 23, sets out the only circumstances in which an accused can be required to deposit cash or security. Those circumstances are where he is not ordinarily resident in the province where he is in custody, or where he lives more than 100 miles away from the place where he is in custody. I think it is probably worth while pointing out that by virtue of subsection (3) that is a last resort, because the justice is obliged and bound not to make an order under that paragraph until he has exhausted the previous provisions. The Crown really has to show in all of these cases that a less onerous method of securing his attendance just will not do.

As far as the release by the police is concerned, there is a provision in section 439 that would permit the desk officer to require a deposit of some kind.

The Deputy Chairman: Honourable senators, we are delighted to have with us this afternoon the Honourable John Turner, the Minister of Justice and Attorney General of Canada, who has a busy schedule this week of constitutional talks with the provincial premiers in various parts of Canada.

We were able to obtain permission, Mr. Turner, to meet this afternoon while the Senate is sitting, and we are happy that you are here to deal with Bill C-218, which is commonly referred to as the bail reform bill. I think I can report to you that the bill has been well received. We are going to give you a free rein to deal with it as you see best.

The Honourable John N. Turner, Minister of Justice: Mr. Chairman and honourable senators, I want to thank you, first of all, for your courtesy in hearing me, and I offer my apologies for being late. I have just got out of the other place after the Question Period. I thank the Senate for its courtesy in suspending its rules to allow this hearing to be held this afternoon. I was in New Brunswick and Newfoundland yesterday, on behalf of the Prime Minister, seeing whether I can narrow the scope of those areas of potential agreement, and to isolate those areas of disagreement, for the forthcoming Constitutional Conference, so that the first ministers, when they meet in Victoria, will have an opportunity of dealing with issues capable of resolution. I am leaving tomorrow for British Columbia, the last of the ten provinces I am visiting for this purpose.

There is not much I can add to what Senator Prowse said when he moved the second reading of this bill in the upper house. I wrote and told him that it was as able a presentation of a piece of complicated legislation as I had read either in the House of Commons or the Senate, not only for his mastery of technical details—and this is a very difficult bill in that the Crimnal Code is not an easy piece of legislation—but also for his ability to seize the spirit of what the Government is attempting to achieve.

The bill is based in its major respects, as he pointed out, the report of the Committee on Corrections which was under the chairmanship of Mr. Justice Roger Ouimet. Mr. Arthur Martin, Q.C., of Toronto, was the vice-chairman of that committee. We introduced it first on June 8 of last year for the purpose of first reading only, and we let it sit the entire summer and most of the autumn in order to allow the law enforcement authorities of Canada, people who were involved with the criminal law, and those who, as citizens, took an interest in the criminal law, to make comments about it. I discussed it for half a day at the meeting of attorneys general which was held in Halifax last July. Those 10 gentlemen and myself spent a whole half-day going over the bill, and they had been properly prepared by their own department. The Canadian Bar Association, in Halifax again, in September at its annual meeting went through the bill thoroughly.

I appeared before the Canadian Association of Chiefs of Police on two occasions—at their annual convention in London, and with their executive which met with the Royal Canadian Mounted Police a month or so ago in Ottawa. As a matter of fact, I tabled before the committee of the other place, Mr. Chairman, a letter of support from the Canadian Association of Chiefs of Police, saying that they were satisfied now with the principles of the bill, particularly after the amendments that I introduced had been made.

We met the Ontario Police Association and the Montreal Brotherhood of Police. We received representations from the Quebec Police Commission, the Ontario Police Association, the Canadian Police Brotherhood, and the Provincial Association of Quebec Judges. The Criminal Law Section of the Conference of Commissioners on Uniformity of Legislation—that is to say, those ladies and gentlemen representing the federal and all provincial jurisdictions including the Deputy Attorney General of Canada and the Deputy Attorneys General of all the provinces, together with their commissions—met in

Prince Edward Island prior to the Canadian Bar Association meeting in Halifax, and went through the bill clause by clause.

What I am saying to you is that we felt that this bill, because of its sensitive nature and the fact that it is concerned with the first contact between the ordinary man and woman who runs afoul of the law at the arrest stage, and subsequently at the bail stage, and because it is as important as any piece of legislation in determining the attitudes of ordinary citizens to the criminal law, should be given the widest scrutiny possible.

Some amendments were made to the bill during last summer before it was re-introduced as Bill C-218 on January 21 of this year. Further amendments were made by the Standing Committee of Justice and Legal Affairs of the other place. That does not make it a perfect bill, but it does illustrate the fact that a number of minds are better than one, even the minds of Mr. Christie, the Deputy Attorney General, and Mr. Scollin, who had the major part of preparing this bill within the department. The minds that have been brought to bear on this bill have been impressive and we are grateful to them, and we are grateful to honourable senators for their observations in the Senate.

What we are trying to do is cut down the power of arrest; to place a reasonable obligation on the policeman on the beat and behind the desk, in cases where he can do so without jeopardizing proper law enforcement, to release or issue a summons or appearance notice, and to use the power of arrest only where necessary. I am talking about the minor and less serious offences. There is no doubt about the fact—and this was an amendment made in committee in the other place—that in the serious offences the justification for arrest is paramount.

We are trying to clarify the rules for the granting or withholding of bail; to make it clear that the burden of proof is on the Crown to establish why an accused should not go out on bail; and to set forth guidelines for justices of the peace, magistrates, provincial judges, and judges, so that they may have some guidance as to what the criteria are. The first criterion is—and this is the classic one out of the British common law—whether the accused will show up for trial. That is what bail is all about. The second criterion is, even if it is certain that the accused person will show up for trial whether there will be a risk to the public interest or the safety of the public, to the accused, or to the preservation of evidence, if he or she is let out on bail. The present law is very long on discretion, and very short on direction. We have set forth statutory guidelines in the bill, as Senator Prowse pointed out on second reading in the Senate.

The aims of the bill are quite simple: to avoid unnecessary arrest whether with or without warrant; to encourage the earliest possible pre-trial release on bail; if bail is not granted, to accelerate trial so that pre-trial detention is shortened as much as possible; and really to establish, in a practical way, the presumption of innocence, that the man or woman who is accused of a crime is considered by the law and by the procedures under the law to be innocent until adjudged by a court of his or her own peers to be guilty.

We have tried to equalize also the application of the law as it affects those with wealth and those without wealth; those with influence and those without influence. We have tried to eliminate, as far as possible, the consideration of cash bail. If a person can establish community identity—that he has lived in a place, that he has a job, that he has a family, that he has responsibilities, and that there is every likelihood he is going to face trial—then whether or not he is able to put up cash bail is irrelevant. In certain cases, of course, particularly in motor offences where a person is driving through a community and involved in some sort of criminal charge, it might be impossible to establish identity with the community. In such a case we have provided that where the jurisdiction is more than 100 miles from his residence, and cash bail is the only way by which he can show that he will come back for his trial, cash bail may be placed as a last resort.

I have one final observation to make. This bill, if it achieves the approval of the Senate and thereby of Parliament, will not work unless the law enforcement officers of this country—the police, the judges and magistrates, and justices of the peace—want to make it work. The spirit contained in this bill must be adopted by the police and the magistrates.

I and my parliamentary secretary, Albert Béchard, the Member of Parliament for Bonaventure, who pilots my bills with me through the other place, spent a great deal of time consulting with the police as to assure them that the bill would work, that they could technically make it work, and also to convince them that although it restricted their power of arrest, although it placed certain additional burdens upon them, it was in their interest that these burdens be placed upon them, because if they could shorten and narrow the areas of abrasive contact with the public and cut down abuse of the power of arrest, if they could accelerate the use of bail, then the relationship between the police forces of this country and the ordinary Canadian citizen would improve a good deal. It will allow them to deploy their forces far better. Instead of a policeman having to bring somebody to the desk and book him for a relatively minor offence, he could issue a summons or appearance notice. This, in terms of time, will allow for a better deployment of police-officers in the police cars and on the beat. I believe the police forces of this country are convinced of that. We have made it clear by the amendments that they are not to be criminally held to account if they should make an honest error in judgment. They are not even civilly to be held for account if they make an honest error in judgment. The burden of proof in a civil case is on the person who claims the policeman did not properly exercise his judgment. We have clarified all that area that I think the police quite legitimately, were concerned about when they first saw the bill.

I have asked the provincial attorneys general to issue and improve their police manuals—to reduce the words of this bill to even simpler language—and to improve their manuals for magistrates and justices of the peace. I have asked the Royal Canadian Mounted Police, who are drafting a manual for the federal police, to put their

drafts in the possession of the Quebec and Ontario provincial and the metropolitan police forces. This is not to bind them as to what a manual should say, but to guide them in the necessary police education that is fundamental to the proper operation of this bill.

I think that is all I want to say, Mr. Chairman, because Senator Prowse made my case for me better than I can.

Senator Willis: Mr. Chairman, I spoke for the Opposition on this bill in the Senate. I commended the minister for this step in the right direction. I think it is a good bill and, as far as my party is concerned, we are in favour of it in its present form.

I take this opportunity to move that the bill be reported without any further amendment, and without going through it section by section.

Senator Lang: I have not followed this bill closely, I am afraid. Does this bill in any way affect the time lapse between an arrest without warrant and an appearance before a J.P.?

Hon. Mr. Turner: It accelerates the appearance. There has to be an appearance not only within 24 hours, but without unreasonable delay. That means the burden is on the police not to take advantage of the 24-hour maximum but to get an arrested person before a Justice of the Peace without unreasonable delay.

Senator Prowse: It shortens the period.

Hon. Mr. Turner: Yes, it accelerates the appearance.

Senator Lang: I am not certain what the present provisions are, but that is where you run into a very common experience with a client.

Hon. Mr. Turner: In some jurisdictions police tend to rely on the 24 hours. They now have the burden of bringing an accused person before the desk of a Justice of the Peace without unreasonable delay.

Senator Prowse: And within 24 hours at the maximum.

Hon. Mr. Turner: Yes.

Senator Lang: I am just wondering how it stands now. I believe there are no time limits set.

Mr. Scollin: Yes, Senator, there are. The present section 438 (2)(a) of the Code provides that "Where a justice is available within a period of twenty-four hours after the person has been delivered to or has been arrested by the peace officer, the person shall be taken before a justice before the expiration of that period." The provision in this bill is that he shall be taken before the justice without unreasonable delay and, in any event, within 24 hours. So, 24 hours is not a standard holding period now; it is a maximum.

Senator Lang: Those are cases where you experience extreme embarrassment, particularly when you get calls in the night from your friends saying they are in the tank.

Senator Haig: And, usually at 3 o'clock in the morning.

The Deputy Chairman: Honourable senators, if there are no further questions of the minister, we have a motion that we report the bill without amendment. Is it agreed.

Hon. Senators: Agreed.

The Deputy Chairman: Then Bill C-218 will be reported to the Senate without amendment?

On behalf of the Legal and Constitutional Affairs Committee, Mr. Turner, I should like to thank you very much for taking time out to appear here this afternoon. You always come well prepared for discussion of any bill relating to your department, and today you have been very convincing in all the arguments that have been put forward. Your presentation was excellent.

We commend also Senator Prowse for the presentation he made in the Senate, and Senator Willis for his speech on behalf of the Opposition in which he pledged the full support of his party to the passing of this bill.

Hon. Mr. Turner: Mr. Chairman, I thank you and your committee for your usual courteous hearing. I always enjoy coming here. I want to say to Senator Willis that I did not respond to his speech in the same terms that I acknowledged Senator Prowse's speech because I thought it might be interpreted by his colleagues as my having succumbed to his flattery of me in the Upper House. I appreciate what he said very much.

The Deputy Chairman: It is all right for me to say it.

I should also like to thank Mr. Scollin, the Director of the Criminal Law Section of the Department of Justice, for appearing this afternoon, and also, the Minister's parliamentary secretary, Mr. Béchard.

We look forward to seeing you, Mr. Minister, on a future occasion when we will be discussing the statutory instruments bill.

Senator Prowse: Mr. Chairman, to save myself some embarrassment I point out that if my presentation was at all useful, it was because of the excellent briefing I received from Mr. Scollin.

The Deputy Chairman: Thank you.

The committee adjourned.

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

Available from Information Canada, Ottawa, Canada.

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 7

THURSDAY, MAY 6, 1971

Complete Proceedings on the following Bills:

Bill S-19 : "An Act respecting the Royal Victoria Hospital"

Bill C-182: "An Act to provide for the examination, publication, and scrutiny of regulations and other statutory instruments"

First Proceedings on the Motion respecting the *"Criminal Records Act"*

REPORTS OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

23272—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

Argue	Hayden
Bélisle	Hollett
Burchill	Lang
Casgrain	Langlois
Choquette	Macdonald (*Cape Breton*)
Connolly (*Ottawa West*)	*Martin
Cook	McGrand
Croll	Méthot
Eudes	Petten
Everett	Prowse
Fergusson	Roebuck
*Flynn	Urquhart
Gouin	Walker
Grosart	White
Haig	Willis
Hastings	

*Ex officio member

(Quorum 7)

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, Thursday, April 1, 1971:

The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Flynn, P.C., 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-182, intituled: "An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments".

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 Legal and Constitutional Affairs.

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

Extract from the Minutes of the Proceedings of the Senate, Wednesday, April 28, 1971:

The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Hastings resumed the debate on the motion of the Honourable Senator Hastings, seconded by the Honourable Senator Prowse:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon the operation and administration of the *Criminal Records Act*, chapter 40 of the statutes of 1969-70, and in particular upon the operation and administration of subsection (2) of section 4 thereof.

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

Extract from the Minutes of the Proceedings of the Senate, Thursday, April 29, 1971:

Pursuant to the Order of the Day, the Honourable Senator Beaubien moved, seconded by the Honourable Senator Willis, that the Bill S-19, intituled: "An Act respecting the Royal Victoria Hospital", 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 Beaubien moved, seconded by the Honourable Senator Willis, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

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

Robert Fortier,
Clerk of the Senate.

23272—1½

Minutes of Proceedings

Thursday, May 6, 1971.
(7)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 3:00 p.m.

Present: The Honourable Senators Urquhart (*Deputy Chairman*), Belisle, Burchill, Choquette, Cook, Fergusson, Grosart, Haig, Hastings, Lang, Martin, Macdonald (*Cape Breton*), McGrand, and Prowse—(14).

The following Senators, not members of the Committee, were also present: The Honourable Senators Beaubien, Benidickson, Laird and Quart.

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

On motion of the Honourable Senator Choquette it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

The Committee proceeded to the consideration of Bill S-19, intituled: "An Act respecting the Royal Victoria Hospital".

The following witnesses were heard in explanation of the Bill:

The Honourable Senator L. P. Beaubien

Mr. D. R. McMaster, Q.C., Counsel for the Royal Victoria Hospital.

The following witness was also present but was not heard:

Mr. D. J. MacDonald, Executive Director of the Royal Victoria Hospital.

On Motion of the Honourable Senator Macdonald it was Resolved to report the said Bill without amendment.

The Committee then proceeded to the consideration of Bill C-182, intituled: "An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments".

The following witnesses were heard in explanation of the Bill:

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

Mr. P.O Beseau, Legislation Section, Department of Justice.

The following witness was also present but was not heard:

Mr. Albert Béchard, M.P., Parliamentary Secretary to the Minister of Justice.

On Motion of the Honourable Senator Belisle it was Resolved to report the said Bill without amendment.

The Committee then proceeded to the consideration of the following Motion by the Senate:

"That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon the operation and administration of the *Criminal Records Act,* chapter 40 of the statutes of 1969-70, and in particular upon the operation and administration of subsection (2) of section 4 thereof."

On Motion of the Honourable Senator Prowse it was Resolved to appoint a Subcommittee of five senators to consider the Motion from the Senate and which will report its recommendations to the Committee in due course.

The following Senators were named on the Subcommittee: The Honourable Senators Belisle, Choquette, Hastings, McGrand and Prowse.

It was Resolved that three senators will constitute a quorum for meetings of the Subcommittee.

It was also Resolved that the members of the Subcommittee elect one of the members as Chairman of the Subcommittee.

At 4:20 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Committee.

Reports of the Committee

Thursday, May 6, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill S-19, intituled: "An Act respecting the Royal Victoria Hospital", has in obedience to the order of reference of April 29, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Earl W. Urquhart,
Deputy Chairman.

Thursday, May 6, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred the Bill C-182, intituled: "An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments", has in obedience to the order of reference of April 1, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

Earl W. Urquhart,
Deputy Chairman.

Minutes of Proceedings

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Thursday, May 6, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-19, respecting the Royal Victoria Hospital, and Bill C-182, to provide for the examination, publication and scrutiny of regulations and other statutory instruments, met this day at 3.00 p.m. to give consideration to the bills.

Senator Earl W. Urquhart (*Deputy Chairman*) in the Chair.

The Deputy Chairman: Honourable senators, we have a quorum so we shall proceed to the work before us this afternoon.

Our first item of consideration is Bill S-19, respecting the Royal Victoria Hospital. The sponsor of the bill, Senator Beaubien, is sitting on my right. He has pointed out that the main purpose of this bill is to take the Royal Victoria Hospital within the provisions of the Quebec Hospitals Act. We have with us also this afternoon Mr. McMaster of the legal firm of McMaster, Meighen, Minnion, Patch and Cordeau, who has been the solicitor for the Royal Victoria Hospital for many, many years, and Mr. MacDonald, the Executive Director of the Royal Victoria Hospital. These gentlemen will be only too happy to explain any provisions of the bill which require further explanation.

I should point out before we begin our discussion of this bill that I have a letter from Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel advising me, as Chairman of this committee, of the following:

In my opinion, Bill S-19, is in proper legal form.

I shall now ask Mr. McMaster or Mr. MacDonald to make a general statement concerning the bill.

Mr. D. R. McMaster, Q.C., Counsel, Royal Victoria Hospital: The charter of the Royal Victoria Hospital has been in effect since 1887 without any changes whatsoever. There are certain restrictions in that charter which make it very difficult for the hospital to operate today under the provisions of the Quebec Hospitals Act. We are asking for these changes so that we can comply with those provisions.

There is also provision in the act which requires us to approach all the heirs of the original benefactors in respect of any change. Today that is out of the question.

Senator Prowse: I am sorry, but I did not hear you.

Mr. McMaster: The original benefactors of the hospital, Baron Mount Stephen and Lord Strathcona who gave $1 million, provided that the act cannot be changed unless all their descendents agree and specifically request it, and today that is impractical.

The Deputy Chairman: That is the main provision now, is it?

Mr. McMaster: That is right.

Senator Prowse: And this amendment sets it up in a practical way on the basis of today's considerations?

Senator Beaubien: They have to conform with the Quebec Hospitals Act, which they cannot do unless Parliament amends their charter. As the charter now stands it does not conform with the Quebec Hospitals Act.

Senator Choquette: What are the changes in the Quebec Hospitals Act today that cause you to come to Parliament for amendment of your act of incorporation. What are the changes that have been made so suddenly—it appears to be that way—in the Quebec Hospitals Act that require your coming here?

Senator Beaubien: That act was passed in 1964, Senator Choquette. There have been no changes in it. The hospital has not been able to conform in many ways, and they are coming here so that they can.

Mr. McMaster: In accordance with the Quebec Hospitals Act we have filed our by-laws, and they have refused on the basis that they do not comply.

Senator Prowse: Your non-compliance would be in the fact that you have the right to establish other hospitals outside their jurisdiction?

Mr. McMaster: That is just one minor point, sir.

Senator Prowse: It is the one that I see here.

Mr. McMaster: Yes, that is the very first article. We have the right to establish branches, according to the federal legislation, but the Quebec Hospitals Act contemplates but one hospital.

The Deputy Chairman: Are there any further questions, honourable senators?

Senator Benidickson: How significant is clause 2? The purpose of the amendment is to remove the hospital's power to establish branches outside Quebec.

Mr. McMaster: The answer to that question, sir, is that I do not think the Quebec Hospitals Act could have anything to do with hospitals outside the province, but we have the right to establish branches.

The Deputy Chairman: Is it agreed that I report the bill without amendment.

Hon. Senators: Agreed.

The Deputy Chairman: On behalf of the committee I thank Mr. McMaster and Mr. MacDonald for appearing on behalf of the Royal Victoria Hospital, and also Senator Beaubien for presenting the bill and appearing with us this afternoon.

The Deputy Chairman: Honourable senators, our next item of consideration is Bill C-182, known as the Statutory Instruments Bill. You will recall that we had a lengthy and very instructive debate on statutory instruments in the Senate, and we also had the privilege of having the Honourable John Turner, Minister of Justice, appearing before this committee with respect to statutory instruments on Wednesday, June 17, 1970. At that time he dealt very fully with the whole question of statutory instruments, delegated powers, regulations and so forth. He pointed out at that time that legislation would be introduced to replace and repeal the Regulations Act.

We now have Bill C-182 before us and I shall call on the Honourable John Turner, Minister of Justice, to make a general statement on the bill, after which honourable senators may put to him their questions.

The Honourable John N. Turner, Minister of Justice: Mr. Chairman and honourable senators, I do not feel it is necessary to make too long an opening statement before this committee. Senator Martin has represented the Government in the upper house, and indeed this committee has taken a special interest in the review of delegated legislation and the review of what are called in a wide global way, statutory instruments.

Mr. Chairman, you have refreshed my memory, because I recall appearing before this committee and participating in a general discussion of what methods might be used for a better review of regulations, statutory instruments, which is a wider term than "regulations" as defined in the bill. We discussed how Parliament could review legislative powers which it delegates to administrative boards, tribunals, ministers and the Governor in Council and so on, because the legislative function of Parliament is being delegated more and more, and while the legislation itself is subject to the review of Parliament over the past generation we, the legislators, have lost a good deal of control over delegated legislation. No only have we lost control, but we do not really know what is happening. It is not only delegated legislation which is beyond Parliamentary review, but a lot of it is anonymous, a lot of it is unpublished, and a lot of it is not available for inspection.

The primary purpose of this bill is to provide a more open government. It is not a perfect piece of legislation by any means, but I think it does provide a significant step forward. It is based primarily on the Third Report of the Special Committee on Statutory Instruments of the other place made under the chairmanship of the honourable member for Windsor-Walkerville, Mr. Mark MacGuigan. I am sure honourable members are familiar with that report and indeed, if I recall correctly, we discussed this the last time.

Senator Benidickson: When you say "we", Mr. Minister, do you include your colleagues in the Cabinet? These matters have to be ratified, in large measure, by them.

Hon. Mr. Turner: No, when I used the term "we" I meant you and I, senator, and I was referring to the last time we—I, as your witness, and you, as a member—were discussing the problem of statutory instruments, and reviewing this committee report. Since that date the Government has ratified the report, in the sense that we have brought forth legislation that we hope implements it.

I do not intend to go through those recommendations one by one. I did that in the House of Commons, and if members of the committee are interested they can see a list of the recommendations of the committee and my appraisal of how the Government implemented them or did not implement them. Some of them could not be implemented in practical terms, and some of them will have to be implemented by the House of Commons or by the Senate, or both, when a scrutiny committee is set up.

I submit that this bill will provide a more open Government in a number of ways. First of all, subject to narrowly defined exemptions, all regulations will be published in the *Canada Gazette*. This will be enforced by means of a mandatory registration system whereby a regulation will not come into force until it is registered. That is not the case now.

Second, rules, orders and regulations governing the practice or procedure of federal judicial or quasi-judicial bodies will be subject to the requirements of the new legislation.

Third, members of the public will be given a statutory right to inspect and obtain copies of statutory instruments subject to certain exemptions to be provided under the bill. At the present time, the public of Canada have no right to see or obtain a copy of any statutory instrument.

Fourth, a scrutiny committee of Parliament will be given the right to examine virtually all statutory instruments that are made. By providing for a scrutiny committee of Parliament the Government has left the position open. We have not spelled out in the legislation what form that scrutiny committee shall take. We have not specified whether it should be a committee of the House of Commons or the Senate, or a joint committee of both houses. I dislike putting into legislation any impediment of the full prerogative or privilege of either the House of Commons or the Senate. I think the terms of reference of those committees, as they appear under the umbrella of the legislation, should be left to the respective houses. I think also it will be up to the Senate and the House of Commons to decide in consultation between them whether it will be more efficacious to have a separate committee of the Senate or a separate committee of the House of Commons, or a joint committee. I would anticipate, from what I know of members of this committee and their interest in the subject, Mr. Chairman, that the Senate in any event will want to be involved. Frankly, I think a

committee of the Senate would be an admirable vehicle for the type of work envisaged for a review committee.

Senator Grosart: Mr. Chairman, may I ask the minister a question on that particular point? It seems to me that under the bill the powers of any such committee are restricted to reviewing. Mr. Minister, how far could such a committee set up by either house, or a joint committee, go beyond the powers that the bill would give it which, as I understand it, would be limited to reviewing. As I understand the bill, there is not even the power to report. Not having the power to report, would such a committee be entitled to say that it is going to report and, if so, to whom?

Hon. Mr. Turner: The committee can be given any power that the respective house wants to give it. All the bill says is that there will be a statutory review committee to which all regulations will be referred. The type of committee and the powers that it will be given will depend upon the rules as they are adjusted of either the House of Commons or the Senate, or both. There will be the power to review and the power to report. There are powers which are available, if a house should so wish, to provide that reports would be made on motions. That is left completely open. In other words, we have in no way restricted the latitude of either the House of Commons or the Senate to deal with this. That is for Parliament, and the two respective Houses of Parliament, to decide.

I take your point, senator. The committee has primarily the power to review. How effective that review is depends on what powers each house gives to it. Obviously, the initiative of promulgating the regulations lies with the Executive somewhere. It is obvious that the committee itself will not have the power to redraft regulations. It might suggest a redrafting, but its power will lie primarily in whatever inherent power is given to it by the respective house.

Senator Grosart: Is there not a degree of window dressing in this, because that power already exists. Neither house needs this Bill to exercise that power now. You are giving no additional powers. It is there now.

Hon. Mr. Turner: Senator, with the greatest respect, we are. At the moment there is no way by which either the committee or the House of Commons can be seized of the regulations under the Regulations Act. This makes it mandatory for a committee or two committees, or a joint committee, to be seized of the regulations. Once they are seized of those regulations or, more properly, statutory instruments, then the full power of the House of Commons or the Senate is available.

Senator Grosart: Would you not agree that either house could appropriate those powers at any time? The House of Commons can set up a committee now to do this very thing. What is there to stop it?

Hon. Mr. Turner: There is nothing within the Regulations Act to ensure that those regulations would be submitted to your committee.

Senator Grosart: No, I am not speaking about that. There is no question that other sections of the bill do things to these regulations. I am speaking only of the very essential part of it, and that is the review. It is true that under the bill the regulations, if you like, are more open and available. I am suggesting to you that there is nothing in this bill that gives the review committee of either house, or a joint committee, one iota of power that is not available to it now if it wants to exercise it.

Hon. Mr. Turner: You are right in the sense that the power of that committee is not changed, because Parliament will decide what powers will be. The essential change is fundamental. At the moment there is no way by which a committee of the House of Commons or a committee of the Senate could be seized of the regulations.

Senator Grosart: Parliament is supreme. Parliament can seize itself of anything it wishes.

Hon. Mr. Turner: You cannot hit what you cannot see, senator. At the moment, you do not know what the regulations are and that is part of the problem. We are now bringing this out into the open.

Senator Grosart: We are not really too far apart. I am merely saying that other clauses do certain things. I am now asking what additional powers have you given the special review committee, and my suggestion is that you have given it none. Let me go a step beyond that and ask you as Minister of Justice—I am not really asking you to interpret the bill, but to explain it—if such a committee decided to go beyond the narrow limit of the power to review, would it not then be taking unto itself a power not under this bill? Why is there this limitation in the word "review". It is an ordinary word, and it has a very narrow meaning. If someone says that I can review something, it does not mean that I can do anything else but review it, which means to go over it again in my mind, or re-look at it.

Hon. Mr. Turner: Senator, that is a very wide word, when you take two stages of what a committee is going to be able to achieve here. First, there is the enabling power in the statute itself. You brought that up in your speech in the Senate. The enabling power is, of course, subject to the scrutiny of Parliament because Parliament has to approve that enabling power in the statute itself. I want to suggest to you that I think in the past Parliament has overlooked the breadth of enabling powers.

Senator Grosart: I agree.

Hon. Mr. Turner: Part of the recommendations of the MacGuigan Report, which the President of the Privy Council and I will implement, if, as and when this bill receives your approval, is to set forth some criteria for the drafting of bills which will allow the Department of Justice to recommend, with cabinet backing and with the moral support of this committee and the legislative support of this bill, the setting of criteria underwhich enabling clauses will have to qualify. That is the first stage.

Senator Grosart: I was going to ask you about those criteria as well. On whom will they be binding? Will you include that in your statement?

Hon. Mr. Turner: On whom will the criteria be binding? They will be cabinet directives presumably binding on the Government, but they will give me as Minister of Justice a little more leverage over my colleagues than I now have in the width and breadth of those enabling powers.

Senator Grosart: Those are dangerous words in this particular climate. You are speaking of more leverage over your colleagues in the cabinet.

Hon. Mr. Turner: I will exercise that leverage to restrain the breadth of enabling powers, thereby restraining the breadth of ministerial discretion, or administrative discretion, under those powers. I think thay you and I are at one there, senator. You want me to have that power.

Senator Grosart: I am quite sure you will, Mr. Minister. Not only am I quite sure you will but I am also quite sure you will stay in the cabinet.

Hon. Mr. Turner: I want to take you to the second stage, once we have the statute—and you have had a crack at the statute because you follow these things very carefully when they come through the Senate. How wide is that enabling power? All right; we get the regulations. To begin with the regulations will be subject to inspection, registration and publication, except for the exemptions, and you will want to deal with that later, perhaps. Then they will be subject to referral.

Now, what does review mean? It means that, against the criteria in the bill and the criteria established by the committee and your own cirteria that you set forth in your earlier deliberations when you looked at the Manitoba situation and the British situation, the committee will measure those regulations which it examines. And if the committee feels that those cir.eria have not been met, it will draw that to the attention of the minister concerned, and will obviously have the power to ask the minister or the officials of the department concerned to attend, and if satisfaction is not given, if the regulation is not amended, the committee reports to Parliament and the report can be debated. The issue of the report can become a matter of confidence by way of a motion. I do not have to suggest to senators how wide the privileges of this house and of the House of Commons are to bring a matter before the executive.

So the full plenary powers of the legislature will be available within that term "review". That is not window dressing. That is a legislative counterbalance against executive power.

Senator Grosart: I am delighted to have your answer, which I take to be, Mr. Minister, that the word "review" is to be interpreted in its widest sense and the omission of such words as "and report" is not intended to be restrictive in any way.

Hon. Mr. Turner: No, it was not intended to be restrictive because we did not want to restrict the privileges of either house.

Senator Prowse: Would it help to have the words "and report" in there?

Hon. Mr. Turner: No. I think it would bind your hands.

Senator Prowse: The way it is now we can take anything we do not like and bring it to the public attention and give it all the publicity available to either of the houses of Parliament.

Hon. Mr. Turner: Which is the best weapon you have, aside from the confidence motion.

But with respect to publicity, Senator Grosart, you are not one to suggest to me that publicity is not a good weapon.

Senator Grosart: I will merely suggest, Mr. Minister, that it is not always as effective as the publicists would wish it to be.

The Deputy Chairman: If there are no further questions on that point, perhaps we could proceed.

Hon. Mr. Turner: I will go on to No. 5. The powers given to the Governor in Council to exempt regulations and other statutory instruments from the appl.cation of any provisions of the bill are very narrowly defined. At the present time there is no restriction placed on the Governor in Council in the exercise of his power to exempt regulations from the application of the Regulations Act. It is open to the Government and it is open to the cabinet today to exempt any regulations from the provisions of the present Regulations Act in terms of referral, publication in the *Canada Gazette*, or what have you.

Finally, Members of Parliament—and this may be a mixed blessing—will receive a copy of every regulation that is published in the *Canada Gazette*. If ever there was a reason for extra office space that is going to be it.

Mr. Chairman, I do not really have anything to say by way of further statement. It is obvious from the way the bill was debated in the Senate on all sides that the Senate has a great interest in what we are trying to achieve here. As you have pointed out, there was considerable debate prior to the introduction of the bill.

Senator Grosart: One of the main differences between the bill and the recommendations of the MacGuigan committee is the extension of the limitations on the matters that are exempt.

The MacGuigan committee recommended that the only exempt or secret area, if you like, should be national security. The bill extended that to include federal-provincial matters and international matters.

We have had a pretty good explanation as to why that was deemed necessary, but I would ask you, Mr. Minister, if that is not opening the door pretty wide, particularly in view of the fact that it does not seem clear in the bill just who will decide when national security, international affairs and federal-provincial matters are criteria that should be applied.

The Deputy Chairman: Under clause 27 of the bill, the Governor in Council will determine that.

Senator Grosart: It looks to me as though this gives discretion to departments to say, "Oh, this comes under

federal-provincial affairs and therefore the act does not apply to it."

Hon. Mr. Turner: Mr. Chairman, in answer to Senator Grosart's question, he is perfectly right that the exemptions, under clause 27(d) of the bill, are international relations, national defence security, or federal-provincial relations. There are certain other exemptions where the result of publication would result in injustice or undue hardship to any person or body affected thereby, or where the number was so overwhelming that it would be a burdensome expense on the Crown.

Let us deal with the latter. We found in reviewing this bill in Cabinet that there were certain types of regulations or statutory instruments that related to individuals—a parole is a statutory instrument as is a pardon or a remission of a criminal record—and obviously it is in the interests of the person concerned that these should be private documents insofar as it is possible to have them remain private because they involve individual rights. The knowledge of an exemption from a criminal record, or a pardon, or the knowledge that an individual was on parole would be prejudicial to his ability to rehabilitate himself in society. So those are going to be very narrowly construed and very narrowly restrained.

There are some types of regulations that are so bulky that they have to be exempted. There are 2,500 Orders of the Day issued each week by the Department of National Defence alone. There is nothing highly secret about most of them, but they are much too bulky to deal with. So we get down to the nitty-gritty of international relations, national defence and security, or federal-provincial relations. I think the MacGuigan committee recommended national security only. There is not much difference between national security and defence; it is defined as national defence and security and it is going to be interpreted that restrictively.

So we are left with international relations and federal-provincial relations. We feel that the government has to have an exempting power which it will not invariably exercise, but which it will have the privilege of exercising to exempt documents from inspection and publication where the revelation of those documents might well prejudice international relations or Canada's foreign policy. In terms of federal-provincial relations, particularly in the case of documents that might relate to current negotiations, or that might involve issues that have to be resolved by the agreement of all provinces or where one would want to wait until the matter was successfully or unsuccessfully concluded, the government felt it should have that exempting power.

I want to say at this stage that all the regulations made under the Statutory Instruments bill will be referred to whatever form of scrutiny committee is established and the criteria for exemptions have to be set forth in the regulations under this bill, and those criteria for exemptions will be a public document and will be reviewable by the scrutiny committee, and it will be open to the Senate committee or to the joint committee to review the criteria for exemptions within the meaning of this bill, and to take issue with them. If the members of the scrutiny committee are not satisfied with the particular exemption, they may require the attendance of witnesses directly concerned and ask for, and obtain, it is to be hoped, a satisfactory explanation.

At the moment we anticipate that the Statutory Instrument regulations, the regulations promulgated pursuant to this bill, will provide no exemptions for regulations dealing with federal-provincial relations. And in the area of international relations, the only regulations proposed to be exempted at the moment are those relating to international security.

Senator Benidickson: How do you relate that to current negotiations, which I think was your term?

Hon. Mr. Turner: During the current negotiations we have not had to promulgate a statutory instrument. In the current constitutional negotiations there would not be any documents that would come under this bill in any event.

So, honourable senators, in summary I want to say to you that the exemption regulations would have to be published pursuant to this bill and would have to be sent to the scrutiny committee, and the general criteria for exemptions can be challenged by this committee.

Senator Grosart: Mr. Minister, it is all very well to speak about the criteria, which is a generic term, but this committee, as I understand it, will now know that a specific document is exempt. Let me give you an example, and a very interesting one, of what I mean. In the negotiations leading to the recognition of the People's Republic of China—and here let me make it clear that I am not taking sides on this matter—and the question of what obligation we might have undertaken or refused to undertake in respect of former commitments to the government in Taiwan, I have not been able to find out what has happened. I have asked a question in the Senate but I have not yet had a reply although, no doubt, one will be forthcoming. But there is a reference in an official publication by the Department of External Affairs to an undertaking given to the representatives of the People's Republic of China that we would sever all official diplomatic relations with Taiwan. Now, is it a document? Is it a secret document? I would like to know but I have not been able to find out. Now, let us say that there had not been what I think was a slip of somebody's pen in letting us know that this undertaking had been given, how would we know that such a document existed? We are talking about delegated legislative powers, not about the papers that go back and forth, the position papers and so on. I think perhaps in exempting this whole area of international affairs, we forget that we are dealing with delegated legislative power. Now if the government assumes by Order in Council a legislative authority in respect to an international obligation, then I suggest we should know about it, and the government should not have the power to exempt that document from public scrutiny or the scrutiny of this committee.

The same thing applies in federal-provincial affairs. I do not think we need any secret legislative instruments or statutory instruments. Again I am not talking about

papers that are necessarily confidential, but rather respecting what this bill is about—delegated legislation. Why should the government take unto itself the authority to keep statutory instruments in those two fields exempt from public scrutiny, contrary to the recommendation of the MacGuigan Commission which looked at this very carefully? My own view is that the MacGuigan Commission was right in saying that you should only limit this to national security which would include defence. That is my question, and remember I am trying to make this a better bill.

Hon. Mr. Turner: I know that, and your arguments are valid arguments which, if I were sitting in your position, I too would make them, not as well as you did, but I would make them. Now when you talk about legislative authority—and you are technically right, if I may say so, in using the term legislative authority—I think we have to distinguish in dealing with international relations and even in dealing with federal-provincial relations between legislative authority properly defined, either by way of a bill or an act of Parliament, and a regulation or statutory instrument passed pursuant to an act of Parliament, and that type of authority which derives from the prerogative of the Crown, since the prerogative of the Crown, after all, still applies in international treaties. The Government of Canada can conclude a treaty—the Columbia River Treaty, for instance—with any foreign power on its prerogative with no obligation for ratification by Parliament. It usually submits the treaty to Parliament by way of courtesy, and it can be raised as a matter of confidence by Parliament, but the treaty strictly speaking could not be amended by Parliament. This is the prerogative.

Senator Benidickson: What about the point of money?

Hon. Mr. Turner: It is only when legislation is necessary, either to substantiate a drain on the *fiscus* as a result of that treaty, or to construct works in respect of that treaty, or when provincial co-operation is needed within areas of provincial jurisdiction, that you may need provincial legislation or federal legislation as the case may be. Aside from that, international relations is primarily a matter traditionally of prerogative, and Parliament's role is not to impose its will on the executive with regard to the negotiation of the treaty or the drafting of the treaty, but is limited under the general matter of confidence, as to whether the treaty is or is not a good thing; and governments have been defeated on that.

We are speaking here of the prerogative power, which is a diminishing power because statutes from time to time are limiting the scope of the prerogative in international affairs and other matters.

Federal-provincial relations, except in so far as they may fall within the terms of the British North America Act, also fall partially within the prerogative power. There is always a weakness in any exempting procedure. Exemptions on matters of security are valid only if from time to time what is being exempted is unknown. That is the risk, and there is no way I can answer you. It is one of those occasions when the legislature has to assume good faith in the executive. You may consider from time to time that it is an unjustifiable faith, but it is there nevertheless.

Senator Grosart: The reason that I asked the question was because . . .

Hon. Mr. Turner: I cannot give you a complete answer.

Senator Grosart: Let me take the matter of prerogative a little further. It is true that legally—perhaps not under the developing conventions of the constitution any more—the prerogative can be exercised in relation to the actual signing of an international treaty. What concerns me is that there could be a secret treaty, and under the prerogative there is no way in the world to stop it. That has already caused enough trouble in the world without inviting any more. There could be orders in council or statutory instruments issued to give effect to the exercise of the prerogative, and we would know nothing about it.

Hon. Mr. Turner: It has been pointed out to me that if the treaty were not ratified or consolidated by act of Parliament, because of legislative approval being necessary, the order in council would not be a statutory instrument within the definition of the bill, anyway.

Senator Grosart: But it would be an order in council?

Hon. Mr Turner: Yes.

Senator Grosart: Then are you suggesting that any such order in council would not come under the bill, that the Government would not even have to consider whether this bill in any way applied to an order in council—which was a statutory instrument, having legislative effect, affecting Canadians—that it was completely exempt by this bill?

Hon. Mr. Turner: You are using the term "legislative effect" in an ambiguous way. If it had legislative effect, and affected Canadians, it would have to be implemented by legislation.

Senator Grosart: No. There are hundreds of orders in council not implemented by legislation.

Hon. Mr. Turner: A treaty does not bind the lives of Canadians unless there is some legislative . . .

Senator Cook: But there has to be legislative authority in order to make an order in council, does there not?

Senator Grosart: No.

Senator Cook: Under what authority are they made?

Senator Grosart: Under the prerogative. Under the Crown's prerogative a treaty can be implemented by order in council.

Senator Cook: I thought that an order in council had to be made pursuant to a statute.

Senator Grosart: No, it does not.

Senator Prowse: Under section 27 we are setting out where the Government or the Cabinet undertakes.

Senator Cook: But the Government has no power unless it is a statutory power.

Hon. Mr. Turner: I am trying to suggest the difference between prerogative and legislative power. Senator Benidickson pointed out that if any treaty is to have legislative effect, within your meaning of the term, then there must be legislation to justify it. If there is legislation to justify it, it becomes a public matter, and you then make an order in council, and only then.

Senator Prowse: Under section 27 you are going to spell out the basis on which you can operate without submitting for examination; is that correct?

Hon Mr. Turner: That is correct.

Senator Prowse: The moment that anybody finds out that something has been done which they think is a breach of that, then we have all the procedures of our committees and everything else, the question period in the house, and the votes, in order to bring it to the attention of the public, and take an appeal to them. Is that so?

Hon. Mr. Turner: That is so.

Senator Grosart: I hope the minister will examine this interesting proposition, that every order in council must have statutory authority. It is an interesting suggestion, but I suggest to the minister that there is not an iota of validity in the statement. Let us examine what is an order in council. An order in council is a decision of the Cabinet expressed in a statutory instrument. I suggest there is nothing in our constitutinal law that necessarily relates an executive act of the council to a statute.

Senator Prowse: Until section 27.

Senator Cook: The council has no authority at all unless it is pursuant to a statute.

Senator Prowse: Section 27 provides some limitations on that.

Hon. Mr. Turner: I suggest that when I use the word "criteria" I am not going far enough. The statutory instrument regulations, pursuant to this bill, will set forth not the criteria for these exemptions but the types of instruments that will be exempted. In other words, it will be even more precisely set out for the benefit of the scrutiny committee.

Senator Prowse: It will set out the basis on which exemptions can be justified; is that correct?

Hon. Mr. Turner: That is correct.

Senator Grosart: Then I have a good deal of sympathy for the draftsman to whom you give the job. He has a tough task if he has to describe every kind of instrument on which the Government will impose this self-discipline.

Hon. Mr. Turner: He is up to the job, senator. As a matter of fact, as a result of this bill being introduced and the Government's accepting the policy of the Senate and of the MacGuigan committee, Mr. Beseau, who was for two years in the Privy Council Office representing the Department of Justice, is now back in the Legislation Section of the department. He has been replaced by three or four people—first, because we believe that Mr. Beseau is worth three or four people, and, secondly, because the amount of verification necessary as a result of this bill gives the Department of Justice four times as much scrutiny authority, and I believe is giving the Senate and the House of Commons almost limitless authority over these regulations.

Senator Grosart: We may be holding you to that word "limitless" in due course.

Hon. Mr. Turner: I said almost limitless.

Senator Grosart: Mr. Minister, the definition of "statutory instrument" in clause 2 (1)(d) seems to be very wide. It includes such things as tariff of costs or fees, commissions, warrants, proclamations, by-laws and resolutions. This is one case where it seems to me that the drafting goes a little far, for example in tariff of costs or fees. I parked my car in a garage operated by the federal Government where there is a tariff of fees. If you lose your ticket you are liable for the maximum cost, which happened to me. Would this "tariff of fees" be a statutory instrument under this bill.

Hon. Mr. Turner: I would ask Mr. Beseau to answer Senator Grosart's personal problem.

Mr. P. D. Beseau, Legislation Section, Department of Justice: If I am not mistaken, senator, that tariff of fees is established under the Government Property Traffic Act by way of regulations. Therefore I presume the provision is included there, saying that if you lose your ticket you are liable for the full day's payment.

Senator Grosart: I think the garage operator put this up, for his own convenience because it is an administrative matter. That is why I questioned the extensiveness of this. Will you really police it this far?

Mr. Beseau: If these are regulations, of course, they will be examined. Statutory instruments will not be examined. There will not be that much policing of it by the Privy Council office or the Department of Justice. That is where it is envisaged that the scrutiny committee will be able to say if you are operating by virtue of this statutory instrument—if you have made this pursuant to a statute of Parliament—we want to look at it and see exactly what you have done.

Senator Grosart: So if it happens to me again and I can discover that this tariff or fees was not reviewed by a committee of Parliament, then I can have my money refunded.

Hon. Mr. Turner: He did not say that, senator. The failure to have brought a regulation to the scrutiny committee, although that may have involved a parliamentary sanction, does not by the bill invalidate the fee.

Senator Grosart: Oh, yes; I had forgotten you have given yourselves that other out.

Hon. Mr. Turner: Yes, otherwise every statutory regulation would be in suspense.

Senator Grosart: Yes, and a good thing too. It has occurred to some of us here from time to time that there is something a little bit absurd in passing a bill which says the Governor in Council shall have authority to make regulations when we do not know what the regulations are. Very often the regulations that are going to be promulgated are more important in understanding the scope of the bill than the bill itself.

Would it make sense if Parliament were to indicate it was not going to pass any of these bills until they had seen the regulations? I know the first answer is, of course, that you cannot draft the regulations until the act is passed. This, of course, would only be window dressing. Obviously you have to know what you want in the regulations before you can draft the bill. The draftsmen may deny that, but it seems obvious to me that that is the fact.

Now, would it not make sense if Parliament required that it see the regulations in order to really understand what you want to do under a bill?

Hon. Mr. Turner: I suppose that has happened from time to time, senator.

Senator Grosart: I do not think it ever has; I have tried to find out.

Hon. Mr. Turner: One of the reasons for making regulations rather than including them in the statute itself is to provide the flexibility needed because of the unpredictability of the situations which may have to be met. If the facts are precisely enough known at the time the bill is brought in it would be preferable to include those provisions in the statute. The flexibility gained by the regulations is needed because of the lack of predictability. It is often impossible for a minister to explain to Parliament at the time what the regulations will be.

Senator Cook: Would it not also take much more legislative time to have the regulations in the statute?

Senator Grosart: I am only speaking of the initial regulations, which do indicate the scope of the act. We have had some very weird ones; we have had a bill here known as the Canada Deposit Insurance Act, which actually said that the definition of "deposit" would be left to the by-laws of the company. In other words, they could say "deposit" means supermarkets and this bill would bring supermarkets under a deposit insurance bill by regulation. This kind of thing happens then quite often.

Hon. Mr. Turner: Your immediate recourse there would be to attack the enabling power as being too wide, rather than regulations to be passed pursuant to it. I do not wish to be lured into a trap; I do not know what bills are before the Senate at the moment.

Senator Grosart: If there is a trap, Mr. Minister, I can assure you that it is a tender trap.

Senator Belisle: Mr. Chairman, knowing that Senator Grosart has the ability to ask intelligent and technical questions for a long time and knowing that the minister has been very kind, but precise, in his answers, I move that the bill be reported without amendment.

Senator Grosart: The guillotine is one thing from the enemy, but when it is from your friends...

Hon. Mr. Turner: You must be used to that, senator.

The Deputy Chairman: Honourable senators, is it agreed that Bill C-182 be reported without amendment?

Hon. Senators: Agreed.

The Deputy Chairman: On behalf of the members of the Standing Senate Committee on Legal and Constitutional Affairs once again I wish to thank you, Mr. Turner, for coming over before our committee and making such a brilliant presentation on the provisions of Bill C-182. The deft way in which you answered the questions put by members of the committee certainly substantiates once again that you do your homework well, and that you are thoroughly familiar with all the provisions of legislation that you present to Parliament.

Senator Choquette: You mean that *Maclean's* magazine is absolutely correct.

Hon. Mr. Turner: I am prompted by what Senator Choquette's remark to say that I appreciate, once again, the courtesy of the committee. I wish to say that the Senate, historically and certainly within the last three or four years, has taken a deep interest in this subject. I think the Senate appreciates what an important piece of legislation this can be for the Canadian people and for Parliament. I would think that the role of the Senate could well be enhanced by the establishment of such a committee, and I would hope that the Government Leader and leaders of the parties would discuss with the other place the possibility of a joint committee. I say that without in any way presuming as to how you may wish to handle it. In any event, I think this is, if I may say so with respect, a very useful function for the Senate of Canada.

The Deputy Chairman: We certainly appreciate your remarks, Mr. Turner. Thank you for appearing. We look forward to having you appear before us on future occasions.

Hon. Mr. Turner: May I recognize, with the courtesy of your permission, the fact that my Parliamentary Secretary, Mr. Béchard from Bonaventure, has appeared with me today.

The Deputy Chairman: Honourable senators, the third and last item on our agenda is the motion of Senator Hastings regarding the Criminal Records Act. Senator Hastings, since you are a member of this committee, would you like to address the committee on what you have in mind, and how you intend to go about this investigation?

Senator Hastings: Mr. Chairman, as I said in the Senate, from the facts that have been brought to my attention by various people affected by the act it is my

opinion that the intent and purpose of the act is being completely defeated by the administration's use of the Royal Canadian Mounted Police to carry out the investigative procedures of the act. I think it is unnecessary and repugnant to use a peace-keeping force to investigate the lives of these people. I have been unsuccessful in my efforts with those concerned to have the administrative changes made, so I have brought it to the attention of this committee as my only recourse. I hope the committee will undertake to inquire into the administration of this act, and particularly the investigative procedures, by calling witnesses from the department, interested organizations who are in agreement with me, and those concerned.

The Deputy Chairman: From the RCMP as well?

Senator Hastings: From the RCMP, certainly.

The Deputy Chairman: And from the National Parole Board perhaps?

Senator Hastings: We could then inquire into this matter and, if it is seen fit, make recommendations accordingly.

Senator Cook: It seems to me that if we follow that procedure, which is a very good idea, the first thing to do would be to call some senior officers of the RCMP to hear their side of the story, and carry on from there. I think it is a good idea, and I think we should start with the RCMP.

The Deputy Chairman: Honourable senators, what are your views on whether this should be done by the whole committee, or whether we should set up a subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs to deal with the matter?

Senator Prowse: Mr. Chairman, I move that we set up a subcommittee consisting of five persons, with Senator Hastings as chairman. The responsibility of determining who the other four members of the committee should be could be worked out in conversation between yourself and, Senator Hastings. When you are in a position to recommend the names, we could have a meeting of the whole committee to confirm that subcommittee, which could then carry out this investigation.

Senator Cook: What is the virtue of having a subcommittee?

Senator Prowse: Because they would have a great-deal of work to do, which might tie up the committee and prevent it doing other things of importance.

Senator Belisle: Before we discuss the merits of Senator Prowse's motion, I should like to ask a question. We have been dealing with some very technical problems over the last hour, and this question may not sound too intelligent, but I ask it because I toured the country with the Special Committee of the Senate on Poverty and found that we could not get anywhere. Does the Government favour this committee? Does the Government favour what it is proposed to do?

Senator Prowse: The Government has no concern with it. It is our decision.

Senator Belisle: Let us be practical. Do they want us to do it?

The Deputy Chairman: The Senate referred this matter to the Standing Senate Committee on Legal and Constitutional Affairs, and it is up to us.

Senator Grosart: We are required to report.

The Deputy Chairman: We are required to report back to the Senate.

Senator Belisle: A while ago the Minister of Justice said that we cannot get what we do not see, but we can look for their blessing to be given to us.

The Deputy Chairman: We have power to send for any persons we wish, and Senator Hastings has indicated some of the officials he would like to appear before either the whole committee or a subcommittee.

Senator Belisle: I was in the house the other day when the Leader of the Government said to Senator Hastings, "We should get together." Did Senator Hastings have a meeting with Senator Martin?

Senator Hastings: Yes, I have had a meeting with Senator Martin and with officials of the National Parole Board. That is why I said that I personally got nowhere with my representations, and I therefore appealed to the Senate.

The Deputy Chairman: I think it is immaterial whether the Government or the Government Leader approves of this. We have an order and directive from the Senate, and we are obligated to act on that order and report back to the Senate. Is that not the situation?

Senator Fergusson: Yes.

Senator Prowse: I suggest we set up a subcommittee or a steering committee, but let us do it reasonably quickly.

The Deputy Chairman: That is right.

Senator Prowse: My motion is for the setting up of an ad hoc subcommittee. I suggest that the person who brought up the matter and knows what he is talking about, Senator Hastings, ought properly to be the chairman of that subcommittee, and that he in consultation with the chairman of this committee, after talking to the representatives of the various parties involved, recommend to us next week the memberships of that subcommittee, which can then start to work.

The Deputy Chairman: Why cannot we set up the subcommittee today while we are all here? It is difficult sometimes to get such a large group together. It might be simpler to set up our subcommittee right now, and to name the chairman of that subcommittee.

Senator Burchill: I presume that the Department of Justice administers the Criminal Records Act.

Senator Hastings: No, the Solicitor General.

Senator Macdonald: This committee was authorized by the Senate to do these things? Can we in turn delegate that responsibility to a subcommittee?

Mr. Hopkins: You cannot delegate responsibility, but you can delegate the doing of the work.

Senator Fergusson: Yes, we did it for years in the divorce committee.

The Deputy Chairman: The subcommittee reports back to the main committee with a recommendation, and the main committee makes its own recommendation to the Senate.

Senator Grosart: Mr. Chairman, before you put the motion, one of the questions which arises in my mind is whether it is fair to ask Senator Hastings to be the chairman of that subcommittee. He has really brought certain accusations against those in charge of these records. I wonder if we are not making him judge and jury.

The Deputy Chairman: He can be a member of the subcommittee.

Senator Grosart: Certainly, he can be a member. This is just a thought.

Mr. Hopkins: The usual course is for a subcommittee to be named and then it selects its own chairman.

Senator Grosart: Yes, but it is not necessarily so. This committee has the power to appoint the subcommittee chairman.

The Deputy Chairman: We can name the chairman of the subcommittee.

Senator Prowse: This is not really very serious. No one is buying or selling Crown lands; we are merely setting up a subcommittee to do some investigative work, which I am sure the whole committee has not the time to be concerned about because it has other responsibilities. I suggested that Senator Hastings be the chairman because he has some basic information about this matter that the rest of us do not have. It is as simple as that.

Senator Grosart: He has also brought some accusations against public servants. I would like to see him freer than he would be if he were chairman.

The Deputy Chairman: Senator Hastings agrees with Senator Grosart's idea.

Senator Grosart: He would be very circumscribed if he were chairman.

The Deputy Chairman: The subcommittee will consist of Senators Hastings, Prowse, Choquette, Bélisle and McGrand. The subcommittee will elect their own chairman, there will be a quorum of three, and they will report to this committee in due course. The subcommittee can take all the time they need.

Hon. Senators: Agreed.

The committee adjourned.

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

Available from Information Canada, Ottawa, Canada.

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

(Sub-committee examining Criminal Records Act)

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 8

TUESDAY, JUNE 1, 1971

First Proceedings of the Sub-committee examining the "Criminal Records Act"

(Witnesses and Appendix—See Minutes of Proceedings)

23333—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

Argue	Hayden
Bélisle	Hollett
Burchill	Lang
Casgrain	Langlois
Choquette	Macdonald (*Cape Breton*)
Connolly (*Ottawa West*)	*Martin
Cook	McGrand
Croll	Méthot
Eudes	Petten
Everett	Prowse
Fergusson	Roebuck
*Flynn	Urquhart
Gouin	Walker
Grosart	White
Haig	Willis
Hastings	

Ex officio Member

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, April 28, 1971:

The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Hastings resumed the debate on the motion of the Honourable Senator Hastings, seconded by the Honourable Senator Prowse:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon the operation and administration of the *Criminal Records Act*, chapter 40 of the statutes of 1969-70, and in particular upon the operation and administration of subsection (2) of section 4 thereof.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative, on division.

Robert Fortier,
Clerk of the Senate.

Minutes of Proceedings

Tuesday, June 1, 1971.
(9)

Pursuant to adjournment and notice the Sub-committee examining the Criminal Records Act (Legal and Constitutional Affairs Committee) met this day at 3.30 p.m.

Present: The Honourable Senators McGrand (*Chairman*), Belisle, Hastings and Prowse—(4).

Also present but not members of the Sub-committee: The Honourable Senators Casgrain, Croll and Eudes—(3).

The Sub-committee proceeded to the consideration of the following Motion by the Senate:

> "That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon the operation and administration of the *Criminal Records Act*, chapter 40 of the statutes of 1969-70, and in particular upon the operation and administration of subsection (2) of section 4 thereof."

The following witnesses were heard in explanation of the Motion:

The Hon. J.-P. Goyer,
Solicitor General of Canada;

Mr. T. G. Street, Q.C., Chairman,
National Parole Board;

Mr. W. L. Higgitt, Commissioner,
Royal Canadian Mounted Police;

Mr. L. L. England, Chief,
Clemency and Legal Division,
National Parole Board.

On Motion of the Honourable Senator Hastings, it was Resolved to print 800 copies in English and 300 copies in French of these proceedings.

On Motion duly put, it was Resolved that the brief headed "Brief-Inquiry-Criminal Records Act", provided by the Solicitor General, be printed as an appendix to these proceedings.

At 5.40 p.m. the Sub-committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Sub-committee examining the Criminal Records Act, Legal and Constitutional Affairs Committee.

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Ottawa, Tuesday, June 1, 1971

The subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs, to which was referred an inquiry into the administration of the Criminal Records Act, met this day at 3.30 p.m.

Senator Fred A. McGrand (*Subcommittee Chairman*) in the Chair.

The Chairman: Honourable senators, we have with us as our witnesses the Honourable Jean-Pierre Goyer, Solicitor General of Canada, Commissioner W. L. Higgitt of the Royal Canadian Mounted Police, Mr. T. G. Street of the National Parole Board, and Mr. L. L. England of the Department of the Solicitor General.

Mr. Goyer, do you wish to make an opening statement?

Senator Hastings: Mr. Chairman, at our previous meeting it was decided that we would not print the proceedings of this meeting. Since that time, there has been shown a great deal of interest both inside and outside the Government service in our work. With that in mind, I would move that we print the usual number of copies, in English and French, of the proceedings of this subcommittee.

Senator Prowse: Mr. Chairman, I think that that would have to be moved in the full committee. I do not think that a subcommittee has a right to order printing.

Senator Croll: We can move the motion here.

Senator Prowse: Then it has to be confirmed.

The Chairman: We are just rescinding what was moved the other day. Is that agreed?

Hon. Senators: Agreed.

[*Translation*]

The Honourable Jean-Pierre Goyer, Solicitor General of Canada: Mr. Chairman, may I first of all say that it gives me great pleasure to appear before your committee to answer the specific questions that have been raised, namely, the way in which the inquiry is to be conducted by the Board in the case of a Canadian citizen who requests that his criminal record be erased and that he be granted a pardon.

First may I remind you of subsection 2 of section 4 of the Criminal Records Act, and I quote:

> The Board shall cause proper inquiries to be made in order to ascertain the behaviour of the applicant since the date of his conviction,...

Therefore, this means that at the outset, it is necessarily up to the Board itself to set the criteria in such a way that it can be satisfied with the inquiry, which must be conducted in accordance with the terms of the Act. It might happen, in view of the fact that the Board must submit its recommendation to the Cabinet, when such recommendation is positive, it might happen that even the Cabinet may ask to be better informed on the applicant's record. This means, I think, that what interests us to begin with is to find out whether we are satisfied with the way in which the inquiry is being conducted, and that it will be up to us to consider whether our reasons are valid.

First, may I say that it is not my intention to answer all your questions dealing with the technical aspect of this matter; this is why Mr. Street and Mr. Higgitt have accompanied me; they will be able to provide you with more information on the technical aspects.

As for the policy itself, I shall first say that the fact that the inquiry is conducted by the Royal Canadian Mounted Police, in the cases that concern us, has raised no particular problem to date. Until now, I am informed that the RCMP has made about 480 investigations which have been requested by the Parole Board, and no one has found it necessary to complain about the way in which the RCMP conducted the investigation. This does not mean that, in future, there will not be individuals who may raise objections about the way in which the investigation is conducted, but anyway, the fact that 480 investigations have taken place in a single year and no one has had to complain augurs well for the future.

Moreover, a practical advantage of the fact that the RCMP is conducting the investigations stems from the fact that the Force conducts a number of investigations in various fields and when the RCMP contact other citizens and ask questions about a citizen's behaviour, the citizen being questioned cannot know exactly why the RCMP is investigating. There may be various reasons for it. Certainly, it may be a criminal investigation, but it may also be merely because the individual is seeking employment with a government agency or department or a Crown Corporation and they want to find out exactly what his behaviour is like for security reasons, for example, or it may simply be for inquiries which may, in eight out of ten provinces, deal with aspects such as obser-

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vance of the Highway Code, for example, or it may simply be that individuals are questioned in relation to the Criminal Records Act specifically. Therefore, the RCMP has a wide range of possible reasons for conducting investigations. We believe that this is a positive aspect of the fact that the RCMP conducts the investigation. If we had to entrust this investigation to a particular agency, such as the Parole Service, for example, then, of course, the person questioning citizens would automatically have to disclose the fact that this was being done with a view to erasing a criminal record since that would be his one and only reason for investigating. Whereas, I repeat, in the case of the RCMP, there may be a variety of reasons.

I am informed—and you might question the Commissioner in this connection—I am informed that when, during an investigation, a citizen becomes too insistent on knowing why the RCMP are making an investigation, then, instead of disclosing the basic reason, an attempt is made to sidestep the question, and if this is not possible, they simply suspend the questioning of that person. In short, they are not inclined to be very talkative; on the contrary, they are inclined to be very discreet in the way the investigation is conducted. Furthermore, by calling on the RCMP, we are calling on a professional police force which, of necessity, is very skilled in conducting investigations, and does so in the most professional way possible.

Of course, if really necessary, it would be possible to train personnel who would perhaps become as professional as the RCMP in conducting investigations, within another government agency. But it still remains to be seen whether we would achieve these results as quickly without hurting the reputation of the applicants; secondly, we would not be setting up a second structure, another governmental superstructure, when it seems that up until now the RCMP have been providing services that are entirely satisfactory to the Parole Board.

There might be other reasons, Mr. Chairman; perhaps, during the course of the questions which may be raised by the Honourable Senators, we might disclose others. Moreover, I think that basically it is a practical reason that prompts us to retain the present practice; this does not mean that the present practice excludes all others. As a matter of fact—the Act makes it clear—the Board could ask police forces other than the RCMP, and in fact it does so—it may ask provincial and municipal police forces for additional information. Also, I am informed that the Board does not ask the RCMP for a full investigation in each case.

The Board merely asks for an investigation on specific questions on which it would like to be better informed. The Board could very well use the services of the Parole Service in some cases, for example, and I imagine that this will be the growing practice, in cases where a person has been granted conditional release, that if that person—after two years in the case of a summary conviction—that if that person applies for a pardon, his file might be reactivated in the Parole Service, which might use almost the same contacts as when a person has been unconditionally released, for example, two years previously. This means that it is a source of information which might be very valid and which might be used more and more.

In short, it is flexibility that guides us, simply to be able to achieve our goals in as practical a way as possible, without, naturally, harming individual reputations, and without having to create or set up another government structure, which would appear to us to be a major expenditure under the circumstances and which may, which might be avoided while still achieving our hoped-for goals.

The Chairman: We have heard the statement of the minister. Senator Hastings, would you care to ask any questions?

Senator Hastings: My first words must be in appreciation of the minister and his officials. Perhaps Mr. Street could answer my first question. Could we have a run-down on the number of applications for pardon that are on record?

Mr. T. G. Street, Q.C., Chairman, National Parole Board: Do you want that figure for the last year?

Senator Hastings: Whatever is the latest reporting date.

Senator Prowse: Whatever figures you have. We would like the number of applications, and the disposition.

Senator Hastings: While Mr. Street is looking for those figures, perhaps I could ask another question. On reading the record of the committee hearings held last year I noticed there was a good deal of concern over the investigative portion of the act. At that time the committee asked that the act be amended from the word "shall" to the word "may". At the time both the minister and the committee agreed to the amendment, but for some reason it did not appear in the final drafting. Can you make any comment as to what happened?

Mr. Street: I never heard of the discussion or of the significance of the two words. It simply says that the board shall cause proper inquiries to be made. We would interpret the word "may" to mean in the sense that it depends on what is a proper inquiry. If we knew nothing about a person we would have to ask the police to provide us with a report. On the other hand, if there are any well-know references concerning the person we would not require much of a report and we would consider the information we have as being sufficient inquiry.

I do not think we would have any objection to either the word "shall" or "may". It depends on what the board considers is proper. If we know nothing about a person we make a detailed investigation. On the other hand, if we know a good deal about him we need not make such a detailed investigation.

Senator Hastings: But how extensive an investigation would be carried out?

Mr. Street: If it were a well-known person we could get almost all the information we require from *Who's Who.*

Senator Hastings: The board or its officials would make that decision.

Mr. Street: It is not always necessary to have the police make inquiries about a person who is well known. We seldom get requests concerning people who are well known. When I was before the Justice Committee recently I mentioned the case of a man who had been convicted 30 years ago involving the selling of tires. That man was now head of a company and his company wanted to send him to the United States. The fact that he was head of his company and that the company was sending him to the United States was all that we needed to know about him. We did not need to make an investigation in his case, particularly as the offence occurred a long time ago.

Senator Hastings: You and the board made that decision? Can you not extend the same courtesy to Mr. John Smith, a plumber in Calgary? Can your board not make a decision as to whether an extensive investigation by the police is necessary by interviewing the man? This is my exact argument, that you or employees of your board are quite capable of making the decision as to the extent of the investigation and whether to involve the Royal Canadian Mounted Police. This should be available to all citizens, not only those who are prominent.

Mr. Street: As the act reads, it is for the board to decide on the inquiry. If a man is well enough known there is no need for an extensive inquiry. Applicants are also invited to present letters of reference. The application form lists suitable persons, such as Members of Parliament, judges and other prominent people.

Senator Hastings: Is that courtesy extended to every applicant who appears before your officers when they decide whether to extend the investigation to involve the police?

Mr. Street: We have never considered doing it just like that. It would extend the procedure appreciably. Thirty-five officers, to whom applicants are referred, are stationed throughout the country. They can present themselves and offer information, but I do not think it has ever happened.

Senator Belisle: Do I understand you correctly when you say that you could do that? In other words, do you have the power to make these investigations without calling on the RCMP?

Mr. Street: Yes, because it is for us to decide what is proper. It is difficult to legislate what is proper. The act provides that the board shall cause proper inquiries to be made. In a case such as I mentioned where the man is well known and employed in a large company which wants to transfer him to the United States and a pardon is required we would not have the police chasing around enquiring about him. He could also send letters of reference, upon which we might act.

Senator Hastings: All I submit is that John Smith, the plumber in Calgary, should have the same opportunity of appearing in your office in Calgary, where the investigation can be completed in one hour. Surely you can accept the recommendation of your own officer as readily as one of the RCMP?

Mr. Street: The offices are open and while applicants are not directed, they can always present themselves and tender whatever information seems to be desirable to support their application.

Senator Casgrain: Are there any women on the parole board?

Mr. Street: Yes, we have a lady on the parole board, Miss M. L. Lynch. She is a senior member. She and I have been members longer than anyone else.

Mr. L. L. England (Clemency and Legal Division National Parole Board): This is under the Criminal Records Act. Under the Royal prerogative of mercy. Any application received before the act was proclaimed we proceeded to consider for a pardon under the Royal prerogative of mercy. The effect was the same, but it was not referred to the board in the same way that those under the Act are. There were 52 pardons given in that eleven recommended. The Solicitor General has often pardons granted altogether.

Senator Hastings: Eighty-nine as compared to 75 the year before?

Mr. England: In 1969 there were 120 pardons granted under the prerogative of mercy. In addition, there were eleven recommended. The Solicitor General has often stated that in 1969 there were 131 pardons recommended.

Senator Hastings: How many were granted?

Mr. England: 120 were granted. On December 31 there were 11 with the Governor General which happened to be signed in January. You can take the figure of 120 or 131, as you wish.

Senator Prowse: All those that were recommended were granted eventually.

Mr. England: That is correct. In 1970 we were proceeding under the prerogative of mercy until June 11, 1970. When this act came into force, a decision had to be made as to whether those people who had applied for a pardon under the prerogative of mercy and were told that it would be proceeded with under the prerogative of mercy, should continue to be processed under the prerogative of mercy. The decision taken by the then Solicitor General was that they would continue to be processed, and they were. Fifty-two pardons were granted under the prerogative of mercy in 1970. During that same period we had the new act to contend with. This meant new procedures, and the National Parole Board had to be satisfied with the type of investigation and the submission made to them. The Governor in Council had to be satisfied. There was thus question of processing new applications under the Criminal Records Act.

In June, as soon as it was announced, eleven applications were received, besides the hundreds of inquiries. There was obviously a slow down in the processing of

pardons. In July 37 completed applications were received; in August, 42; in September, 68; in October, 108; November, 78; and in December, 61. Now a flow of Criminal Records Act applications was commencing. In addition, there was the matter of putting a new program into effect. There was a time element there. We are all aware of what happened in Quebec in October, and the investigation of pardons by the R.C.M.P. was delayed. Then, of course, there was a change in the department. A new Solicitor General was appointed. I think it is only fair to say that the new Solicitor General had not had an opportunity to look at the program.

Senator Hastings: Could we have the rundown of the total number of applications received?

Mr. England: Under the Criminal Records Act to date there are 766. These are active files.

Senator Hastings: How many have been granted?

Mr. England: Thirty seven.

Senator Hastings: How many more have been approved by the Board?

Mr. England: In the April statistics there are 58 approved by the Board.

Senator Hastings: How many are under investigation?

Mr. England: Up to May 25 there are 766 under investigation.

Mr. Street: The number is 766 less the 89.

Senator Hastings: All the remainder are under investigation?

Senator Prowse: There are 729 under investigation.

Mr. England: There are 766 presently under investigation. There were 37 pardons granted and they are not under investigation now.

Senator Hastings: How many rejections were there?

Mr. England: Two.

Senator Hastings: You have completed 180 investigations, and you are in the process of denying two?

Mr. England: That is quite right.

Senator Hastings: If there are two out of 180 that you are going to reject, would that not indicate the investigation is not necessary?

Mr. England: All of the people who write in asking about criminal records do not complete investigation forms. There were 766 plus 37 applications for which files were made up and investigations commenced. This does not mean that only 800 people made inquiries. A great number made inquiries. When they make an inquiry we do not make up a file, and I do not call that a matter under investigation. When they inquire we inform them that a thorough investigation is made. We forward to them extracts from the act which state that an investigation shall be made, and often we do not hear from them again.

Senator Hastings: Why?

Mr. England: Presumably because they do not feel they could stand up to an investigation.

Senator Hastings: I submit to you that you are wrong.

Mr. England: Many know full well that they have been leading a good life and feel that they are entitled to a pardon and they do apply, and the investigation is a positive one.

Senator Prowse: In other words, it is the investigation that scares them, not the results?

Mr. England: It is just supposition. I have no way of knowing why a person does not apply. That could be an explanation.

Senator Hastings: Eighty-eight per cent of the people who have been successfully rehabilitated have done it by covering up a past because society that will not accept them and their attitude towards them. When they are told that there is going to be an investigation into that past, no matter how discreet, that individual will feel that there is a real danger of his past being exposed and all of his progress being lost. He says, "I dont' want it. I'll continue as I am." In that respect I suggest we have defeated the act.

Mr. England: How would their past be exposed? What is the basis of your comment?

Senator Hastings: The danger of exposing their past by the investigation.

Mr. England: The investigation is made in respect of the references that the person has given.

Senator Hastings: You are not confined to the references?

Mr. England: Not necessarily.

Senator Prowse: The person making the investigation may speak to a person and inadvertently tell him who he is, what he is doing, and why. For example, if I wanted to buy an insurance policy, they would send out a fellow to see my neighbours, and he would tell them who he was and why he was there. They would tell me he had been there. All of the neighbours would not tell me, but I have had this happen on various occasions. I presume they are experienced with that kind of thing, but the investigator might say, "I am from the RCMP and want to know about John Doe".

Mr. England: Here is a memorandum that we received from one of our offices in Canada. Our district representative had an opportunity of reading the transcript of the radio program that involved Senator Hastings and Mr. Adams and myself on the CBC. A man who received a pardon came into our National Parole Board office, and I quote from this memorandum:

> He stated further that he was very pleased with the pardon... I asked him whether he had any feelings about the investigation itself by the police or whether he had been embarrassed in any way at all. On the contrary he stated that he had been quite happy with the whole procedure and any of his friends who had been approached by the R.C.M. Police were under the impression that they were investigating him for a Government job. There was no embarrassment or any inconvenience.

This memorandum is really in relation to the program.

Senator Prowse: It is what we call self-serving hearsay.

Senator Hastings: I think the people who are getting the pardons are those who do not really need them. One man came to me and said that he would welcome an investigation by the Royal Canadian Mounted Police, but in our discussions later it turned out that he had not been gainfully employed for the two years he had been released from custody. It is those people who do not need the pardons who are applying. It is the ones who are completely rehabilitated and who do not have a past to cover up, who are applying for pardons.

The Chairman: When you say they do not need a pardon, what do you wean?

Senator Hastings: Those rehabilitated persons who do not care whether their pasts are exposed or not.

The Chairman: The ones on the border line.

Senator Hastings: They are on the border line or have covered up their past. That is, 88 per cent of those successfully rehabilitated have covered up their past until it is a secret, and they are not coming forward for their pardons because of the danger of being exposed, even to their own families.

Senator Prowse: These are people who have gone to new communities to get new starts.

Mr. Street: You cannot guarantee that he will never be found out. I do not think there is much chance or possibility that the investigation will reveal that the man who is being investigated has a criminal record. The police are very discreet about these things and are trained to be discreet, as you know. I honestly do not think that this has happened. In his remarks someone has told you it happened. I think the chances of that happening are very slim indeed, and I do not see what else we can do.

Senator Hastings: I suggest that you do the same as you do for prominent citizens. Any citizen could enter your office and the board could make its decision.

Senator Prowse: If there is nothing against them on the records anywhere and the R.C.M.P. have nothing in their records, then do not go beyond the records. Why could you not do it that way?

Mr. England: I would say that if we did nothing but check records then, with the greatest respect, the value of the pardon would not mean very much. I think the real value of the pardon is not that it erases something that happened, but that it indicates he has been very carefully checked out by competent people and found to be deserving of it. Therefore, it has some value.

Mr. Street: If it could be done automatically I would be happy. It would relieve us of 700 or 800 investigations each year. Its real value is knowing that he has been checked out, and found to be a responsible citizen deserving of this special consideration. If it is done automatically it means nothing. All you have to do is have five years of undetected crime, or even two years, and automatically have your record done away with. I do not think that would be doing a favour to people who deserve it.

I think the senator has a point, that the people who really need it just do not bother unless they have to get a visa or something like this. Some people want it for sentimental reasons. The people who have not inquired are the somewhat inadequate people. They do not get along very well, anyway. You find when you check them out that they are drinking all the time, that they beat their wives, have not had a job for more than two or three months. Those are not the kind of people to whom we want to give pardons.

Senator Prowse: That would be on the record somewhere.

Mr. England: His reputation in the community would not be on the police record.

The Chairman: I would like to clarify something in my own mind. You mentioned that the RCMP take charge of this in order to have a proper inquiry. It depends on the purpose of your inquiry as to whether it makes it proper or not. Do the RCMP have details about the behaviour of these people that persons in your employ would not have?

Mr. Street: Do you mean from their own records?

The Chairman: Yes, or their investigations.

Mr. Street: We usually do not have anything. People who apply for pardons usually do not have a record within the last five years, or they would not be applying for a pardon.

The Chairman: When you set out to check on a man applying for a pardon I understand it is done through the RCMP. The question is: Why cannot officials working for your organization do the same thing?

Senator Prowse: Or even people hired publicly.

The Chairman: That is what I meant by "in their employ". Does the RCMP have something in their records, or in their technique of investigation of a person's record, that your people would not have, to make it a more efficient and proper inquiry?

Mr. Street: I should let Commissioner Higgitt answer that question. As the minister said, the advantage of having it done by an RCMP officer is that everyone

knows that they make investigations for various purposes like jobs in the Government, crown corporations, security jobs, and so on. If a parole officer does it, everyone in the community will know he is investigating a pardon or parole. I think I should let Commissioner Higgitt answer the question about special knowledge and what knowledge they do have.

The Chairman: We had better finish Senator Hastings' questions.

Senator Hastings: Mr. Street, you were speaking about the value of the pardon. Would you indicate who would receive the pardon? Would you indicate that you had a pardon?

Mr. Street: That is just it, sir. If I had a pardon in my pocket I would not be telling anyone about it. I would not be anxious to publicize it.

Senator Hastings: The point that I am trying to make is that the pardon that you mail to the man really does not mean a great deal. The great value in the pardon is the psychological knowledge that his record has been sealed.

Mr. Street: I think so, senator, and it enables the person to obtain a visa or bonding. Up to a few years ago we were not giving them that freely, and the American authorities still would not accept them. It did give you a point of argument with the American authorities—a person could say, "I have this pardon and it means I was checked out." It gives them a chance to get a visa where they might otherwise not get it. The only time I think they really need it is when they have to overcome some difficulty. It has a value where a person applies for a job as a police officer. If he has a pardon the police authority considering engaging him would be impressed with that.

Senator Hastings: I think one would be as impressed if the National Parole Board were to carry out the investigation.

Mr. Street: That is true. I really think, even though our officers could be discreet, it is impossible to have one of our parole officers in a small town, who is known as a parole officer, going around and making inquiries. It would be known that it was done for only one purpose. An RCMP officer may be doing it for a dozen different purposes.

Senator Prowse: In a small town he does not have to go around. In small communities I think those fellows are pretty effective, and it is because everyone knows everything about everyone else.

Mr. Street: We do not have parole officers in small towns. The police do.

Senator Hastings: You have 35 officers.

Mr. Street: In a small town it is easy to get the information. You could get it by a couple of telephone calls.

Senator Hastings: This is the point I am making.

Senator Prowse: We are trying to get everybody out of work.

Senator Hastings: We are trying to get the RCMP out of work.

The point I am making is that the officers in your employ could make the investigation as discreetly as the RCMP officer. If a further investigation is necessary, I think your officers are capable of making a decision after an interview with the man, and a check of the records.

Mr. Street: I think we ought to encourage them to come to our offices. It may be a great deal more work, but it would be more efficient and more expedient.

Senator Prowse: This may speed it up. They take an average of five months to process now?

Mr. Street: Yes.

Senator Prowse: We are of the opinion that in many of these cases you are very seriously carrying out your instructions. Please understand that this is not a criticism.

Mr. Street: Thank you.

Senator Prowse: The result is that it is holding up the granting of the pardon, and I know of a case where this became a problem. A fellow wanted to go overseas and needed a visa. It is his fault that he got into trouble, but it seemed to me that in the circumstances the pardon could have been granted almost automatically. We can do it in two ways. First, in respect of certain types of minor offences it could be automatic on application, pending a check to see whether there was anything else in the records. Secondly, we can track it down. Let us take the case you mentioned earlier of the fellow who had not been convicted of anything, but he was drunk all the time and was a bum around town. I am sure the local police would be able to tell you that they know something about that person and then, only in those special cases, would it be necessary to do a more serious check. In other words, the check would be taken as almost an appeal against a refusal of a pardon, and only in those circumstances. That would relieve everyone of an unnecessary workload, which is generally a waste of everybody's time because the granting of the application, on the basis of only two turned down, is going to be automatic. Can we work out a formula by which nearly all of these could be automatic, in the absence of evidence to the contrary? You would notify the police authorities and they would have the right to put in a caveat if they wished. That would take care of certain types of persons who are consorting regularly with criminals and the other people you are speaking of. Does that area suggest a possibility to you?

Mr. Street: I agree with you, senator, that we should not waste time on investigations that are not necessary, and that we should shorten them as much as possible. It

may be, although it was not done deliberately, that in some of these cases a more detailed investigation was asked for than was necessary. I would agree that we should try to cut it down, especially in not very serious matters. I am in agreement with some of the things that you have said. This has suddenly blown up in the last year when we had 700 files, while in the previous year we had only about 100 or so.

Senator Prowse: Who knows how many you will have next year.

Mr. Street: That is true. I agree we will have to streamline it.

Senator Prowse: But not to cut out the purpose of the act, nor go to the point where you become another civil service.

Mr. Street: We do not want all this extra headache and work. We are busy enough processing 15,000 applications for parole each year, and maintaining 5,000 people on parole. The police have plenty to do.

Senator Prowse: I am sure the police have other things to do as well.

Senator Hastings: Did I understand the minister correctly when he said 480 investigations had been completed?

Commissioner Higgitt: There have been 480 since the coming into effect of the act completed by us, up to about two weeks ago.

Senator Hastings: Did I understand the minister correctly to say that you have had no complaints with respect to the inquiries?

Mr. England: I did not hear what the minister said.

Senator Hastings: Have you received any complaints with respect to the inquiries?

Mr. England: I received a complaint over the phone and one in writing. The result of this investigation showed that this person could not hold a job, and was a very hot tempered person who infuriated his fellow-workers. He wrote in and said that he did not like the investigation that was being conducted. That is one individual. The results indicated that he was not a normal type of person. I did have one phone call in which a person said that he was slightly embarrassed because his employer was not contacted. It could be the investigator, in using his judgment felt that he might prejudice the employee's position, so he did not go to the employer. That is all we have had.

Senator Hastings: Do I understand you to say that because a man is hot tempered you do not give him a pardon?

Mr. England: I am just indicating the type of person that he was. That is the result of the investigation.

Senator Prowse: You said he could not hold a job because he could not hold his temper. In other words, he would complain, anyway.

Mr. England: That is what I thought from the results of the investigation.

Senator Prowse: Did you grant him his pardon?

Mr. England: He requested that we do not proceed. I wrote to him and told him the investigation was completed, and asked if he would like to think it over.

Senator Hastings: How many have you agreed to without an investigation or a very minimum investigation?

Mr. Street: I would say very few. Most of them are quite unknown to us and I do not think we would be able to do this every time. I would say that we have to have an investigation, such as you are speaking of, in almost all cases.

Senator Hastings: He could just go to the parole office.

Mr. Street: If he could come into the parole office and produce enough information.

Senator Hastings: Or show cause.

Mr. Street: We have not tried that idea. If we could, and if that would shorten it, I would be in favour of it. I think you were misled a little while ago about two out of 180 being refused. That was not correct. I can give you the exact figures. Last year the pardons were 113 granted, and 35 refused. The year before 69 were granted and 74 were refused.

Senator Hastings: That does not alter my figure of 170. As I understand it, you have completed 488 investigations and, as a result, you are going to reject two.

Mr. Street: No, there will be more than that.

Senator Prowse: What is the percentage of rejections you have processed to date of the number upon which you have finished you investigation?

Mr. England: Of 58 advanced to the criminal records board, two have been denied.

Senator Prowse: Why were they turned down? There is a basis for the refusal.

Mr. England: When the board turns down an application for a pardon, the person is advised of it and given 30 days to make representations, either by himself or his solicitor. In this one particular case the person did make representations and statements to the board.

Senator Prowse: He was still turned down?

Mr. England: He is still being investigated. He made statements to the board and the board has directed a further investigation to be made, and that the person be interviewed by the investigator. The report has just come in. The statements made by the person were not correct. When it is suggested that the person come forward and merely tell a parole service officer what a fine person he

has been, we find that this is not always so. The figures that Mr. Street has just given you indicate that 74 were turned down, and these were turned down after investigations indicated that if those persons were granted pardons it would be an error, in that they could use them in a manner which would be to the disadvantage of employers, society, et cetera. This often happens. Some of the denials in the past have been as a result of a thorough investigation where all references all spoke very badly of him, and of suspected thefts where he was not prosecuted, and continual suspicion that the person is border-line or working or associating with criminal elements.

Senator Prowse: The problem that Senator Hastings is concerned about is that there have been certain individuals who have made application, and who have been living not only a life of undetected crime but a reasonable life, in the community, and who thought, "I can get this last load off of my mind. I will not be subjected to answering questions in a particular way any more," and who were then shocked to discover that people whom they knew suddenly became aware that they had a criminal record. This would never have become known if the person had not made the application for a pardon. This, I think, is what we are talking about when we say that the investigation defeats the purpose of the act. In other words, we are wondering if it is not possible to set up a procedure whereby the great bulk of these cases could be covered in a routine way with the investigation limited to the law enforcement areas. If the police have no reservations, but when you go to see a neighbour he says that the man is a real thief who stole his lawnmower and it look six months to get it back, then you have to investigate further. But if a person is involved in criminal associations and is maintaining criminal associations, then any police force in the country knows about this. They know about it better than the neighbours do. What we are doing is trying to keep the investigators away from the neighbours or the people in the community who, unlike policemen and people in the law enforcement business, do not have an obligation to not unnecessarily publicize certain matters. If you could keep it to that point to cover the bulk of these applications, and then with borderline cases still maintain the right to investigate because you feel it is necessary to do justice to the person, I think that would meet both your concern about the amount of work that is involved and our concern about possible harm to people who really do not deserve to be harmed at this stage.

Mr. Street: The police or anyone else would not speak to a neighbour, unless the man himself had so directed.

Senator Hastings: Mr. England said they can go anywhere.

Mr. Street: They can, but they check out the references.

Senator Prowse: I would anticipate that this is carried out by junior officers to give them experience. You are really able people, and you are needed for more important things.

Senator Belisle: The five of us who volunteered to form this subcommittee did not volunteer just because we wanted to complain. I joined the subcommittee because I am very pleased with the work done by Mr. Street. I have been associated with his work in northern Ontario for a long time. I am very pleased to say publicly that I was very impressed when I watched him on two different occasions on television by his human and sincere approach to individual problems.

Mr. Minister, at the beginning you said that you would like to answer for the policy of your department. May I be informed as to what criteria or yardstick is used to select members of the Royal Canadian Mounted Police to do this work? Have they special knowledge? Are they selected from a special field? Do they have good human or public relations, or are they selected because they have been good at detecting crimes?

Hon. Mr. Goyer: I think, senator, since this is a question relating to operation, that the Commissioner should answer your question.

Commissioner Higgitt: I would like to clear up one point in answering that question. We only make inquiries when we are asked to make inquiries by the Parole Board. The RCMP does not get, and automatically investigate, applications for pardons. We try to give the best possible service that we can to the applicant, in the sense of protection of his interests and identity, and that of his family and livelihood, and the best service we can to the Government and the department.

You asked what kind of men are assigned these duties. They are men who are doing a wide range of police duties. All of them are trained investigators. They are not always the most senior, but certainly not the most junior. The most junior would not be put on this kind of job which has certain delicacies about it. They would be basically men with a good amount of general investigative experience. We deal with these matters as competently and as efficiently as we can, having regard to the rights of all the people concerned. In so far as it is possible, we try to select a man to do the particular job. Of course, this is from coast to coast, and there may be one case in Northern Alberta today and there may not be another one for months and months; there may be another one in Nova Scotia. It is not the same officer who investigates in both those areas. It is practically impossible to do that. They are all trained members of the force and experienced investigators, and they would not be the junior men on the force.

Senator Belisle: The discretion with which they go about their jobs must be an asset. They do not tell everyone in town that they are in town.

Commissioner Higgitt: I would like to be able to say that we do not do that anyway. We are as cautious as we can be.

The Chairman: Do the RCMP have details or knowledge of a person's behaviour that officers of the Parole

Board do not have, or have they got a sort of technique or expertise that is more suitable for this type of investigation?

Commissioner Higgitt: Mr. Chairman, I would like to think that of this moment we have techniques that are perhaps more experienced. This is not to say that parole officers could not become just as experienced.

In answer to the question as to whether we have information that the Parole Board officers do not have about a given person in a given area, I think I would have to say that the police generally are likely to have information that the parole officer would not have. This does not mean the parole officer could not get it if he went to all the police in the area.

I might also answer a question that was asked a moment ago in which it was said that the police could say that they have no reservations about this man so he is all right. This implies, of course, that we have information about everyone, but police forces do not have information about everyone. If a parole officer or someone came to the police and asked, "Do you have any objection to a pardon for this man?" I would point out that the fact that we did not happen to have any information about him is not really necessarily a recommendation. This would imply we know everything bad about everybody, and we simply do not. This is why it has been decided by the Parole Board that a certain level of inquiry has to be made.

The Chairman: A pardon is granted, and there is always some criticism on the part of the public that a criminal is given a pardon. If there is any backfire from the public on it, I suppose there is an advantage in the Parole Board's being able to share the responsibility with the RCMP.

Senator Prowse: You are a cynic, Mr. Chairman.

The Chairman: I always like to have the second opinion. Does that have any influence on it?

Mr. Street: It is very helpful for us to get the views of the police. It is true, as you have mentioned, they may have information about someone of general reputation. There is no better source of information in a small town than the Chief of Police, especially if a man has a reputation and if they suspect him of any illegal activities. I am sure that they might have this information, and it is useful to have the man checked out by an objective organization such as the Royal Canadian Mounted Police, who get information from the best sources. I emphasize again that the check is on the references the applicant has given us, and unfortunately now and then you will find one of these references does not speak as favourably as the applicant thought he would.

Senator Hastings: I am not here to complain, either. I am here in the spirit of looking objectively at this act, and making some suggestions. It must be obvious from the number of applications you have received that there is a great host of Canadians who would like to apply for pardons, and who are not doing so because of the danger of having their past, which they have had to cover up, exposed. I ould like to say also that I support you, sir, in the great liberal work you are doing in reform, with small help and in very difficult circumstances. Especially, I would like to back your statement that these people should be treated as citizens. They have paid the price for whatever they have done. They have re-established themselves within society, and as citizens have applied for pardons, which just brings me to this one further question: Can you tell me, sir, of any other area, with the exception of criminal activity or the security of the state, where the RCMP are used to investigate individuals?

Hon. Mr. Goyer: Perhaps the Commissioner could answer this question.

Commissioner Higgitt: The Royal Canadian Mounted Police are used to investigate individuals who threaten the security of the state.

Senator Hastings: Or who are suspected of criminal acts.

Commissioner Higgitt: I think under certains acts, in the case of someone applying for a licence, or a game warden, for instance.

Senator Hastings: The only one I know of is the Immigration Act.

Commissioner Higgitt: Game wardens, perhaps. Regarding the appointment of certain persons, we might be requested to investigate.

Senator Prowse: That would really be security.

Commissioner Higgitt: Of a type. Frankly, I cannot think of one. I would like to reserve my answer for a moment or two.

Senator Prowse: Your investigations are really limited to those two areas.

Commissioner Higgitt: Bascially security.

Senator Hastings: But the answer is "no".

Commissioner Higgitt: Basically, I think; and, again, I would like to reserve my answer.

Hon. Mr. Goyer: May I speak on a point of clarification? Of course, the RCMP do not direct an investigation at a particular segment of our citizens. There is no general policy aimed at a particular group of citizens in this country. Having pointed that out very clearly, if one were engaged in subversive activities or in a criminal act, then the police would certainly investigate. Otherwise, it is just for particular purposes, under certain acts, or for Government security clearance purposes of the individual.

Senator Hastings: One other question: Do you utilize any other police force?

Commissioner Higgitt: No, except if, for example, this was in the City of Toronto, we would certainly inquire whether or not the local police had a record on this

person. We would not use them as investigators. We would ourselves seek the record from them.

Senator Hastings: What would you do in the case of a Canadian citizen living in the United States for seven years?

Commissioner Higgitt: In that case there are often particular things the Parole Board ask us to do. Generally speaking, we do not investigate the whole area of this person. We might be asked, "Could you check his employment for the last five years?" "Could you find out what his citizenship is?" In these cases we would put the direct question to the authorities in the United States, which would probably be the Federal Bureau of Investigation.

Senator Hastings: Do you interview the individual concerned?

Commissioner Higgitt: Again, it is decided on the merits of the case. Sometimes the individual or Parole Board asks us to clarify a conflict in two statements or in an application form. Sometimes the applicant himself says that. "I do not want to be interviewed because of certain problems." We respect that. I think it would be fair to say that we very often do but, again, under the most careful circumstances. We are as careful as we can be.

Senator Hastings: I think those are all the questions I have.

Senator Prowse: Mr. Chairman, may I come back to the one thing I am trying to get at? It is this: With a great number of these cases it seems to me that it could be almost automatic. Mr. Street, did I understand you to say that if an application comes in, because of the position that applicant holds you assume that the people around him would know if he had a record; and that if he did, they would already have complained and he would not be holding down the job? Do you say that this is assumed, as a matter of course, and you do not investigate further?

Mr. Street: That is quite right. I can only think of one case where it was so obvious we did not need to check it out, but we do not get many like that, as Senator Hastings has mentioned.

Senator Prowse: Yes. What happens is that if you do not have any knowledge of an applicant at all, then you will ask the RCMP if they can find out anything. Is it not possible at that stage, without giving them a recommendation by not damning them, to have the police make a preliminary investigation, limiting it to official areas, and then, if nothing disquieting comes out of that, could not the matter be dealt with automatically? I am thinking of the situation where, on the face of it, you have no reason to suspect that a man is other than what he appears to be. Or perhaps his virtue is so obvious that you feel an investigation would be a complete waste of time. I am not trying to be smart, and perhaps I have expressed my thoughts badly.

Mr. Street: I think we would want to know whether the police have anything against him. In a big city like Toronto or Winnipeg they may not know very much about him, but he still may not be a very responsible citizen. We would like to know about his work record, about how he treats his family, and so on. It does not take long to find out whether or not he has a family, whether or not he is looking after his family, whether or not he is drunk all the time, and whether or not he is a responsible person. We do not need to take much time to find that out, and he is invited to give us that information himself.

Senator Prowse: One of the things we have in mind is this, that an expression of confidence by way of a pardon—which, after all, can be revoked if he does anything overt at any time—might provide him with just the psychological lift he would require to keep him on the track. We are wondering if it would not be saving you work, achieving the underlying purpose of the bill, and cutting the waiting period, which can be a problem in some instances. That is not a criticism of what you have been doing, but is simply said in order to try to streamline the process. Would you be happy with the situation in which these matters were practically routine, unless there appeared on the face of the record, immediately observable, something that cause your people to say, "Well, just a minute now! This fellow has not been convicted, but we know who his friends are." As an example, take a city like Toronto or Edmonton. I have in mind the fact that I was a narcotics prosecutor for two or three years, and I practised law as a criminal lawyer in Edmonton for a time. I got to know the RCMP very well and developed a high regard for them, but one of the things that always did surprise me a little was that they were never quite convinced—and these were first-class men in the force—that anyone who was once a criminal ever really ceased to have that innate, latent potentiality for repeating crime. This is the one reservation I have about having the RCMP in on this. With all respect, I thought I sensed a little of that from both of you today, in some of the things you have said. I thought you were concerned about matters that, in my opinion had nothing to do with crime. This is not a certificate of good character, morally speaking.

Mr. Street: Well, that is what it says: "Good behaviour..."

Senator Prowse: Well, "Good behaviour". Good behaviour is not behaviour that satisfies God, but behaviour that satisfies the laws of the land, and I do not think we can confuse those two too easily.

Mr. Street: No. Well, I am not quite sure what to say. I really think the reports we get from the police are quite fair and objective. Regarding your experience with the police, I really think the views and the attitude of the police towards parolees and pardons has become much more liberal in the last twelve years, since I have been involved in this area.

Senator Prowse: I think that is true.

Mr. Street: And I think it is only fair to remember that the police, judges and magistrates see all our failures; they do not see all our successes—although the police sometimes do see our successes. So it is always hard to do. Perhaps you are suggesting that we are setting too high a standard for granting pardons, and I did not mean to give that impression. I simply meant to say that we want to know whether the man is a reasonable and responsible citizen: Is he supporting his family? Is he working steadily? Does he have a problem with liquor? Does he pay his debts? If we are so satisfied, then, by all means, give him his pardon. We do not care what his circumstances are as long as he is a reasonable and responsible citizen. The act uses the words "good behaviour." I would not have used those words if I was drafting it, but that is what it says: good behaviour, good reputation.

Senator Prowse: That is referring to good legal behaviour.

Mr. Street: Yes.

Senator Prowse: I think we have to have some kind of basis.

Mr. Street: Well, I would not consider it good behaviour if he was irresponsible, drunk all the time, did not support his wife, was in debt, had a bad reputation, and nobody trusted him, and things like that. We get a few like that. We have to make recommendations to the minister, and the minister has to make recommendations to the Cabinet. We have to be fairly responsible regarding the information we furnish.

Senator Prowse: What I am trying to get at is this: On the basis of your experience, is there an area where we could relieve everybody of the responsibility by saying. "If these criteria are met, no investigation will be necessary at all, and as a matter of form a pardon will follow, subject, of course, to revocation."?

Senator Eudes: Yes, but would that protect society?

Senator Prowse: I do not know whether it would or not. This is the question I am raising. Perhaps the whole value of it would be lost.

Mr. Street: Well, that is what I am trying to avoid, sir. For instance, when a child, any one of us in this room might have been convicted of stealing apples from a farmer's orchard. That was theft and we could have been convicted. That is an extreme example; but supposing one of us had stolen a bike or something when we were a teenager; it could have happened. 20 or 30 years later I am not about to waste time making an investigation regarding a minor office of a teenager 20 or 30 years ago. However, that is not the kind we get. We are getting applications from those in a great rush who apply before the five years are up. It is the more difficult cases we have to deal with. The more deserving cases, as I think the senator indicated, do not apply for it because they usually have no particular use or need for a pardon unless it is to get a visa or something of that sort. We are dealing with some borderline cases.

Senator Eudes: We have to protect society from those who are too eager and do not want to wait the five years.

Mr. Street: Well, some of them are in a great hurry to get a pardon and I think five years is a reasonable time to wait. That is the law now. It used to be the policy, but now it is the law. Two years on a summary offence is a rather generous attitude to take, and some of the borderline cases and some inadequate people, perhaps who may not be deserving, cannot even wait that long. It is very hard to delineate standards, except in a general way. I have not had a chance to discuss this in any detail with my minister, to find out what his views as to standards are. Perhaps that is my fault.

Mr. England: In view of the pardon-granting powers of many of the states of the United States—my section wrote away to a great number of them, as well as to France and England—I cannot help but come to the conclusion that a person in Canada gets a pardon with less administrative difficulty than anywhere else. In many of the states of the United States a person's intention to apply for a pardon has to be published in the newspapers, he appears before a court and also gives notice of intention to the chief of police. Then his rehabilitative period follows his notice of intention, much like citizenship. Whereas under our policy all the applicant has to do is write a letter on the back of an envelope and the whole process takes place, without a solicitor or anything. From that point of view I think this pardon-granting policy is a generous procedure. It is a fact that after receiving the results of the investigation—and hindsight is a wonderful thing—we could say, "We need not have investigated this case"; "This case was over-investigated," but where and when do we draw the line? One more reference may reveal a part of the character of an applicant that was not known.

Senator Hastings: You speak of many of the states in the United States. I understand there are only five.

Mr. England: No, there are a great many more than that.

Senator Prowse: Is not one of the problems down there that a conviction carries with it the abrogation of certain civil rights.

Mr. England: That is quite right.

Senator Prowse: So that may be the reason for their procedure, and that is why a person might feel that it was worth while. It may be a better way of doing it.

Mr. Street: A presidential pardon is investigated by the FBI.

Hon. Mr. Goyer: May I interject a few ideas, Mr. Chairman? When dealing with inmates and ex-inmates we have to be very careful that we do respect their dignity and privacy because, as has been pointed out, we have to consider them as citizens; they are still citizens. I see nothing in the law which means that an inmate or an ex-inmate has lost his citizenship as a result of having been convicted of a criminal offence. We also have to

bear in mind that approximately 85 per cent of the inmates in our institutions are recidivists. The work of the National Parole Board, the rehabilitation of the inmates, and the parole services in support of the Parole Board decisions have improved, and will improve greater, I hope, in the future. Nevertheless, those are facts of today.

I think I am on record now that in the department we would like to put much more emphasis on the rehabilitative process than on the punitive process which was more or less the priority in the department over a certain period of years. I do not know if we will rate better, but let us try it and let us find out if we can improve the figures. I do not think that we can just forget about the protection of society; it is also an important consideration, even if it is not the prime one. The figures show that in the past the Parole Board has recommended to Cabinet many cases for the granting of pardons. Nevertheless, the Parole Board has also decided to refuse applications. I do not know if you are aware of the figures.

Senator Hastings: We have the figures.

Hon. Mr. Goyer: Yes, you have the figures. These prove, after a serious investigation, that we were not able to recommend a pardon because we were not satisfied that the citizen would not be a recidivist in a very short period of time. However, I agree that we have applied the law in a liberal way up to now, and it is not our intention to become more restrictive or more permissive, but it is to try to balance the objectives in the application of this law.

I do not know if you are satisfied with the way the investigations are carried out, but there is also another consideration of some importance. I am responsible in Parole Board and Penitentiary Service, but also for security in the country. We all realize that, because of this department not only for the RCMP, the National the nature of our society, in the future we shall require more of these services. The hiring of more staff for the National Parole Service, to direct those investigations, could make an improvement, if you are not satisfied with the way the RCMP are conducting those investigations, but I would prefer to keep on with the Royal Canadian Mounted Police. After all, if we have to hire more staff, I would prefer to hire more police officers and, thus, to have more flexibility at my disposal.

The point is that we can use a certain number of police officers to direct those investigations, but in case of an emergency we could then fall back on those same officers and put them to work on more urgent matters when there is an emergency. In other words, we would suspend the investigations with respect to criminal records. That can wait because it is not a matter of top priority, while a threat to society, for example, would receive top priority and would necessitate our calling upon all of our human resources in order to cope with the situation. Thus, the officers assigned to investigate criminal records would be a kind of reservoir, if you like, which I would have at my disposal.

Senator Belisle: Mr. Minister, would it not be possible to have special training for officers who would be making these investigations?

Hon. Mr. Goyer: Special training? At the moment we provide a six-months training course, and I am satisfied that the officers are very well prepared to handle these investigations after their training course. Moreover, with the training they now receive they will still be able to be called upon as police officers; but if they were given a training that was specialized solely for purposes of investigation it might be that I could not call upon them in case of emergencies, as I have suggested I would wish to do.

Senator Hastings: Surely the emphasis must be on the rehabilitative treatment of the individual citizen. If that is so, I would submit that it is the rehabilitative arm of your department which should be strengthened. After all, the granting of this pardon, with its attendent investigation into the individual's life, is, I suggest, the final act of rehabilitation, and the people best qualified to carry out the investigation into the life of that individual are precisely the employees of your parole board who have knowledge of what the man has been through. Certainly, from my experience with these men it is obvious that your parole officers can make an objective judgment in almost every case; and they can do so within the space of a two-hour interview in the person's home together with two or three checks on the person. This would not necessitate bringing the law enforcement agency of society back into the parolee's life.

After all, the parolee has paid his price. He does not want to have anything to do with the police anymore. He wants to stay as far away from them as possible. Bringing them back into his life is just not consistent with the rehabilitative process and the final act of rehabilitation.

I repeat that I hope it is the rehabilitation aspect that you are going to emphasize, and not the law enforcement aspect.

Hon. Mr. Goyer: I do respect your views, Senator Hastings, but we are trying now in this department to have more of a relationship between the agencies and to consider our role not only in terms of prevention of crime but in terms of the rehabilitation of the criminal. Included in the rehabilitation is the correctional aspect of the rehabilitative process, because, of course, rehabilitation takes places not only outside, after the release of the inmate, but within the institution during his imprisonment. Another very important factor in whether a person is easily rehabilitated or not is the actual sentencing. As you know, there are no guidelines for the judges to use in deciding what sentences they will impose on the individuals who come before them. Because of that, the process of rehabilitation may be affected according to whether or not a convicted person feels he has been treated justly.

This is not by way of a criticism of the judiciary or judges in particular; but perhaps it is time for the judiciary and the Government and the other societal agencies concerned with people who have been accused to sit

down together and to decide upon guidelines that can be applied right across Canada. However, that is another question.

May I just point out that we do not consider the police as a negative element in our society by virtue of its role of prevention of crimes. And it may be that we should be working harder towards creating an image of the police as a positive force within society, one that assists citizens in a preventive way by enforcing laws which are promulgated not by the police but by another branch of society. The police could very well adopt the attitude that, if society does not like a particular law, society should change that law.

Just to go back to the rehabilitative aspect for a moment, if the police can play a positive role in the rehabilitative process, as I believe the police can, that would be a large improvement, because the more that the police are considered a negative element in our society, the larger will be the segment of our population that will look upon the police with a negative attitude, and a confrontation with police services is a bad thing.

It is my feeling that if we do not build bridges between society and the police, especially between the police and the youngsters of our society, then one day we will take a retrograde step and will end up with a much more punitive society than we have today. Our policy is, therefore, directed towards avoiding that situation.

On the administrative side of my responsibility is the fact that within the same department I am trying to build in a certain amount of flexibility. It might be idealistic to say that each one should have a large number of civil servants to do the job in a better way, and I have received representations from the parole board and from the police and from the penitentiaries services, but I am responsible to the Canadian taxpayers at large and if I can save a dollar without any backlash to the citizens or, in this instance, for the representations of the citizens, then I think it is my duty to try to do so.

The Chairman: Mr. Minister, do you know of any person on parole, or any person who has been pardoned and is now back in the good graces of society, who has ever been allowed to serve as a juryman on a trial?

Mr. Street: I do not know of one, Mr. Chairman.

Hon. Mr. Goyer: I do not know, Mr. Chairman.

Senator Prowse: There is nothing disqualifying such a person.

Commissioner Higgitt: I should think it quite possible, but I am sure he would be challenged.

The Chairman: You know, it is becoming fairly well recognized that former "cons", as they are called, are rather successful in rehabilitating others.

Interestingly enough, in front of the Parliament Buildings yesterday I met a chap carrying a placard. He had a grievance. We had a little discussion about rehabilitation. He said that there is no such thing as rehabilitation in an institution or anywhere else, but that the fellow has to do it himself. His point was, "how can a man stay rehabilitated if he cannot get a job and get some assistance." The point I had in mind is that if former "cons" make good social workers, would they not also be good jurymen?

Senator Prowse: Of course, Mr. Chairman, defense lawyers receive a copy of the list of jurymen to be called. They receive that list about two weeks in advance of the trial, and part of the routine is to run a check on every juryman to find out as much as possible about him in order to know whether or not you want him on the jury. So I would think that this is something that is a self-correcting situation, if they are on or off. I can see situations where I would be quite happy to have one, but I can think of other cases also, depending on what the man's crime was.

The Chairman: If you are defending a bootlegger, you like to have a bottlegger on the jury.

Senator Prowse: Or a drinker.

Hon. Mr. Goyer: Mr. Chairman, may I table a brief on the way the inquiries are conducted under the Criminal Records Act, it is in both languages. It may be of some use to honourable senators.

Senator Prowse: Thank you very much.

Senator Hastings: Mr. Minister, I wonder if you would also have Mr. England give us a breakdown in writing of the numbers received, and the variious categories. We have bandied round figures about here.

Senator Prowse: With disposition as to date and the present status of the applications pending.

Mr. England: We can certainly do that.

Senator Prowse: I should like to say one thing. I made a statement earlier about the RCMP, and it occurred to me it might be subject to misunderstanding. When I said they were very reluctant to believe a leopard could change its spots, I think perhaps I should have added that those conversations took place in the context in which we were discussing two cases of men on habitual criminal charges, the other fellows were in and out of crime, and the RCMP were just not going to believe these fellows were about to be changed. As a matter of fact, the facts bore out their judgement.

Commissioner Higgitt: Thank you very much, senator.

Senator Prowse: I just wanted to make that clear. I believe they have to be suspicious, otherwise they would not be of any use to the police force.

The Chairman: That is it.

Senator Prowse: That was the only point I wanted to make, because I wished it to be clear that I did not want to be unfair to anybody.

The Chairman: They all understand that. If a man went to sleep at the wheel of his car, ran into a ditch and had an accident claim, before he got insured again the insurance company would probably want to know his

tendency to fall asleep at the wheel of a car. It is all the same sort of thing.

Senator Prowse: They would want more than that, mostly money.

Commissioner Higgitt: Senator, I knew you did not intend anything else.

Senator Prowse: No, and I wanted to make that clear.

Commissioner Higgitt: I want to assure you that in these particular cases we are very factual in our reports, so far as is humanly possible.

Senator Belisle: Mr. Chairman, are you prepared to accept a motion for adjournment?

Senator Hastings: As I understand it, we will have the John Howard Society at our next meeting.

The Chairman: I think that is what we asked for, in two weeks time.

Senator Hastings: Two weeks from today. Will the department officials be available after we have seen the John Howard Society, and other societies, if we need them?

Senator Prowse: If we need them again I presume they will be available.

Hon. Mr. Goyer: We are at your disposal.

The Chairman: Is it agreed that this brief headed "Brief—Inquiry. Criminal Records Act" be printed as an appendix?

Hon. Senators: Agreed.

The committee adjourned.

APPENDIX

BRIEF—INQUIRIES

CRIMINAL RECORDS ACT

The Solicitor General, when introducing Bill C-5 (the Criminal Records Act) stated:

> "The Bill represents an attempt on the part of the Government to bring forward legislation that will deal with one aspect of the field of corrections that has been causing concern to all those working in the field and to public figures who have thought about the subject. The area I speak about is the apparent and unjust consequences that still attach to a person who has been convicted of an offence but who has long since rehabilitated himself and become integrated into society in a wholly satisfactory way".

The Criminal Records Act placed new duties on the National Parole Board. These duties are:

(a) to cause proper inquiries to be made in order to ascertain the behaviour of the applicant since the date of his conviction pursuant to subsection (2) of section 4 of the Act.

(b) report the results of the inquiry to the Solicitor General with its recommendation as to whether a pardon should be granted, and,

(c) in any case where the recommendation of the Board is a denial of a pardon, consider any oral or written representations made to it by or on behalf of the applicant.

In essence, the application form is virtually the same as that used in processing applications for a pardon under the royal prerogative of mercy. The purpose of the form is to establish the identity of the applicant in order to obtain his criminal record and to provide the investigator with references in order to obtain information relating to the behaviour of the applicant.

In processing an application for a pardon under the Act, the following are the basic steps in each inquiry:

(a) the acknowledgment of the letter requesting a pardon, or requesting information in respect of a pardon, and where applicable, forward the application for pardon form together with an extract of the Act and any necessary advice to the applicant.

(b) acknowledgment of receipt of the completed application form.

(c) obtain from the custodian of records the criminal record of the applicant and where applicable, the applicant's military service record.

(d) request information from the appropriate police force or where applicable, federal department to determine the circumstances of the offence committed.

(e) request the RCMP to make a community investigation to determine the behaviour of the applicant.

It is thought that the circumstances of the commission of the offence are relevant and where possible they are obtained. There are, of course, many applications for pardons involving offences which occurred 15 or 20 years ago, and details of the circumstances are not available. Many Metropolitan police forces, e.g. Montreal and Toronto do not retain their records over 10 years. The processing of an application is not delayed if the circumstances of the offence are not available. Where the details of how the offence was committed are received, they confirm or otherwise the statements made by the applicant and indicate more clearly the nature of the offence committed.

The number of applicants for the grant of a pardon who have been former parolees are few but no doubt will increase in the future. Where there is a parole file, relevant information from the parole file is used and obviates many of the steps in the investigating process.

The Board has received applications from applicants employed in what they consider to be sensitive positions who have requested that their application not be proceeded with if an investigator is employed. Such applicants have been advised that in lieu of the normal investigation, if they produce statements from well-known persons in the community who by virtue of their status and position their creditability and reputations are beyond dispute, such statements would be acceptable. This procedure has been used sparingly but has not been refused where it has been requested.

The investigation made by the R.C.M.P. is done as discreetly as possible. The investigator identifies himself and informs the person he is interviewing that the investigation is being carried out on behalf of a department of the federal government. The person carrying out the investigation is normally a trained investigator and a member of the criminal investigating branch of the force. He is therefore a policeman with experience and not one who is carrying out the investigation for experience. At no time during the course of the investigation is the reason for the investigation stated and where during the course of the investigation it appears to the investigator during an interview that he may jeopardize the reputation or employment of the applicant, he terminates the investigation.

Each investigation normally involves a check of the local police records to determine whether any other offences have occurred. This liaison between the federal, provincial and municipal police forces is considered valuable.

Many applicants have lived in several localities since the commission of their offence and give as references persons living in other than the community in which the applicant is then residing. The investigation in such cases involves several elements of the force and the assembling of the results of the investigation by the Force.

Attached are statistics relating to applications received and processed under the Act.

CRIMINAL RECORDS ACT

Statistics

Pardons granted under the Criminal Records Act, June, 1970, to May, 1971	37
Submissions awaiting Natonal Parole Board's decision	12
Total number of Board's decisions under the criminal Records Act	85
Total number of active files under the Criminal Records Act	766

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

Available from Information Canada, Ottawa, Canada.

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

(Sub-committee examining Criminal Records Act)

The Honourable A. W. ROEBUCK, Chairman

The Honourable E. W. URQUHART, Deputy Chairman

No. 9

TUESDAY, JUNE 15, 1971

Second and Final Proceedings of the Sub-committee examining the "Criminal Records Act"

(Witnesses and Appendices—See Minutes of Proceedings)

23335—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. Roebuck, *Chairman*

The Honourable E. W. Urquhart, *Deputy Chairman*

The Honourable Senators:

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

(Quorum 7)

**Ex officio member*

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, Wednesday, April 28, 1971:

"The Order of the Day being read,

With leave of the Senate,

The Honourable Senator Hastings resumed the debate on the motion of the Honourable Senator Hastings, seconded by the Honourable Senator Prowse:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon the operation and administration of the *Criminal Record Act*, chapter 40 of the statutes of 1969-70, and in particular upon the operation and administration of subsection (2) of section 4 thereof.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative, on division."

Robert Fortier,
Clerk of the Senate.

23335—1½

Minutes of Proceedings

Tuesday, June 15, 1971.
(10)

Pursuant to adjournment and notice the Sub-Committee examining the Criminal Records Act (Legal and Constitutional Affairs Committee) met this day at 9:30 a.m.

Present: The Honourable Senators McGrand (*Chairman*), Hastings and Prowse—(3).

Also present, but not Members of the Sub-Committee: The Honourable Senators Croll and Fergusson—(2).

The Sub-Committee proceeded to the consideration of the following Motion by the Senate:

"That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon the operation and administration of the *Criminal Records Act* Chapter 40 of the statutes of 1969-70, and in particular upon the operation and administration of subsection (2) of section 4 thereof."

The following witnesses were heard in explanation of the Motion:

Reverend T. N. Libby,
Executive Director,
St. Leonard's Society of Canada,
Windsor, Ontario;

Mr. A. M. Kirkpatrick,
Executive Director,
The John Howard Society of Toronto,
Toronto, Ontario.

Miss Phyllis Haslam,
Executive Director,
The Elizabeth Fry Society of Toronto,
Toronto, Ontario

It was Resolved to print 800 copies in English and 300 copies in French of these Proceedings.

It was Resolved that the briefs enumerated hereunder be printed as appendices to these Proceedings:

"A" The John Howard Society of Vancouver Island;
"B" The John Howard Society of Quebec, Inc.;
"C" Daniel M. Hurley, Professor of Law, University of New Brunswick;
"D" John Howard Society of Saskatchewan;
"E" Service de Réadaptation Sociale Inc.;
"F" The Elizabeth Fry Society;
"G" St. Leonard's Society of Canada;
"H" John Howard Society of Ontario.

At 11:30 a.m. the Sub-Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,
Clerk of the Sub-committee examining the Criminal Records Act, Legal and Constitutional Affairs Committee.

The Standing Committee on Legal and Constitutional Affairs

Evidence

Ottawa, Tuesday, June 15, 1971

The subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs, to which was referred an inquiry into the administration of the Criminal Records Act, met this day at 9.30 a.m.

Senator Earl A. Hastings (*Acting Subcommittee Chairman*) in the Chair.

The Acting Chairman: Honourable senators, I will be acting chairman until Senator McGrand arrives.

I would like to table four briefs that we have received. They are from The John Howard Society of Vancouver Island, The John Howard Society of Quebec, Mr. Daniel M. Hurley, Professor of Law, Fredericton, New Brunswick, The John Howard Society of Saskatchewan, and The Service de Réadaptation Sociale Inc. I am also tabling the briefs submitted by the organizations represented here today; they are The Elizabeth Fry Society (Toronto Branch), St. Leonard's Society of Canada, and The John Howard Society of Ontario. They all deal largely with what we will be discussing this morning from The John Howard Society of Ontario. They will be included in the record.

[*Note:* The above briefs are printed as Appendices "A" to "H" respectively.]

Our first witness this morning is the Reverend T. N. Libby, of Windsor, Ontario, who is with the St. Leonard's Society. That is an organization dedicated primarily to the operation of half-way houses in the interests of the former inmates of penal establishments.

I welcome you, Father Libby. As you are aware, we are inquiring into the administration of the Criminal Records Act and its effect on former inmates, in particular the investigative portion of the act and how that aspect is being administered. I do not know whether you would care to make an opening statement, and informally from your experience tell us your views. Then we could discuss your brief with you.

Reverend T. N. Libby, Executive Director, St. Leonard's Society of Canada: Honourable senators, I am certainly privileged to be here this morning. We have already submitted a brief to you on the function of the St. Leonard's Society of Canada, which now has fifteen groups established across Canada. Nine of these are in operation, and we expect two more to be starting late this summer.

We provide a residence facility for offenders, which in one case includes women and in another probationers. Most of our people come into the house after they are released on parole or, on the expiry of their sentence, from a penitentiary or reformatory. We think the Criminal Records Act is an extremely good one, but we are concerned about the investigative portion of it. We have known a number of people who have passed through our own house and other offenders who have applied for clearance of their criminal records. In one case, a man who has been out of trouble with the law for ten years, and now has a responsible position in the community, applied about last September for clearance of his criminal record. One night at about 11 o'clock an RCMP officer approached a Roman Cathol c priest in the city of Windsor and began to inquire about this man. At this point the priest became very upset, called the man at about midnight and asked him to come over immediately, since the priest had not been given any reason for the investigation. If there is this kind of activity, it can be most dangerous to the community and to the ex-offender. Certainly, it is not admitting or acknowledging, in any sense, that this person has been successfully rehabilitated in the community. I know of a number of other cases in which people have been investigated and in which similar things have happened.

We feel very strongly in the St. Leonard Society that this investigative function should be removed from the RCMP and put under the National Parole Board, whose major function is approaching people in the community without this kind of negative effect a police officer would have in determining the extent of rehabilitation.

The Acting Chairman: Thank you, Father Libby.

When he was present as a witness, Mr. Goyer, said that the RCMP had completed 480 investigations under the act and that they had received no complaints. I, like you, have received complaints. Why are these people not complaining?

Rev. Mr. Libby: One of the things is that an ex-offender feels, and rightly so, that he has been so detached from the community. If he is particularly interested in having his record cleared, he may be very afraid to proceed any further with this, thinking it would be a negative aspect to the actual clearance of the record. This would be my thought, and I have heard people express this kind of thought that once they have made application they feel that is it, that that should be sufficient, and that they should not have to follow this up in trying to correct the damage that has been done.

The Acting Chairman: I think you are quite right. They do not want to prejudice any opportunity they

might have of receiving a pardon. Would an investigation by a parole officer, or by the John Howard Society or some other society, not be any better than an RCMP investigation?

Rev. Mr. Libby: I think it could have some of the same kind of effect. Ideally, a person who has been out of trouble with the law for five years on a particular offence, and has kept clear of any criminal activity, should be cleared; but since this bill does not allow that kind of automatic clearance, the lesser of the evils would be to have someone, who has experience and training in counselling and approaching people, to serve this function. It could have some negative effects, but it would not have anything near the effect a police officer would have.

The Acting Chairman: I agree with you. When the commission and all the organizations recommended that there be automatic clearance, subject to a search of the records, I cannot understand why we apparently intend to continue this investigation. The minister also said that he has to be assured that the person making the application for pardon has lived a life of good behaviour before he grants the pardon. As a representative of society, he wants to make certain that the person receiving the pardon is eligible. What do you think of that?

Rev. Mr. Libby: First of all, it is awfully difficult to be 100 per cent certain that a person is leading a perfect life, or the kind of life one would expect in a community. Surely, after five years, an ex-inmate has demonstrated his ability to interact with society and lead a useful and productive life. A police officer, whose function is mainly investigation of criminal activity before trial, is not really the kind of person who can assess a personality, in terms of how well he is integrating. Pepple who are involved in this work—in particular, the parole officers, whether they be a private agency or the National Parole Board—are in a much better position to make this kind of assessment. Generally speaking, people who are experienced could make a pretty good assessment of the general rehabilitation of this man or woman. On the other hand, I do not believe that the average police officer, whose function is not in this area, really has the skills or the ability to do so.

The Acting Chairman: If a life free of criminal activity is all we are asking, why do we ask more of this man than we would of you or me?

Rev. Mr. Libby: This is one of the hang-ups we have in society, that we expect an ex-offender to demonstrate, not in general terms but explicitly and by many ways, that he has made it. It is unfortunate that we do that, but this has been our tradition, still is and probably will remain so for some time.

The Acting Chairman: It seems to me that we expect him to be a saint, though the rest of us can be sincere. We speak of a changed attitude of society, and these clichés about "rehabilitation" and "change of attitude"; yet we are given an oppportunity to show a change of attitude and we do not show any change at all. We are still going to regard him as something below us and, even though he has been free of crime, we are going to investigate him.

Rev. Mr. Libby: I suppose one of the problems is that when the laws are set up, naturally they are complicated and are expressed in language which automatically sets up a whole hierarchy of investigative procedures. I would still like to see the bill simply say that if an individual is clear of criminal activity for five years he will be pardoned automatically.

The Acting Chairman: On application?

Rev. Mr. Libby: On application.

The Acting Chairman: Very good.

Senator Fergusson: I am very much interested in this and would like to ask Father Libby what training the members of the National Parole Board have that makes them so good at this sort of thing. Would not the fact that they must be known in the locality make their investigation carry just as much of a stigma and be just as difficult?

Rev. Mr. Libby: It varies. Some members of the National Parole Board will have a master's degree in social work or a related field. This is becoming more and more the case. Our own experience in dealing with parolees in the community dictates a certain expertise and knowledge in this field. I can appreciate that when they approach a person in the community there may be some questions raised. Generally speaking, I find that before a man or woman is released on parole, when the investigation goes on in the community it does not have this kind of negative feedback when a member of a private agency or a member of the National Parole Board makes a community investigation, that it has when a police officer makes one. All people in society have some questions about being approached by a police officer. It is just the way we have been schooled in society. If a man or a woman has led a useful and productive life, and then one of his friends, or an upstanding citizen in the community, so-called, is approached by a police officer about them, it immediately lends that aura that there is some trouble brewing.

Senator Fergusson: They suspect something which may never have happened. May I ask another question, which has nothing to do with the brief? I was very interested in the paintings displayed last night. I did not really find out how long this has been going on.

Rev. Mr. Libby: We started this national prison art scheme only last year. This is the second one. Last year it was a travelling exhibit, which was judged in Brantford. It opened there and went to nine major communities in the province of Ontario. This year we are planning to travel from coast to coast, to every major city as well as to many of the institutions. We expect this travelling show will take a year.

Senator Fergusson: Have you some of the teachers on it?

Rev. Mr. Libby: No, we do not. The prisons have various kinds of community involvement in this. Some prisons will have people come in from the community and teach.

Senator Fergusson: Voluntarily?

Rev. Mr. Libby: Yes. We hope to encourage this process in the future.

Senator Fergusson: I think it is a tremendous project. Last evening I was talking to at least one who had done some of the pictures, and I was greatly impressed by what the project must do for them.

Rev. Mr. Libby: I think it does help a great deal in regard to their own attitude.

The Acting Chairman: Would you have former inmates working for you?

Rev. Mr. Libby: Yes, we have one former inmate, who has been out of trouble for a number of years. He is a very solid member of Alcoholics Anonymous. This is in Windsor. We have found that he has done an extremely positive and productive job.

I think the goal is to have more and more former inmates. After all, if we are progressing and are asking society to accept former inmates back into the community, then we should demonstrate that fact. We feel that in many cases former inmates have more to offer than the typical person we have in society, regardless of his educational level.

The Acting Chairman: I notice you place great emphasis on doctoral degrees. Would you say that the former inmate would have adequate training to do as good a job as the doctor of philosophy, for example?

Rev. Mr. Libby: In many cases he would be better. It becomes almost an individual thing in terms of his interaction. Of course, some inmates who have made it feel that everybody else should make it to the same degree, or even better, and they tend to develop more of an inmate-societal attitude, and that is not particularly the kind of person we want. We want a person who has made it, but who has demonstrated that now he will help other people along what is a very difficult course in society. No matter how many changes we make in the administration of justice, at best we expect a former inmate to demonstrate clearly that he is reformed and is ready to take his rightful place in society.

The Acting Chairman: It seems to me there is a great barrier between society and the inmate and former inmate. We are just not crossing that barrier. There is an undeclared war between those people and us, and we just do not seem to be making any headway in breaching the barrier. I have a letter here from a young inmate. You may have met this type of situation before. This letter indicates that the inmates are just not interested in our agencies. I am sorry to say it, but that includes the Parole Board's intercells. This is the barrier we are not crossing. The inmate on release has numerous difficulties—primarily, character defamation, psychological defects, financial instability accompanied by other difficulties that are quite easily overcome. Where can he go to receive help? He most certainly will not go to an agency composed of social workers. Why? There are many reasons for the average ex-convict, but the prime one, according to this letter, is the existing barrier. He is not adjusted to facing reality accompanied by its responsibilities. Nevertheless, at his time of release he has sincere and positive intentions.

However, the inmates just are not prepared to go to you or us or our agencies.

Rev. Mr. Libby: Of course I have heard that sort of argument verbally. All of us in social agencies have. Often it is true; sometimes it is not. There are people who are most anxious to get help. There is this kind of sub-cultural theory inside the prison: "Don't trust anybody, particularly those professional do-gooders who make money off us. They are even worse than the do-gooders." One chap said that, "Without us, you would be out of a job." I said that that would be good; that we would be all too willing to give up and go into something else. But that feeling naturally exists. I agree that there is this great gulf.

Through its governmental agencies, particularly the Department of the Solicitor General, society has over the last few years been talking more and more about, and preaching almost exclusively, community involvement, and yet I see very little evidence that the government agencies are moving into real community involvement. The private agencies naturally have a much better opportunity to do that, whether the private agency be the John Howard Society, the St. Leonard Society or any other.

I see no reason why the Canadian Penitentiary Service itself, the National Parole Board and others could not begin to involve ordinary citizens in their work. These agencies do not have to be exclusively wrapped up in the legal definition of what a paroleee or an offender is. We are releasing more and more people to go into school and interact with the community, but why send them to prison in the first place? That is my question. In my estimation, most men and women serving time in penal institutions in Canada today could better serve their time in communities under some kind of supervision, varying from close to very unstructured supervision. They would benefit far more there than they would in a penal institution.

There are many alternative ways of punishing, if that is what we are after, and there are many alternative ways of habilitating.

The Acting Chairman: I agree with you. We spend a lot of time talking about what we should do, to the point of using cliches, and yet what we are actually doing is contained in this bill. Here we have been given an opportunity to show the change of attitude that we have been talking about. We could show that change of attitude in this new act and in the administration of it, but unfortunately we simply go right back and say to the inmates that we are not ready to accept them without having

another really good look at them. We talk, but, so far as practical demonstration is concerned, we fail.

Rev. Mr. Libby: I have often said that in my opinion the inmate needs habilitation, not rehabilitation. You do not rehabilitate someone who has not been habilitated in the first place. Society is the group that needs to be rehabilitated.

The Acting Chairman: Father Libby, it seems that Canada puts more men in prison and keeps them in prison for longer periods of time than any other nation. We are putting more in as we progress. Why? What is wrong?

Rev. Mr. Libby: I have heard this question discussed. In fact, I have read on it. It must be that the judiciary find this the simplest way of handling those who appear before them. Or perhaps we have lacked the alternative community resources available, although I think they are there in many ways now. We have in Ontario a fairly adequate probation service, although it could have a larger staff, but I sometimes wonder if our judiciary really search out all the alternatives to imprisonment that are available in the community.

Senator Fergusson: It seems to me that there are many communities in which there do not seem to be any alternatives.

Rev. Mr. Libby: There are often alternatives in terms of the people in the community. Perhaps in the initial stages it would require the judge himself taking some interest in organizing a small group of citizen volunteers. It may not be perfect, but it is very often better than the present system of undoing the damage. As it is, we produce more criminals in prison. We set more people back than we tend to push forward, because we give them this negative experience of incarceration.

Senator Fergusson: Father Libby, you were speaking about the houses in operation and you said there was one women's house.

Rev. Mr. Libby: Yes, we have one in Windsor called the Inn of Windsor for Women. It deals with a little broader field than simply the fields of offenders. Although they have had some ex-inmates, more and more the Inn is being used by the courts as an alternative to imprisonment. That, of course, is something we are extremely interested in. Instead of young girls having to be placed in prison, they can be placed by the courts in that facility, under probation.

The Acting Chairman: You said you had run into a number of situations in Windsor with respect to investigations. How many would you say?

Rev. Mr. Libby: Well, I would say I have known of twenty ex-inmates in Windsor who have applied for a pardon. Beyond simply filling out the application form and then hearing that RCMP officers have been around to see certain persons, I do not know of one individual who has received any word beyond the fact that the RCMP were doing investigations. Apparently the whole thing is dropped. I understand there are people who have received clearance from a criminal record, but to my knowledge no one has.

The Acting Chairman: Have they been embarrassed at all by these investigations?

Rev. Mr. Libby: I would say that some have been. Three or four have mentioned to me that they thought it was a very poor way of doing it. In one case a man said he wished he had never begun the process and had never applied for clearance of his criminal record. He said he would not have done so had he known that this was the way it was going to be approached. He was doing quite well but he thought this might demonstrate the fact to other people. He said that if he had to go through the same process again, he would never apply.

The Acting Chairman: At our previous meeting Mr. England indicated that they receive many preliminary inquiries which are dropped. It is my view that when he heard of the investigation he just did not bother any further and dropped it. Is that your assessment?

Rev. Mr. Libby: Yes. If a man has been social-worked to death, right through the courts and through the prison system, not necessarily by professional social workers but by all kinds of people, and he applies for and receives parole and does well in that and is free in the community, and then he looks at the application form and sees the whole process is going to start all over again, I think this would act as a deterrent to his applying in the first place. That is all I have to say on that.

At this stage I would like to introduce Mr. Louis Drouillard, Director of St. Leonard's House in Windsor.

The Acting Chairman: We are very happy to have you with us, Mr. Drouillard. Thank you very much, Father Libby. I wish you every success in your conference here.

We now have the representatives of The John Howard Society of Ontario. Mr. Kirkpatrick is with us this morning. Would you care to make an opening statement, Mr. Kirkpatrick?

Mr. A. M. Kirkpatrick, Executive Director, The John Howard Society of Ontario: Honourable senators, in view of your questioning of the last witness, I shall make reference to my brief, as this might anticipate some of your questions.

The general experience that we have had is that there is reluctance on the part of enquirers to make application form that five references must be provided and that a personal inquiry will be made of those referees.

This is not really so much of a problem for men who have revealed to friends or employers that they have a criminal record, or if they feel close enough to tell their story to friends and ask them to stand as referees. In such cases the direct inquiry does not create problems if it is discreetly done by non-uniformed police. In our experience, this has been the case and we have had no adverse comments as to the procedure followed by the police. However, when a man has completely changed his life-style and has successfully hidden a past criminal

record, even from his family, this does present a problem, as he is most reluctant to reveal his past to his friends or business associates for reference purposes.

In our view, in such a situation it would make little difference if it were police, parole officer or John Howard Society representative who made the inquiry of the referee since the purpose would automatically stand revealed. The question would be, "Why are these people making this inquiry? They are all involved with the criminal law and the correctional system."

It is our understanding that the pardon section of the parole service would, in exceptional cases, accept open testimonials or general references and forego the direct inquiry of referees. This practice is to be commended and should be extended. I think particularly of one man in whose case this has been happening. I could probably think of others, but I can just think of one offhand.

It is our view that the man should continue to make application on an individual basis, as this has meaning to him in his reinstatement in society. It would be numerically impracticable to make an automatic review of all ex-offenders at the end of five years, and we believe it would also detract from the sense of achievement and regained worthy citizenship on the part of the applicant. However, we suggest that the application form be changed by removing the initial request for references and that the applicant be requested to appear in person at the nearest district office of the parole service. This would clarify the actual value of the pardon, and through the personal interview much of the necessary information as to the applicant's community status would be obtained as well as providing opportunity for a personal evaluation by the parole service representative.

However, we see no reason why applications, when received by the parole service, should not be referred to the RCMP, who, in consultation with the local police, could determine the status of the applicant in regard to criminal activity. In our view, this should be the extent of the fact-finding process: Is the man still involved in criminal activity or is he clear? That is all they should be doing, not making an assessment of the individual. The local police have developed intelligence squads and are usually in a position to make such an assessment. If there is no question in their mind, then surely the pardon should be granted without any further investigation. If they have proof of criminal activity or reservations as to good citizenship, the applicant should be faced with this information and given an opportunity to discuss the matter with the police and the parole service. Then, if he satisfies them, the pardon should be granted. In doing this, he should be allowed to give references, if he wishes, or to supply open testimonials and proof of employment and acceptable citizenship activities.

Such a procedure would almost entirely obviate the need of personal interviewing of referees, except with the applicant's knowledge and consent, and then only as a last resort. It would obviously relieve the fears of many would-be applicants and encourage them to make use of this symbolic reinstatement in society.

What is the purpose of this pardon in the mind of the man or woman? Some view it as a practical thing because they want to obtain visas to the United States or other countries. However, the serious question, in fact, is whether such pardon would be accepted for visa purposes, certainly in the United States. Others view it as a means of getting a job, for job applications, and they are prepared to use it in that regard.

Of importance is the fact that most people do not want to reveal, by using the pardon, that they have in fact committed a criminal offence. The very fact that a man says, "I have been pardoned", infers that he is saying "I was an offender. I did commit a criminal offence." Therefore, most people are not prepared to admit publicly that they have received a pardon. A pardon is a private, personal document.

A number of people want this—particularly two general groups of persons. Of one group is the person who has committed one serious offence, maybe early in life, and who feels that the pardon is a recognition of atonement for what he has done. The other is the repeater who, after a lifetime of crime, is anxious to have a piece of paper in his possession which finally says he has made it as a "square John" and has left the "rounder" class behind. This is evidence to him that he has really made it in society.

These are valuable, emotional, factors in the pardon. However, from a practical point of view we feel there could be a change in the act.

Our brief addressed itself only to the actual investigative procedure. With your permission, I would like to make a couple of comments on the act, if that is within the scope of your inquiry.

One of the important questions concerning the act is the word "vacate". In the opinion of many persons, this does not go far enough. I suggested to the former Solicitor General, when he was considering the matter, that we should use, instead of the word "vacate", the phrase "makes null the conviction in respect of which it is granted, so that he will be deemed henceforth not to have been convicted".

This would have a much firmer effect in regard to industrial employment application forms and in securing a job. When a man applies for employment, very often on the employment application form the question is asked, "Have you had a criminal conviction?" or, "Can you be bonded?"—which to some extent is another way of saying the same thing.

The reasoning against the proposal that he be deemed not to have had another conviction is based, to some extent, on an article which was considered by the Standing Committee on Justice and Legal Aflairs in 1967, by a man named Gough in the State of Washington, who believed that there was something objectionable about "legalized prevarication, even though one can rationalize the point by the worthiness of the end. It impairs the laws of integrity by creating a conviction where none is needed".

My response is that the criminal offence is created by legislation of the Parliament of Canada. What we legislate as a criminal offence, with its consequences, the

Parliament of Canada should have the right to "unlegislate", if it so wishes; and if the Parliament of Canada wishes to say that a pardon "makes null the conviction in respect of which it is granted, so that he will be deemed henceforth not to have been convicted", the man then has the right to say on an employment application form in response to such a question, "No." Then, if it is later discovered by an inquiry of the firm and the man is called in and is told, "You falsified your application," he can say, "No, I did not, sir. I have a pardon," and he can then quote those words. Therefore, he cannot be fired, as he so frequently is today, for falsifying his employment record.

I hope you will give consideration to this question, because I think it is vital if a pardon is to be an instrument of any real value on the employment market.

The second question that I raised with the former Solicitor General was with regard to revocation. Provision is made for revocation if the person is no longer of good conduct. I think that is wrong, because the pardon was for an offence or offences in the past and should not be revoked on the basis of a subjective judgment of poor conduct. A conviction for another offence would carry its own penalty and the offender would start again on a new time sequence to endeavour to earn a new pardon, if that were his desire.

However, I fully agree with the other provisions for revocation regarding false or deceptive statements made in the pardon application. I think that is desirable.

I would now raise two or three points about procedures. The first is that they are taking a great length of time to process; it is equivalent to that of human gestation, eight, nine months. I do not really see why it should take so long to create an inert document. The reason is that there has been a tremendous increase in the number of applications for pardon coming to the pardon section of the National Parole Board.

Your committee might very well concern itself with the need for that section to receive support in the processing of these applications, because it is very destructive to the individual, who has made an application in good faith, to be kept waiting for months and months on tenterhooks before knowing whether or not he is going to make it. As your inquiries might show, this delay is probably due to a serious lack of staff. I understand that the gentleman who was working on these matters in that department has left and been replaced by two summer students. I do not consider this to be adequate for such an important matter.

Another provision which causes delay is section 4(5) of the act, which now states:

> —the Minister shall refer the recommendation to the Governor in Council—

Formerly it was referred to the Governor who, in his Letters Patent, has the power to grant the pardon. I am informed that reference to the cabinet creates a delay of a month or more in the total process of issuance of the pardon. Your committee might consider this particular aspect of the act.

I do not think there is anything I wish to add to my statement, but I shall be pleased to answer questions.

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

Senator McGrand: I must explain my late arrival this morning. When we met on June 1, we decided to meet at 2 p.m. today. How did we come to meet at 9.30 a.m.?

The Clerk of the Committee: Because the witnesses are in Ottawa attending a conference.

Senator McGrand: Was I notified that we were going to change the time from 2 p.m. to 9.30 a.m.?

The Clerk of the Committee: Notices were issued.

Senator Fergusson: I think the Chairman should have been consulted, not only notified.

Senator McGrand: That is all right; we will allow that to pass.

I have read this brief very carefully. Twice you mention that you do not see much difference as to who checks on these men on parole, whether it be the RCMP, the local police or other authority. Police are identified only with the enforcement of the law. Having carried out their duty in the apprehension of a criminal and bringing him before the courts, they are finished with the case. A person on parole should not be in the custody of the police. The Parole Board has released him and the matter of those who check on his conduct while he is on parole is not a question of law enforcement. In addition, a man on parole and applying for a pardon anticipates that he is a free man, living in a free society and not under the eye of the police.

Your brief twice states that you see no objection to this situation. Will you tell me why that is so, in view of the fact that so many people do have an objection?

Mr. Kirkpatrick: I think there is a misunderstanding on your part. These men are not on parole. The act provides that there must be an intervening period of five years from the completion of sentence for an indictable offence. Therefore, the man is on parole only until the completion of his sentence. Following that there is a lapse of five years, during which he is free. He is not "free" while on parole, but is continuing to serve his sentence out in the community. Part of his obligation is to report to the police as well as to the parole supervisor. Therefore we are not discussing the situation when a man is on parole, but the pardoning process, when he is in fact a free man and has been for five years.

Senator McGrand: Is the error not in the fact that he has to report to the police? Is that not a weakness in the law? These men should not have to report to the police after they have been brought before the court.

Mr. Kirkpatrick: That is another question; he does not have to report to the police with regard to anything following the completion of his time on parole. We are

discussing an entirely different set of circumstances, with respect, sir. Our feeling is that if a man or woman has been free for this length of time and has built up social and business relationships in the community, no matter who makes the inquiry, if they are connected with the correctional system it will have the same effect. People will ask, "Why is The John Howard or Elizabeth Fry Society inquiring about Joe?" They are part of the correctional system. They will wonder if Joe has a record and will say that they did not know he had been in jail.

Therefore it does not matter whether it is the police, The Elizabeth Fry Society, The John Howard Society or the parole service. This question will start to fester in the mind of the person who was the referee. That is why we suggest that, except in ultimate cases, this approach of interviewing referees be omitted altogether. We do not think anyone should, except in ultimate cases with the man's final consent, interview referees.

Senator McGrand: At the conclusion of your brief you mention the case of a first conviction and a subsequent second conviction. I just cannot remember the words you used.

The Acting Chairman: A recidivist.

Senator McGrand: The first offence is dealt with; he may have a second offence, which must also be dealt with on its merits.

Mr. Kirkpatrick: That refers to section 7(b)(i) of the act, which concerns itself with revocation, and provides that it can be revoked if the person to whom it was granted is no longer of good conduct.

Senator McGrand: That is the word.

Mr. Kirkpatrick: I consider this to be wrong. The pardon was not granted on that basis, but in respect of an offence. It he commits another offence, he starts over again at square one. He has to complete his sentence, and another five years must elapse before he may make another application for pardon.

Senator McGrand: That is what I had in mind, because with the public, the police, The John Howard Society and society in general the first offence is associated with the strong possibility of a second offence.

Mr. Kirkpatrick: The pardon is granted on the basis of five years of crime-free activity and good conduct, no matter how many previous offences the man may have committed. Therefore, as long as he does not commit a subsequent offence he is not in jeopardy of losing his pardon. If he subsequently commits another offence, automatically he starts all over again.

The point I make is that under section 7(b) he should not lose his pardon if it is decided subjectively that he is no longer of good conduct. Should he commit another offence, as you suggest, he should lose the value of his pardon.

The Acting Chairman: Just one question from your brief, Mr. Kirkpatrick, wherein you state:

> "It has been our general experience that there is a reluctance on the part of inquirers to make application when they see on the application form that five references must be provided and that an inquiry will be made in person to the references."

Why is there a reluctance?

Mr. Kirkpatrick: Because this will reveal to their social or business associates that they in fact have a criminal record. Otherwise, why would be the RCMP be coming around?

The Acting Chairman: But they are assured an alledgedly discreet investigation.

Mr. Kirkpatrick: That is true. We have had several cases in which we assisted an applicant with his application, in which the name of our worker was allowed to stand as a reference and our worker was interviewed by the police. It was very discreet indeed, but obviously we knew that there was something involved and we knew what the purpose was. If this had been you, for example, you would have asked, "Well, why are the RCMP asking questions about Kirkpatrick? There must be something funny here." So that is why we suggest that this interview process be cut out entirely, except as a last resort, if the police, the parole service and the applicant do not reach agreement. In that instance he says, "Well, all right, you talk to my friends. I will give you their names."

I should have said, for the record, that we have handled between fifteen and twenty requests a month in our various branches since the act came into force. This is a substantial number, and not all of those have made application. I could not tell you how many have or have not made application, because I do not have those figures.

The Acting Chairman: When you say "handled," you mean you assisted in preparing—

Mr. Kirkpatrick: We answered their inquiries, and we actually interviewed many and told them about it.

The Acting Chairman: And assisted them in applying?

Mr. Kirkpatrick: Yes, and assisted them in applying. In the case of some we actually helped them fill out their application forms. Annually we deal with over 150 applicants for pardons, so it is a substantial number.

The Acting Chairman: In other words, you contend there is no such thing as a discreet investigation when it comes to investigating these people?

Mr. Kirkpatrick: Well, if you receive a credit inquiry about a friend you wonder why—"What is he going to do? Is he going to take a mortgage? Is he going to buy a car?" However, you do not hold this against him, because it is a credit inquiry which you accept. On the other hand, if The John Howard Society came to inquire about your friend you would say, "Well, why is The John Howard Society concerned with my friend? There must be some reason. I wonder if he has a criminal record or has been in jail?" And so you start that process, and your relationship with your friend becomes involved. We think

that this process is completely unnecessary and, if I may say so, that it is probably one of the important factors involved in the delay in processing pardons.

The Acting Chairman: I understand from the Commissioner that there are 600 completed applications.

Mr. Kirkpatrick: There are very few coming out.

Senator McGrand: You mentioned that certain people want paroles, that they want pardons and would like to go back and be a "square John" again—you used that expression—and forget about the "rounders" they had been. From your vast experience, Mr. Kirkpatrick, how many of these people who have been offenders against the law, who have served their prison sentence and who have qualified to the extent that society will take a chance on them, are actually repentant in that they have convinced themselves that they did something wrong and that they will never do it again? Alvin Karpis served a long term in prison. He was released and is now living a life that is supposed to be "on the square." He has written a book and says he would do the same thing again if he had the chance.

The Acting Chairman: He has no regrets.

Senator McGrand: He said, "I do not feel one bit guilty about anything I have done." The income tax evader who gets caught and who pays a penalty by way of a fine is not usually repentant. He just says, "My bookkeeper was not very good." I am just trying to relate these two things. Can you give me any help on this?

Mr. Kirkpatrick: Anything I could say about the state of mind of another human being would be pure conjecture. A substantial number of men and women with whom we deal have every intention of committing no further criminal offence on leaving prison. But with the exception of the middle-class offender—the income tax evader or someone of that sort—what we are asking most people to do is to change their whole values system and their former social associations. This means creating an entirely new life style. We do not have to do this in any other area of our social or health services. In our mental health services we try to strengthen the person's values system and his associations generally. Here we are asking the ex-inmate to create a new environment and a new life pattern of thought, of emotion and of thinking, so it is no wonder that a large number—particularly in the penitentiaries, which house the final graduating group of our whole criminal process—do recidivate. Would you be interested in the research figures on this, sir?

Senator McGrand: Yes, I would.

Mr. Kirkpatrick: In 1965 Mr. Archie Andrews, of our Toronto office staff, did a study on released penitentiary inmates which included parolees and expired cases from the Kingston area. Of 156 who were released in a time sample over that period of time, 94 recidivated for both indictible and non-indictible offences. Many of them were not serious offences. The incidence of recidivism steadily diminished and approached the zero mark at the end of a two-year period. 44.6 per cent of the recidivism took place in the first six months, and this is why we are endeavouring so hard in pre-release work to prepare the man for that period and to grab him just as soon as we possibly can following his release. Of those who did recidivate, 75.5 per cent had recidivated by the end of the first year and 97.9 by the end of the second year. So this indicates that little further recidivism is likely to take place two years after release.

We presented this data to the Standing Commons Committee on Justice and Legal Affairs, and I think this was helpful in their timing of the pardoning process—which is for non-indictible offences two years and for indictible offences five years. So we feel that if a man has stayed clear of the law for five years, there is not much likelihood that he will recidivate.

Senator McGrand: You send him out to look for a new environment to live in, and if he does not find it in the first six months or year, he is liable to get into trouble again. The first six months or a year is the important time.

Mr. Kirkpatrick: That is crucial.

Senator McGrand: That is when he has to rebuild his environment.

Mr. Kirkpatrick: That is crucial. You are quite right.

The Acting Chairman: Don't we make it almost impossible for him to find that new environment?

Senator McGrand: That is the trouble.

The Acting Chairman: As you said, they all come out of the institution ready to go straight and become "square Johns," with the best of intentions, but we are not ready to accept them with equally good intentions.

Senator McGrand: That is why I say that he wants to be a free man in a free society but just does not know how, and he thinks he is being chased, not aided.

Mr. Kirkpatrick: Can I answer your question in part sir, by citing another statistical inquiry? A few years ago we made a survey of employment forms. Of 67 forms that we were able to secure reasonably quickly: 18 asked, "Have you had a criminal conviction?"; thirteen asked, "Can you be bonded?" which is another way of saying the same thing; twelve asked, "Have you ever been refused a bond?"; 49 asked for the employment history, which is natural enough, but in the history of course, is the gap in the work time. One man succeeded in getting a job because he said he had been working for the Department of Justice for five years! He wrote me quite gleefully about that afterwards.

This indicates the assumption in society, that we have to fight so hard, concerning the total restoration of the ex-inmate. I have formerly used the phrase that when a man leaves prison he begins his second punishment.

The Acting Chairman: Which is worse.

Mr. Kirkpatrick: It can very well be, because he then has to maintain himself in a competitive, economic and social society, whereas in prison he has been maintained by the prison authorities. He suddenly comes out and finds himself with all the burdens of a free individual,

whereas he has not been able to exercise that kind of responsibility for perhaps two, three or even five years. Your point is very well taken, sir.

Senator Fergusson: On page 2 of your brief you suggest that the application form be changed to remove the request for references, and that the applicant be requested to appear in person at the nearest district office of the parole service. It seems to me an excellent idea. I wondered whether you had taken it up with the Solicitor General. Have you made that suggestion to him in your correspondence or conversations with him?

Mr. Kirkpatrick: No, madam, we have not. We made it in our correspondence, at Senator Hastings' request. Beyond certain comments made to the former Solicitor General, we have not made any subsequent comments, because the matter of procedure has just been developing, as you yourself have found out. There is a problem, and we had been thinking about it at the time you asked us to comment.

The Acting Chairman: Mr. Street, the Chairman of the National Parole Board, said they had never given consideration to this aspect.

Senator Fergusson: I am sorry. I have not been able to attend the meetings of this subcommittee before.

The Acting Chairman: I would like to discuss that one man with you, if I may. I do not want you to divulge who he is. Could you tell me something about the man?

Mr. Kirkpatrick: He is a long-term offender who has made a very good recovery. I do not know specifically what he is working at, and you would not want to know that anyway.

The Acting Chairman: No, I do not want to know that.

Mr. Kirkpatrick: Over a period of years he has shown a serious change in his whole life style, and we feel quite confident. Among the associations that he now has it is not known that he has a record, and he did not want to give these references.

There is another ex-offender, with whom I have a very close relationship, who very much wants to apply for a pardon. I go fishing with this man, although that would not be the reason for a pardon! He is desperately afraid, despite my assurances, that something might arise that would get back to his mother, who is now rather aged. He is afraid that this might revive in her mind all the past trouble and difficulty he caused her when he was a young man. Despite the fact that he could provide five referees who know of his former criminal activity and his present way of life, he still will not take a chance. That is why I feel these references are not necessary. With respect, sir, I think it could be determined—and there is a gentleman here who might help you to determine it—that the investigative process consumes quite a bit of time. You could ascertain this.

The Acting Chairman: I have no quarrel with the procedure that was used with respect to this one man. In fact, I think it is excellent. I just wonder why he received this treatment. Why cannot all applicants receive the same treatment? Why should this man receive this consideration?

Mr. Kirkpatrick: He is a man who is well known; he is well known to the national parole service, who know intimately of the success he has made following the termination of his parole. In this case they were prepared to do this. There may be other cases that I am not aware of in which this has been done also. I would not be surprised if it had been. I was using this illustration merely to indicate that the national parole service officials are not hidebound in this regard, that they do use judgment and apparently are prepared to do so.

The Acting Chairman: I just wish that they would use it more extensively.

Mr. Kirkpatrick: They may do so. I do not know.

The Acting Chairman: Perhaps we could encourage them to do so.

Mr. Kirkpatrick: As I said, in my opinion this practice should be commended.

The Acting Chairman: Whatever this man has done to rehabilitate himself, I think they should all receive the same treatment. If this man, who is prominent, gets this consideration . .

Mr. Kirkpatrick: No, he is not a prominent man.

The Acting Chairman: . . a man who becomes a carpenter. . .

Mr. Kirkpatrick: Let me correct that. This man is by life standards not a prominent individual. He is a blue-collar worker, just a "Joe". Both men I am talking about are just "Joes"; one happens to be a good friend of mine.

The Acting Chairman: Would you care to tell me from your experience how many men out of, say, a hundred, who are successful have to do it by hiding their past?

Mr. Kirkpatrick: It depends a great deal on the area of life in which the man is involved. If he is from a middle-class group—the lawyer who has been in trouble, the absconder or the embezzler—and his crime has attracted a great deal of public interest, obviously this will be known by his associates and cannot be hidden.

There is quite a number who have received particular publicity, who go to other communities and form a new set of relationships in which this is not known. These men would greatly fear any revelation, or any exposure to their social and economic associates.

The Acting Chairman: You said "a great number". Is that the majority?

Mr. Kirkpatrick: No, I think that would be the minority. The majority of those men who go to prison and whom we deal with, are from the blue-collar class or the unemployed. Many are young men. Unfortunately, many are below the age of 21. Probably 22 or 23 per cent of the men in the penitentiaries are below the age of 21. When

they come out many of them are too young to have gained any employment skills, and this creates another problem in regard to re-establishment. This group has lived in a kind of environment where going to prison is something that just happens occasionally. With their associates it would not, in too many cases, make a difference. However, many of them move to other communities and, here again, the exposure will be just as real, because they have every emotion that everybody else has. So, in answer to your question, I would say that we have fewer people from the middle class, the white-collar group, but that the majority of men would have changed their life style and would have a serious question about revealing their past.

The Acting Chairman: Thank you very much, Mr. Kirkpatrick, for giving us of your time. We wish you success with your conference.

Honourable senators, we now have Miss Phyllis Haslam of The Elizabeth Fry Society. You should have been first, Miss Haslam, and I apologize to you. Do you wish to make an opening statement?

Miss Phyllis Haslam, Executive Director, The Elizabeth Fry Society of Toronto: Mr. Chairman and honourable senators, briefly I would like to say that I work with a women's after-care agency that is very much like The John Howard Society only our primary interest is with the woman offender.

First of all, we work with girls and women who come into conflict with the law. We help the community in general, and our members in particular, to get a better understanding of some of the reasons why people get into trouble. We also deal with some of the procedures that have been used in various cases—some more effectively than some of the ones we use—to help the individual become established happily in the community. And, where appropriate, we take action with various levels of government to bring about changes in legislation in the kinds of facilities we have, and so on.

We were pleased to receive your invitation to appear before this committee. I have tried to put down some of my thinking about this in the statement which I sent to you.

Our own experience has been limited. In fact, while I know of three or four women who have applied for a pardon, only one has had this completed. However, in preparation for today, I talked with a lawyer who had quite extensive experience in this field, and he helped to clarify some of my thinking as well.

I would like to stress the tremendous importance it has to a women who receives a pardon. In a number of instances, the importance to a person of receiving the pardon—which is not something that you put up on the wall—is the sense of feeling free of the weight which society has laid on her shoulders, caused originally through her own activities. This is something which those of us who have not had this experience find it difficult to realize and appreciate.

It brings to mind a real concern about this sense of guilt which we tend to reinforce and reinforce and reinforce in the person who has been caught. Many of us have committed offences. I have heard some of my friends boast about the way they have committed offences—for instance, bringing things through customs, breaking speed limits, drinking and then driving. They boast about it, because they have not been caught. Once a person is caught and is found guilty, we tend to say to that person, "You are very much a second-rate citizen".

On the point Mr. Kirkpatrick made, where a person has received a pardon for an offence which happened oftentimes then years before and then does something else which is not approved, people begin to say again, "You are not any good. We always knew you were not any good". By inference, that is what this law is saying.

I have tried to indicate a division here, in the investigation area, between the straight, factual situation regarding a person having committee another offence or not, found guilty of another offence or not, and the character aspect.

I am always at little leery about things which say that a person must be "of good behaviour". What is good behaviour for me certainly is not good behaviour for many of my friends, and vice versa. A term like this has little significance. Unfortunately, so often we tend to expect of somebody else, in a situation like this, behaviour which is far in excess, in terms of correctness, of that which we expect of ourselves.

With that opening, if there are questions, I shall be glad to answer them.

Senator McGrand: I understand a great many of your women in prison are serving a term for drugs. How many prisoners do you have who are mothers who have the battered child syndrome?

Miss Haslam: Very few.

Senator McGrand: What is the crime of the largest number?

Miss Haslam: One type of offence for which women get into custody is being found drunk in a public place—and oftentimes, of course, they are picked up for being in a public place because they do not have a home because they do not have the capacity to get money to have a home. Others are picked up because of vagrancy, a prostitution charge. This is a law which discriminates against the poorer prostitute, and the community tolerates a great deal of misbehaviour in terms of sexual offences. The third group is people charged with theft.

Senator McGrand: Shoplifting?

Miss Haslam: Sometimes shoplifting, sometimes petty theft. Again, one of the questions we raise is that of a person who perhaps has stolen an article worth 25 cents and has to wait five years to be considered for a pardon.

In the discussion this morning, because the three of us who have spoken are particularly interested in people coming out of prison, we have tended to concentrate on the person who has been in prison and therefore proba-

bly has committed a more serious offence, particularly in the case of the men, because the penitentiary is a large source of their intake. I think we also need to realize that this applies to the person who is found guilty of a very minor offence and is fined or is placed on probation, or even on suspended sentence without probation. Our own Society also tends to work more with the person in custody, and that is the group.

Senator Fergusson: Miss Haslam suggests that for someone who has committed a very minor offence the time limit of five years seems inappropriate. On the other hand Miss Haslam suggests that it is regrettable that no provisions have been made to grant a pardon to a person who has been given a life sentence.

Miss Haslam: It is recognized that there are people who have committed murder or manslaughter and have received, in consequence, a life sentence. In a sense the sympathy of the court, and sometimes of the community, is very much with that person. There may have been a great deal of aggravation leading up to the crime, and so on. If a person receives a life sentence, he cannot be considered for a pardon until five years after the end of the life sentence. That does not really help the person very much at that time. We wonder whether there might be some consideration of pardon for a person who, in his teens, has committed an offence which incurs this type of sentence, but who has since continued to live a very productive and helpful kind of life. We feel it is unfortunate that that person should never have the satisfaction of feeling that society is now saying to him, "We now consider that you have atoned for your crime."

Senator Fergusson: In other words, there is nothing to look forward to.

Miss Haslam: No.

Senator Fergusson: Miss Haslam, do you agree with Mr. Kirkpatrick's statement that recidivism mostly takes place within six months to two years?

Miss Haslam: Certainly, any studies that have been done tend to support his statement.

Senator Fergusson: In your own experience you would not have any figures, I suppose.

Miss Haslam: We do experience some recidivism, senator, but I do not have any figures. Very often a woman who commits an offence does so under pressures which she has to learn how to handle in ways that do not involve crime. Sometimes you get a person who, for instance, is finding it very difficult to handle loneliness and who, perhaps, tends to drink excessively. Sometimes a person is very anxious to make a good impression and buys something on time; then she loses her job and does not have the money to cover it and issues bad cheques at that point. Very often a crime which takes place some time after the person has been getting on relatively well does seem to be tied up with an emotional situation—at any rate, so far as women are concerned. If the person can get help—and that help may be by being able to talk it out with a friend, or by coming back to an agency such as ours which can help her to look at the pressure, why she has that pressure and how she is handling it—then the probabilities of additional offences are removed.

We do find that sometimes a person who has been doing very well in society for quite some time will suddenly revert to, for example, excessive drinking. This can be occasioned by the death of a close friend or relative on whom she has relief for emotional stability. With the absence of the emotional support the person may tend to run away from reality, leaving children, for example, and drinking to excess.

There are a variety of ways in which persons express the pressures that they are subject to. Some of these ways are acceptable to our community; some are not.

With respect to the question about battered children, we very seldom get a woman in on an offence involving a battered child. We do from time to time have women in for neglect of children. Our own belief is that so often as a community we tend to judge by the end result, without having any kind of understanding of what has come before that end result.

If I may take the time, I should like to tell you of the experience of one family which will illustrate the sort of thing that happens.

A young family living in a community was chosen by that community as the family giving best leadership in the care of children. That family was chosen by the community group. Unfortunately, after a short time, the head of the family became ill and lost his employment. The family then went on to welfare. Incidentally, this all happened about ten years ago. Some time after the family went on welfare the woman became ill.

For those of us who have never had to live on welfare, it might be difficult to understand the sort of situation in which this woman found herself. The strain of attempting to keep up, on welfare, the standards that she had previously maintained made her ill. On welfare she was in a home where there was no hot water and where there simply was not enough money to buy soap. So her clothing and her children's clothing tended to look dirty, even though she was constantly washing it and trying to clean it. The children were constantly hungry, as were the parents, of course. The husband was supposed to have a special diet, but there was not sufficient money to get the diet. Add to this the constant whining of the children and the various pressures of just never being adequately housed or fed and having little recreation, and you will understand why the deterioration in that family became more noticeable and why the mother's health failed.

The deterioration continued, and largely owing to the bad health of both parents, one evening the parents, I think just to get away from it all, left the children with a young neighbour and went out and got drunk. They were picked up. They were charged with neglect of their children. There was little question that there was neglect of children, but I think one might well ask, "Whose neglect?"

The woman appeared in custody, as did the man, and the children were removed from them. After they got

out—and their health had been built up in a period of custody—they came together again and the children were returned to them, I am happy to say, and they were able to carry on successfully in their home.

That is the kind of situation which sometimes occurs as a result of pressures which we, as a community, put on people. And then we go on holding them entirely responsible. Certainly, they must face up to their responsibilities, but as a community we need to face up to our responsibilities too in producing the offender.

The Acting Chairman: Miss Haslam, you have heard the evidence of Mr. Kirkpatrick. He states that there is not really such a thing as "discreet" investigation, whether it is done by your society, by The John Howard Society or by anyone else. Once a person is investigated, rumours are triggered with respect to that individual. Would you agree with that?

Miss Haslam: I certainly like Mr. Kirkpatrick's suggestion with respect to the handling of this situation. It is excellent. I had rather an amusing experience of having the RCMP come to question me about a young woman. Interestingly enough, the RCMP did come in the daytime and they did come in civilian clothes. The story I was given was that this person was applying for a job which involved a security rating. After two or three minutes I said, "You know, I do know this person gave my name as a reference for a pardon, and perhaps it might be easier if we just talked on that point." I think it would be very difficult to hide the fact. We certainly advise the people who have come to us about this that if they are going to give references, then they should discuss with the person whose name they give the fact that they are applying for a pardon. I think it is almost impossible, whoever does it, to get the kind of information which might possibly do some good. But again, as I have indicated, this comes back to the question of what we are attempting to find out.

The Acting Chairman: Well, getting back to what you said about its being best to discuss the matter with your referees, if I were an individual—and I suppose the same situation would apply to a woman, or to the great majority—who had hidden my past, and if I went to discuss this with my referees, which would mean exposing my past, then I would be either reluctant to apply for the pardon, or I would be in the embarrassing position of exposing a past which I had successfully hidden.

Miss Haslam: Yes, and I think that is the reason why you will find in most cases people use as referees people such as The John Howard Society and The Elizabeth Fry Society, or they will give a police officer or their priest with whom they have very often talked, or they will get in touch with the minister in the institution. To me this may automatically trigger off a reaction on the part of the person doing the inquiry and he might say, "Well, the only people they seem to know are those connected with the criminal world. Perhaps these are the only people they know." In fact I think this is not the reason; they give the names of these people only to protect themselves.

The Acting Chairman: And, of course, the investigator is not confined to the five references he has given. He can go and make inquiries anywhere he wishes.

Miss Haslam: I did not realize that.

The Acting Chairman: He is not confined to those five people. I could give the names of five people and discuss the matter with those people and say, "This is the situation," but the investigator can go wherever he feels like going and discuss it with anyone he wishes to discuss it with in order to ascertain my behaviour.

Miss Haslam: I was not aware of this, and if this is so, then I would strongly advise people against applying for a pardon.

The Acting Chairman: Do you have any knowledge of people not applying for a pardon because of these investigations?

Miss Haslam: They have not stated that this is the reason they have not applied, but we have had people telephoning and inquiring as to whether we had application forms. One of the questions the lawyer brought up is that it is sometimes difficult for a person to figure out where to get the application form. But, as I say, they have called and asked us about this and have said that they would come in to collect the form, but then they have not come. I think this certainly may have some significance, because if a woman is now married and established in the community, she probably is not prepared to jeopardize that security.

Senator Fergusson: Miss Haslam, on page 2 you have said that you would be prepared to discuss the need to let people know how to obtain an application for pardon. This strikes a very familiar note with me, and I know it does with Senator Croll, because when we were on his Poverty Committee we were told many times by many people that while there were many things that people might be entitled to, they do not know they are entitled to them and even if they know they are so entitled, they do not know where to go and ask about it. Can you say a few words about that?

Miss Haslam: Well, in speaking with this lawyer, who I understand has been particularly interested in this, he said that their greatest number of requests come from people who say, "I would like to get a pardon. I read about it in the paper, but I don't know how to go about it." He said he had inquired around, and people did not seem to be too familiar with where to get the information as to how to go about it. Of course, once he found out it was through the Parole Board, then it was fine. His suggestion was that there could be papers in places like post offices, where you can get other kinds of papers. There was also a question as to whether, when a person receives a sentence, he or she could be given a slip indicating that he or she could apply for a pardon from the Parole Board.

Senator Fergusson: But that, of course, would only apply to people from now on.

Miss Haslam: That is true. I think perhaps they could read it in the papers, but it would need to be in a variety of papers.

Senator McGrand: Has the rising cost of living and subsequent poverty in certain classes, in certain areas, led to an increase in crime among women?

Miss Haslam: I think that where it affects women particularly is in the advertising that goes about. So often the woman who gets involved in crime is a person who feels that she does not belong. She reads in the newspaper and sees on television that if only she had the right kind of this or that, then she would be more popular. She is anxious to have friends, and sometimes she sees a way of getting friends by giving them gifts that are more expensive, but then she has less money and cannot afford them. The pressure of not having money is one of the things that intensifies a sense of difference, and therefore a person is more likely to drink excessively, and so on.

Senator McGrand: Then there is the case of men who run away and leave their families, do you find that that is a big contributing factor to crime?

Miss Haslam: If the woman is looking after children, we do not find that too often she gets into custody.

Senator McGrand: But oftentimes the amount of money they get on welfare does not meet their demands or obligations, and then they try to get a little extra money somewhere else.

Miss Haslam: Yes, I think this certainly happens to an extent, but it is amazing the number of women who do not do this.

Senator Croll: There are four prominent members of the Poverty Committee in this room and on this committee, so I want you to know that we know something about this. You have been in touch with women for many, many years. Has it ever occurred to you to say to a woman, "I think it would be a good idea for you to apply for a pardon"?

Miss Haslam: When a woman comes in to visit us, to let us know how well she is doing and to let us see the very fine husband and the lovely children she has—and this happens from time to time—if she speaks about the fact that she only wishes she could feel that her past was wiped out, then we will indicate to her that there is a way of getting a pardon. I do not work too directly with women at the present time and cannot really speak for my staff, but my belief would be that we would probably not initiate this because of the sorts of procedures that a person has to go through. If a person does not feel this very deeply, then we might not.

However, we do find that if a woman who has applied for a pardon talks with others, usually the others decide they will go ahead and apply for a pardon too.

Senator Croll: If this committee arrived at a different approach to this question of a pardon, do you think there would be many more applicants? Would you feel that it was incumbent upon you to advise people to obtain a pardon, to let them know that the Government is in a mood to consider it?

Miss Haslam: I think we would be much more inclined to do this if there were proper clarification of "vacative conviction", of what it, in fact, means. We feel that it is practically a meaningless term at the present time.

Senator Croll: Were there many pardons, granted in the last couple of years?

The Acting Chairman: There have been 54.

Senator Croll: In the last year?

The Acting Chairman: No. There have been 54 under the Criminal Records Act in the last year.

Senator Croll: And before then?

Miss Haslam: Practically none.

Senator Croll: Oh, no. My recollection is that there have been many applications for pardon.

Miss Haslam: We do support the view that there is a long wait before anything happens. When you have brought yourself to the point of going ahead with this, it is unfortunate that there should be such a long wait.

Senator Croll: You are quite right on that.

Senator Fergusson: I gather from what you said that a person who is refused a pardon is not given adequate information regarding the basis of the refusal. Have there been cases of people having been refused and not told why?

Miss Haslam: I was not able to find that out specifically. In one instance the answer given was that there was an outstanding charge against a particular person, that had occurred something like twelve years before. The person concerned had a very common name. Let us call her "Jane Smith", which was not her real name.

The offence was passing a bad cheque in a part of Canada in which this person had never been. However, there was another person who had been in the penitentiary at the same time who was a dud cheque writer and who went to that part of the country about that time. The probabilities are that she used this girl's name. The girl in question was told that she could not receive her pardon because of this outstanding charge, and that in order for her to receive her pardon it would be necessary for her to stand trial for an offence which she was certain she had not committed.

I was approached on this matter, because she was on parole to our agency at that point. We were in constant touch with her and everything indicated that she had never left Toronto at that time. However, the alleged offence had occurred 12 years before.

The fact that we who had been in touch with her at that time had no reason to hide anything concerning the woman finally persuaded the authorities that the evi-

dence against her was so slight that perhaps the case should not be proceeded with.

I made personal representations to the Parole Board regarding the matter as I believe did Miss McNeil, and the result was that the woman was granted a pardon.

In a situation like this, it is not too difficult to tell the person. However, we come back to what is considered to be good behaviour. A person may be living common law and the one doing the investigation may feel that this is not quite suitable; or a person may have appeared in court on charges for which she has not been found guilty. All of us recognize that there are times when, if a person has committed a certain type of offence and the police know they are in the district, that person becomes a prime suspect.

There are certain things that one is not likely to bring to the attention of a person. A person giving a reference might say, "Well, perhaps I should indicate that she is pretty unstable, has a degree of mental disturbance." And they then say "Oh, that might lead to further crime." I do not know why they would refuse it. However, it seems to me that if it is going to be refused, a person should know why.

Senator Croll: According to the last page of the proceedings, it indicates, "Pardons granted, 37; submissions awaiting parole, 12." That makes a total of 49. The total number of board decisions under the act was 85. I assume then that approximately 35 were refused?

The Acting Chairman: Thirty-seven have been granted.

Senator Croll: Yes; and I assume that 12 will be granted.

The Acting Chairman: The figures we had at the last meeting indicated that 52 had been granted and two had been refused.

One further question, Miss Haslam. With respect to your answer to Senator Croll—I would like you to correct me if I am wrong—did I understand you to say that you would be reluctant to recommend applications for pardon because of the procedures being used?

Miss Haslam: I would say that if the person indicated that a pardon was important to her, I would bring to her attention the procedure used and would say, "If you can get references from persons who know about your record, and you are not concerned about this, then, if you wish to have this, that is fine and this is how you go about it." I would seriously question saying to a person, just routinely after five years, "I think you had better apply for a pardon."

The Acting Chairman: Why?

Miss Haslam: Those who have applied, think it is important. Regarding the others, I think the risks in dragging up all the unhappiness and having the matter discussed with family and friends is too great a price to pay when the results, as presently stated, do not hold water, as Mr. Kirkpatrick indicated.

The Acting Chairman: Are there any further questions? Thank you very much, Miss Haslam.

That concludes the hearing of witnesses for this morning.

The committee adjourned.

APPENDIX "A"

THE JOHN HOWARD SOCIETY of Vancouver Island

1951 Cook Street
Victoria, B.C.
May 25th, 1971

Honourable Senators:

The John Howard Society of Vancouver Island has long been an advocate of progressive measures to deal with the criminal offender, and particularly, to ensure his rehabilitation in the community following imprisonment.

The Society therefore welcomed the introduction, and passage of legislation, enabling a person with a criminal record to make application for, and receive, pardon upon proof of law-abiding conduct over a period of years following expiration of his last sentence for a criminal offence.

Since the Criminal Records Act was brought into force, the Society has received numerous inquiries from successfully rehabilitated persons anxious to remove traces of a background, of which they have no pride and which, in many cases, remains as a constant threat to their ability to sustain their position of acceptance in the free community.

Many inquiries have exhibited concern and fear over the process of investigation which would necessarily accompany any application on their part for a pardon under the Act. The Society, sensing some real dangers in the event that such investigations were not handled discreetly, felt that clarification should be obtained regarding the procedures taken by the Department of the Solicitor General when an application for a pardon was received.

Accordingly, on April 15th, a letter was written to the Honourable Jean-Pierre Goyer, Solicitor General. No acknowledgement nor reply to this letter has been received to date.

Since that date the Society has been advised of the debate which has taken place in the Senate of Canada on this very issue. It is gratifying to note the members of the Senate agreed that a possible problem exists which merited further, close, examination by your Committee.

Our Society is greatly concerned that responsibility for investigating an application for a pardon has been delegated to the Royal Canadian Mounted Police. Such a task would not appear to be consistent with the normal duties of a police force but more appropriately should rest with an organization whose primary responsibility is the rehabilitation, rather than apprehension, of the criminal offender.

As indicated in the letter to Mr. J. Goyer, this Society has two further major concerns regarding the investigatory process.

First, it is questioned whether or not a direct approach to an employer, unaware of an applicant's previous criminal record, would jeopardize the work status of such a person. The Society has, over the years, witnessed numerous cases of termination of an employee's services, for one reason or another, when previous criminal activity has become known to the employer. If, in order to substantiate good working habits, it is considered necessary to approach an employer, the Society is anxious to know how such an approach can, and is, being made in those cases where the employer is unaware of an employee's past.

Second, and in a similar vein, it is questioned whether it is appropriate to approach a person or persons, for character reference purposes, unaware of an applicant's previous criminality. What guarantee can there be that the results of such an approach (as in the former case) might not be harmful to the applicant? It would seem virtually impossible for an investigator to make definitive inquiries of any persons, be they employers or character references, without (a) revealing his identity and (b) directly, or indirectly, revealing details of the applicant's past. In both situations, the repercussions could be more harmful than the results obtained.

As it would appear difficult to guard against negative repercussions of approaches to persons unaware of an applicant's past it might be questioned whether direct approaches should be made, irregardless of the investigator's role in the community (R.C.M.P., Parole Officer, etc.).

In view of the fact that considerable emotional effort is spent by the ex-offender in repressing the past, it would appear to the Society to be inconsistent with the spirit and intent of the Criminal Records Act if the investigatory process was conducted in such a manner as to place the pardon applicant's status in the community in jeopardy.

Accordingly, The John Howard Society of Vancouver Island would recommend that:

1. authority for investigating pardon applications be removed from R.C.M.P. and delegated to an authority whose primary role is the rehabilitation of the criminal offender.

2. close study be made of possible negative results of approaching persons in the community unaware of an applicant's past criminality.

3. in the event it can be demonstrated that approaches made to persons listed under Section 11 and 15 of the Application form may prove harmful to the applicant, that appropriate changes be made either to the requirements of these Sections, or to the form of approach to persons listed in these Sections.

Respectfully submitted for your consideration.

Yours sincerely,

The John Howard Society of Vancouver Island
Michael C. Bennett
Executive Director

APPENDIX "B"

The John Howard Society of Quebec, Inc.,
1647 St. Catherine St. West,
Montreal 108, P.Q.

June 3rd, 1971.

Honourable Senators:

Our organization is the oldest prisoner's aid society providing continuous service in Canada. It was founded in 1892. Its objectives are the rehabilitation of adult offenders, both male and female, and penal reform.

Assuming you are referring to criminal records our view based on experience is the following.

There are many obstacles that come between the offender and his rehabilitation. One of the most serious ones is his difficulty in finding acceptance by the community once out of prison or pen.

This alienation leading to recidivism is further intensified by his past criminal record. Even if he approaches the community and begins to benefit from some initial acceptance, his inability to obtain employment due to the record merely serves to drive the more sensitive ones back into the old familiar haunts and pursuits.

All figures seem to agree that the overwhelming majority of those that will recidivate will be back in prison or pen within six to seven months. Hence, any one who keeps himself crime-free for three or five years is said to have contributed to his own rehabilitation.

Criminal records of permanency are an injustice to the ex-offender when our society hypocritically maintains that the offender "has now paid for his crime and is free". He is not free as the record hangs over his head like the sword of Damocles for the rest of his natural life.

The permanent criminal record also fills the ex-offender with bitterness and hostility towards society, and gives him some justification for once again lashing out at the community by resorting to crime. It also makes it extremely difficult for us to rehabilitate anyone under similar circumstances.

To preserve the system of permanent records is in our estimation archaic, punitive, and unjust.

Most sincerely,

Stephen Cumas
Executive Director

APPENDIX "C"

BRIEF TO THE SENATE COMMITTEE ON THE CRIMINAL RECORDS ACT

When Bill C-5 was first introduced in 1969, I was puzzled as to whether it was intended to be an act to deal with Criminal Records or if it was an act purporting to extend the Royal Pardon. However, by section 8, it would appear that this act does not concern itself with the Royal Pardons but introduces what may be termed Governor-in-Council Pardons. Why it was thought necessary to introduce this element of a pardon is equally as puzzling to me now as it was in October 1969. It seems to me that combining the matter of granting pardons and custody of records simply creates confusion and does not seem to achieve any desired purpose.

PURPOSE OF ACT

(a) Is it a Records Act?

If the purpose of the Act is to expunge the records of persons who have remained record free for a particular number of years, then there seems no reason why that ought not to be done. All that would be necessary is a simple act setting out substantially what is now in section 6 of the present act, changing the words "in respect of which a pardon has been granted" to "a person who has not had a further conviction for a period of five years or more."

(b) Is it a pardon?

If it is intended to grant pardons to persons who have conducted themselves in a particular way then this ought to be done. It seems to be somewhat of a child's game to say we will grant you a pardon, however, if you don't behave yourself in the future we might revoke it. That type of psychological approach seems to be rather doubtful when dealing with grade one children and seems to have absolutely no merit whatsoever in dealing with adults, particularly with the type of adults that this Act purports to deal with.

If the present Act is to be continued with its two-fold method of granting pardons and controlling records, which I suggest is simply bad law, I would suggest two improving amendments, as follows; (a) repeal section 3 requiring persons to apply for a pardon. If it is genuinely felt that a person who has lived a normal life for a period of five years or otherwise, ought not to be burdened by a lingering criminal record, then that record ought to be expunged without more. It seems to me wrong in principle to be dangling goals in front of people and in effect saying to them, "If you will be good for so long and if you will ask nicely, we will look you over and see what we think of you now." As I indicated earlier this seems to me to be a form of a child's game. Furthermore, the need to make application creates in fact a built in discrimination. If such provision is necessary, then it can be accepted, where it is not necessary, then surely it ought not to be used.

(b) Repeal section 4 and replace it with a section simply requiring that the records of convicted persons will be examined after a five year period to ascertain whether any further convictions have been recorded.

I do not believe that persons who have been convicted of an offense and who have paid their fine or served their time ought to be treated differently from anyone else in society. I do not see why they should be held to account more so than any other person. It seems to me quite improper that those persons ought to be required to build up a record of goodness. It is totally fallacious thinking that every sinner who is punished will be or should be from then on a saint. There seems to be a fundamental, but false, impression that every convicted criminal having served his punishment must then lead a *good* life. Surely it is sufficient if such people lead a normal life. Surely all ex-criminals do not have to maintain themselves in a state ready for canonization, yet this seems to be what the majority of unconvicted people think. I maintain that we must deal with ex-criminals with realism rather than with idealism. Surely all that is necessary is that there be an examination of the records.

If, however, it does seem necessary to require persons to make applications and have such applications followed by an investigation, it should surely not be necessary to have the investigation conducted by the top criminal investigation agency in the country. It must be well known the stigma attached to such an investigation. The fact that the investigation may completely exculpate the person investigated may be totally irrelevant for it is the fact of the investigation that causes the damage. If it is necessary to conduct such an investigation it is certainly not necessary that they be conducted by the R.C.M.P.

It may be argued that the R.C.M.P. are, because of their training etc., best able to conduct criminal investigations and to ascertain whether or not a person has been, in the past five years or otherwise, engaged in criminal conduct. That may be true, however, that does not indicate that the R.C.M.P. are the best agency to investigate an applicant for a pardon. In such a case, surely all that is necessary is reasonable assurance that the applicant is leading a normal life and it is surely not necessary to subject the person to an inquisition. Furthermore, at this time in Canada with so much sophisticated criminal investigation to be conducted it seems incredible to me that members of our best police force be diverted to investigating applicants for a pardon. I personally suggest this is quite an improper use of the R.C.M.P. Although I have the highest regard for the R.C.M.P. as a police force, I just do not see such investigations as proper police activity and I am reasonably convinced that such investigations are likely to defeat the very purpose for which they are conducted.

There is one other matter that causes me some concern and that is the effect of a pardon. Section 5(b) provides that the grant of a pardon vacates the conviction in respect of which it is granted, unless the pardon is subsequently revoked. It is unclear to me what is included in the word vacates. The situation I have in mind is where a person receives a pardon and is later concerned to fill out an application for a bond or for admission to a profes-

sional society and one of the questions asked in the application form is, "Have you ever been charged or convicted of a criminal offense?" Does section 5(b) of the Criminal Records Act mean that a convicted person can answer such a question in the negative. I would suggest it does not. A person replying to such a question would still have to answer that they had been convicted although they might add as an explanation that they had been pardoned. Even if such an explanation were offered, it seems to me of little help for the person has already admitted to having a criminal record. What the real effect is of vacating the conviction is difficult to understand. A person who receives a pardon is unlikely to go about the boasting of it and indeed it is necessary if one mentions a pardon to disclose the conviction. It seems to me the very thing the convicted person wants to avoid is disclosure of his conviction.

Even if one were to argue that the term vacates in section 5(b) means that a person would be entitled to say that he has no criminal record is still faced with the possibility of having his pardon subsequently revoked, thereby putting him in a most difficult position.

For many years I have thought and have advocated that certain records ought to be expunged after a particular period of time. In the case of criminal records, it seems to me to be within the legal jurisdiction of the parliament of Canada to expunge criminal records. I am still not convicted that it is beyond the ingenuity of the Canadian parliament to do so effectively. The present Criminal Records Act does not do so.

Daniel M. Hurley, C.D.
B.A., B.C.L., LL.M., Ph. D.

APPENDIX "D"

John Howard Society
of Saskatchewan

June 7, 1971.

Honourable Senators:

May I express first of all our appreciation for your efforts in keeping us informed of the debate proceedings within the Senate on matters relating to a review of the administration of the Criminal Records Act and other matters relating to the correctional system, the ex-offender and the offender in Canada. The John Howard Society of Saskatchewan, since it expresses both a citizen concern and a professional concern in the corrections field, is vitally interested in developments and proceedings of this nature.

Our provincial board will not be meeting again until possibly September or October of this year. My comments on the Criminal Records Act and the administrative procedures, although they might be shared by members of the board of the John Howard Society of Saskatchewan, must remain as simply my comments until such time as the board is in a position to endorse or compile a position statement on the matter.

First of all let me say that I agree with the position on the inappropriateness of the R.C.M.P. conducting an investigation of this nature. I support your position that such an investigation should be carried out by the National Parole Service. The only valid argument that I can see being put forth for the R.C.M.P. conducting the investigation is that the organizations, business firms, or individuals who are to be informed by the ex-offender of the fact that he has received a pardon would be more likely to place trust in the investigative procedures leading up to the pardon if these were conducted by the R.C.M.P.

Although I do not agree with a number of the objections raised in the Senate debates by the Honourable L. P. Beaubien, I do believe that he has hit upon an important factor when he asks the question, regarding the ex-offender's motivation in applying for a pardon, "Why would he appeal then, if he has never had any problems, to have his record obliterated?" I believe that in reviewing the administration of the Criminal Records Act a review of the use to which the pardon will be put by the ex-offender is essential.

From my experience with ex-offenders enquiring regarding the possibility of obtaining a pardon, since the passing of the Criminal Records Act in its present form, I am convinced that the pardon is not meeting the needs or concerns of the ex-offender.

The first concern of a number of the ex-offenders who have made enquiries regarding a pardon is that they be allowed visa privileges to the United States, both visiting and resident. The fact that the pardon is not recognized by United States Immigration authorities, negates its use in this regard. It would seem that there is a growing necessity for interpretation and discussion with U.S. Immigration officials to allow for the recognition of a pardon toward the easing of immigration regulations in this instance.

Another motivating factor, on the part of the ex-offender seeking a pardon, may be his intent to apply for a bond in connection with his employment. In this regard, I have contacted two of the largest bonding organizations in the province of Saskatchewan and they inform me that such a pardon would definitely have weight in their consideration of a bonding application. It is interesting to note however that both of these major insurance companies in Saskatchewan indicate that they have not been provided with material from the federal government relating to the changes in the Criminal Records Act and the resulting provisions for a pardon. They expressed an interest in obtaining material relating to the provision for a pardon and also relating to the investigative procedures employed in the screening of applicants. I feel it is a rather serious oversight that such material has not been provided to them as a matter of course.

As a matter of interest, both of the insurance companies which I contacted indicated that they would not weight the pardon differently depending upon whether or not it represented the investigative efforts of the R.C.M.P. or the investigative efforts of the National Parole Service. Their concern would be with the investigative procedure itself.

Another use that the ex-offender may be intending for the pardon is in relation to his application for credit. Again, I have contacted two of the largest credit bureaus in the city of Regina. I have been informed by the credit bureaus, that they have received no information on the Criminal Records Act or the procedure for granting pardon. They have informed me as well that information relating to a pardon having been granted to an ex-offender would definitely have a positive effect upon his credit rating.

I recognize that the problem is much greater than that of communication and, in effect, involves jurisdiction. It is a matter of concern however that, although the records of the R.C.M.P. and the Penitentiary and all records on a federal level are "locked up" upon the granting of a pardon, records kept by credit bureaus, insurance companies, provincial police, municipal police, etc., are in no way affected. These records are more likely to have an immediate effect upon the ex-offender's operation within the community.

Again, as a matter of interest, the credit bureaus which I contacted indicated that they would be willing to destroy all records relating to criminal offences upon receipt of confirmation that a pardon had been granted. One credit bureau informed me that, as a matter of course, any offence committed more than seven years prior to the enquiry regarding the individual's credit rating is not included in their credit report.

I have appreciated this opportunity of expressing my concerns on the administration of the Criminal Records Act. As you can see from the above comments, I feel that

the present provisions of the Criminal Records Act as well as the administration of this Act restricts the effect of a pardon to the point that it becomes of very little significance to the ex-offender. I hope that your sub-committee enquiry will lead to measures being taken which will increase the scope and effectiveness of the present provisions and administration of the Act.

Yours sincerely,

S. Hunter, M.S.W.,
Executive Director.

APPENDIX "E"

[Translation]

Service de Réadaptation Sociale Inc.
50 St. John Street,
Room 156,
Quebec 4, P.Q.
Telephone: 529-9441

Honourable Senators:

We, the Social Rehabilitation Service, are pleased to reply to the invitation of May 13 from the Honourable Senator Earl A. Hastings and to forward these comments to the subcommittee of the Senate Committee on Judicial and Constitutional Affairs set up to investigate the Law on police conviction records.

We have enclosed some information circulars as well as a report on the objective of our society.

On examining these documents, you will discover that the Social Rehabilitation Service is an interdisciplinary centre for services to adult delinquents of both sexes, to their family and to the community to which they belong. Our society caters to the immediate area of Quebec.

You will find in the report the required information on our goals, our duties, our services, our staff, our methods of working and our clients.

Yours sincerely,

Service de Réadaptation Sociale Inc.
Jean-Luc Côté, t.s.p.,
Chief-Director.

Comments of an "ad-hoc" committee of staff of the Social Rehabilitation Service to the sub-committee of the Senate Committee on Judicial and Constitutional Affairs concerning the investigation into the Law on police conviction records, and in particular, on the operations and the application of paragraph 2 of article 4.

I—The "ad-hoc" Committee of the staff of the Social Rehabilitation Service that investigated this question, wishes to express its support for the Honourable Senator Earl Hastings who did well to point out the implications of placing the R.C.M.P. in charge of the inquest in cases of requests for pardon. The examples cited by the Honourable Senator show clearly that such a position is inadequate and not in keeping with the spirit of the new law.

We have the impression that the National Commission of Paroles, in delegating to the R.C.M.P. its authority to carry out this inquest, is not in tune with the new law and that it has simply retained the procedure followed previously for obtaining a pardon. In so doing, it has undermined the new spirit that Parliament intended and wished to uphold in adopting this law.

II—In regards to the inquest to be carried out, our committee is of the opinion that the same procedure as in investigating parole requests ought to be followed in requests for pardon. Thus, the responsibility for the inquest would rest with the officer of the National Commission of Paroles, who could if the need arises consult with the various agencies to complete this inquest. The R.C.M.P. and the other police forces if need be could be called to check if the petitioner has committed other offences since those for which he is requesting pardon. Other community societies, such as the Social Rehabilitation Service, could supply social background in the case of petitioners known to them.

Moreover, before the National Commission of Paroles makes its recommendation to the Minister, the petitioner should have the chance to appear before a regional commission of the kind which has sessions in institutions of detention when parole requests are investigated. This regional commission could consist of two (2) commissioners of parole qualified to make a decision on the spot as to the recommendation to be made to the Minister. These commissioners could be assisted by a parole officer who made the investigation and a representative of the consulted community society, if necessary.

To uphold the spirit of the law, it is only right to add that the inquest ought to be held and the decision made within a reasonable time limit.

III—Regarding the community inquest in cases of parole, we believe that it ought in no way rest with the police. If the National Commission of Paroles claims that its officers are overloaded, it should perhaps make more use of the charitable societies as was advocated by the Commission Ouimet. We find that the National Commission of Paroles tends today rather to exclude these charitable societies from the services which they have been providing for a long time and which they still provide.

As another way of relieving the parole officers who are said to be overloaded, we agree with the suggestion to use trained citizens as assistants by giving them a role as observer. Moreover, we have advocated the use of citizens in our report on the objective of the Social Rehabilitation Service (cf. pages 55 and 56) and we are presently negotiating to obtain the funds to train citizens and to help them the better to play this role.

IV—Concerning the intervention of the Honourable Senator Beaubien, we respect his opinion on the question and we can only express our dismay before the fact that in the twentieth century, such antiquated views and ideas can still be defended.

An "ad-hoc" committee of the staff of the Social Rehabilitation Service.

By Jean-Luc Côté, t.s.p.,
Chief Director
The 4th June, 1971

APPENDIX "F"

The Elizabeth Fry Society
Toronto Branch
215 Wellesley Street E., Toronto 282
Telephone: 924-3708

June 10, 1971

To: The Sub-Committee Examining the Criminal Records Act

From: The Elizabeth Fry Society, Toronto Branch

It has been evident to us that the gaining of a pardon is of very great importance to those who receive it. We are pleased to be able to bring to your attention some of our concerns in relation to it. We note that your particular area of interest has to do with the inquiry which takes place so our comments will be related to that part of the law.

Sec. 4, Sub-Section 2—The Board shall cause proper enquiries to be made in order to ascertain the behaviour of the applicant. There would seem to be two aspects of any such enquiry: 1) the possibility of further criminal involvement and 2) the question of the person's behaviour. The information is readily available as to whether or not a person has been found guilty of further indictable offences and the probabilities are that the local police can provide information as to whether or not there has been a finding of guilt for any summary conviction offence.

Great care needs to be taken in considering charges which have been laid where the person is found "not guilty". In some places, because of a previous record, a person is charged with an offence without any adequate basis of fact. In other cases, the finding of "not guilty" is based on a technicality but there is every indication that the person is still involved in criminal activities. If such charges are brought to the attention of the Board, there should also be an objective appraisal of the reasons for acquittal.

The question of good behaviour is much more difficult to assess. The first point needing clarification has to do with the meaning of "good behaviour". One tends to interpret such a phrase by one's own standards, which may be very different from the standards of the group to which the applicant belongs.

Should the standard of behaviour on which one is being judged have any direct relationship to the situation under which the previous crime was committed, and if so, is this the only area of behaviour which should be assessed?

These questions and other related ones would indicate that any such enquiry should be carried out by a person who has training and ability to look at the person's behaviour in relation to these matters.

On the form, the applicant is asked to give names of references and to indicate whether or not the person knows of the applicant's criminal record. If the person knows of the record, there is little difficulty in discussing the applicant's present situation with the referee. If, however, the person does not know of the record, it is important that the information is not conveyed to him by word or manner of the interviewer.

For these reasons it would seem to us to be important that the carrying out of this part of the enquiry should be handled by the staff of the Parole Board or a community person selected by the Regional Director of the Parole Board. In larger centres this might be a staff member of an after-care agency. In a smaller centre, it might be a social worker, minister or some other appropriate professional person.

Sec. 4, Sub-section 2 (b)

We would like to raise the question of the time limit being 5 years for all indictable offences. For instance, it seems inappropriate that a person whose only conviction is for a very minor petty theft should have to wait 5 years before being considered for a pardon. At the other extreme, we regret that no provision is made for the granting of a pardon to the person who gets a life sentence.

These are the points which I will look forward to discussing with the committee on Tuesday. Other points which are of concern to me, and which I would be prepared to discuss with you, if you consider them within your terms of reference and have time to discuss them, are:

1. The need to let people know how to obtain an application for pardon

2. The significance of the term "vacate the conviction".

3. If a person wishes to appeal to the Board, is she given adequate information regarding the basis of refusal?

4. The implications of a pardon being revoked.

Phyllis G. Haslam
Executive Director

THE ELIZABETH FRY SOCIETY
Toronto Branch
215 Wellesley Street E., Toronto 282
Telephone: 924-3708

June 10, 1971

The Elizabeth Fry Society, Toronto Branch, is a voluntary agency which was incorporated in 1952. It is managed by a Board of 18 members, elected by the membership of the Society. It has three main aims:

(1) To help girls and women (16 years of age and over) who have come into conflict with the law, to gain a new sense of their own worth and dignity and to help them to become happily established in the community.

(2) To carry out a program of education for our own membership and the community in general regarding basic information about girls and women who come into conflict with the law especially in relation to causes of crime, need for strengthening preventive services, present services for the woman offender and changes which should be encouraged, need for changes in legislation, etc.

(3) To carry out a program of social action which includes bringing to the attention of respective governments the need for changes in service and/or legislation, the preparation and presentation of briefs etc. and, where necessary, carrying out a program of public information regarding serious needs for change.

The program of the agency falls into three main categories:

(1) A counselling service for those who have come into conflict with the law.

(2) A residence which accommodates fourteen.

(3) An active volunteer program which carries out activities in areas such as a) court volunteers, b) assisting with temporary absence programs, c) public relations, public action and education programs and d) assisting in the office and residence, etc.

APPENDIX "G"

Submission to the Subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs Inquiring into the Administration of the Criminal Records Act by St. Leonard's Society of Canada.

Honourable Senators:

The St. Leonard's Society of Canada was established in January 1967, under a federal charter to assist in the organization of community residential centres for parolees, released prisoners, probationers and offenders, including the selecting and training of a qualified staff for St. Leonard's Houses as they are established in major cities throughout the country.

This organization represents Canadian society as completely as possible, particularly the religious, social, business and labour elements from the various regions across Canada, in addition to the representative Houses affiliated with the national society.

The objectives of the St. Leonard's Society of Canada are:

1. The establishment and development of community residential centres.
2. The study of penal and correctional legislation and to play an active role in reforms aimed at the advancement of corrections in Canada.
3. To act as general liaison between the St. Leonard's Society of Canada and government authorities.
4. To establish minimum standards for Member Houses.
5. To do fund raising on a national basis including possible financing of individual houses through government grants.
6. To build essential research into the whole programme.

There are now thirteen communities that are associated with the St. Leonard's Society of Canada and seven of these are in operation. It is expected the balance will be operating in the near future. Several other communities are in some initial stage of organization at the present time.

HOUSES IN OPERATION:

St. Leonard's House, London
St. Leonard's House, Windsor
The Inn of Windsor
La Maison Painchaud, Quebec
The Fraternity, Sudbury
St. Leonard's, Vancouver
St. Leonard's House, Toronto

HOUSES IN PLANNING STAGE:

New Beginnings, Windsor
St. Leonard's, Bramalea
St. Leonard's, Brantford
St. Leonard's, Halifax-Dartmouth
Dysmas House, Kingston
St. Leonard's, Waterloo County

The St. Leonard's Society of Canada feels very strongly that the Criminal Records Act is an excellent statute and will do much to assist those people who have served their sentences imposed by the Courts and have been released from prison, rehabilitated themselves in the community, and are now leading useful lives as citizens of Canada.

We are very concerned, however, with the one section of the Act which allows members of the Royal Canadian Mounted Police to investigate the lives and records of those who have served their sentences, sometimes as much as twenty to thirty years previous.

We feel very strongly that if any investigation is needed that this particular function should be taken over by members of the National Parole Service who are trained and experienced in dealing with people who have served their time and have been rehabilitated in the community.

It would seem to us that people who have spent five years in the free community without any additonal trouble with the law or further convictions are certainly entitled to a clearance of their record and to be included as useful and productive citizens of Canada.

We hope this one particular aspect in the administration of the Act will be changed in order that more people who have demonstrated their ability to exist as productive citizens will be allowed this privilege.

All of which is very respectfully submitted.

St. Leonard's Society of Canada
(Rev). T. N. Tibby, Executive Director

ADDENDUM
"A"

THE "HALFWAY HOUSE" MOVEMENT

The "Halfway House" Movement is a long-established tradition in Europe. It is a modern and practical approach to the age-old problem of assisting men and women discharged from prison to habilitate themselves in society and to avoid the temptations which might lead them back to crime and prison.

Many people return to crime and prison because when they leave prison, they cannot return to a normal, or satisfactory, home life; because they find it extremely difficult, and often impossible, to find suitable employment; and because they lack personal counselling services.

A "Halway House" is a residence, as home like as possible, within a metropolitan area, where persons recently released from prison can live inconspicuously for a few weeks or months, sharing with others the task of re-shaping their lives, seeking employment, receiving counsel and encouragement. It is an extension of the services offered by the John Howard Society, and does not in any way conflict with, or duplicate these services.

THE MOVEMENT IN NORTH AMERICA

The first modern "Halfway House" in North America was established in 1954 in the city of Chicago by the Rev.

James G. Jones, Jr., an Episcopal priest who was then Chaplain of the Cook County Jail in Chicago. Other small undertakings in the "Halfway House" movement had taken place as early as the 1850's but they were small and insignificant and it was not until St. Leonard's House in Chicago was established by Fr. Jones that the modern "Halfway House" Movement was born in this part of the world.

In 1959, "Dismas House" was established in St. Louis, Missouri, under the direction of the Rev. Charles Dismas Clark, S.J., a Jesuit Priest who provided a temporary home for 60 men at a time. The famous movie, "The Hoodlum Priest", was made on the work of Fr. Clark and depicts his humanitarian effort extremely well. Many new "Halfway Houses" have been established recently in the United States of America. There are several hundred operating in major American cities at the present time.

A START IN CANADA

The first "Halfway House" in Canada dealing with released prisoners from both penitentiary and reformatory was "St. Leonard's House", established in Windsor, Ontario, receiving its first guest on May 8, 1962. Both Fathers Jones and Clark attended the official opening in January, 1963, at Cleary Auditorium, Windsor, Ontario.

From May 8, 1962, to December 31, 1969, six hundred and sixtyone men had passed through St. Leonard's House in Windsor, Ontario. In addition to this residence facility, in the year of 1968 alone, four hundred and sixty-six out-clients were served by St. Leonard's House in the areas of employment, counselling and other services which is a greatly expanded service for people not residents of the House and including ex-guests as well as men serving time in penal institutions.

Incorporated under a Provincial Charer in December, 1961, St. Leonard's is located in two houses in the 400-block of Victoria Avenue, Windsor. The corporation is conducted by inter-denominational boards of men and women from all walks of life.

Although the project was initiated by an Anglican priest, the Rev. T. N. Libby, B.A., M.S.W., L.Th., it has been supported by the Roman Catholic Bishop of London, the Jewish Communtiy of Windsor, and most major religious denominations not only on the local but also on the national level.

St. Leonard's House is staffed by its executive director, Louis A. Drouillard, an assistant, several house managers working on split shifts in order to staff the House 24 hours a day 7 days a week, a secretarial and office staff dealing with the large volume of correspondence with men in prison and their families as well as parole boards and other concerned people in the community, a cook and a cleaner, students from the School of Social Work and seminarians during the summer months.

ST. LEONARD'S SOCIETY OF CANADA

The St. Leonard's Society of Canada was established in January, 1967, under a federal charter to assist in the organization of community residential centres for parolees, released prisoners, probationers and offenders, including the selecting and training of a qualified staff for St. Leonard's Houses as they are established in major cities throughout the country.

This organization represents Canadian society as completely as possible, particularly the religious, social, business and labour elements from the various regions across Canada, in addition to the representative Houses affiliated with the national society.

The objectives of the St. Leonard's Society of Canada are:

1. The establishment and development of community residential centres.
2. The study of penal and correctional legislation and to play an active role in reforms aimed at the advancement of corrections in Canada.
3. To act as general liaison between the St. Leonard's Society of Canada and government authorities.
4. To establish minimum standards for Member Houses.
5. To do fund raising on a national basis including possible financing of individual Houses through government grants.
6. To build essential research into the whole programme.

The head offices of the St. Leonard's Society of Canada are located in Suite 204, 327 Ouellette Avenue, Windsor 14, Ontario. Further information on this national programme can be obtained by writing to the Executive Director, the Rev. T. N. Libby, at the above address. There are now fifteen communities that are associated with the St. Leonard's Society of Canada and seven of these are in operation. It is expected the balance will be operating either this year or in 1971. Several other communities are in some initial stage of organization at the present time.

HOUSES IN OPERATION:

St. Leonard's House London
St. Leonard's House Windsor
The Inn of Windsor
La Maison Painchaud, Quebec
The Fraternity, Sudbury
St. Leonard's Vancouver
St. Leonard's House Toronto

HOUSES IN PLANNING STAGE:

St. Leonard's Bramalea
St. Leonard's Brantford
St. Leonard's Halifax-Dartmouth
Dysmas House Kingston
Moncton
Waterloo County
Montreal

OPERATING METHODS:

People are received at St. Leonard's Houses on the completion of their sentence or on parole granted by the National Parole Board or a Provincial Parole Board. A new programme through the Canadian Penitentiary Service where people come to us early on release through a pre-release programme was instituted in 1967. They

remain for periods ranging from six weeks to three months, averaging approximately two months each.

Persons who are without homes and jobs after their release from prison and are returning to a particular area, are given preference. But exceptions are made when facilities are available and it is indicated a person could benefit from a stay in one of our Houses.

Applications are received from inmates in penal institutions prior to their release from prison. They are reviewed by an Admission Committee composed of people in the area familiar with after-care of ex-prisoners and others interested in the project. Detailed social histories are received from respective probation departments, institutions, families and friends. Notifications of all applications, and of our committee's decisions, are sent to the National Parole Board or the Provincial Parole Board. This information may influence the Parole Board's decision.

APPENDIX "H"

Submission to the Subcommittee of the Standing Senate Committee on Legal and Constitutional Affairs by John Howard Society of Ontario.

Honourable Senators:

Our Society is involved in after-care work with ex-inmates of penal institutions, both penitentiaries and reformatories. That this is an extensive operation is indicated in that we have fifteen branches in Ontario and that last year we served some 5,000 men in the community and a great many more in the institutions prior to release. Every Province in Canada has a Society doing similar types of work.

In addition we have an extensive role in public education and penal reform in which connection we have many submissions to various public bodies and government departments.

Arising from these activities we have had quite a few enquiries regarding pardon and have worked with some men in their efforts to obtain a pardon.

It has been our general experience that there is a reluctance on the part of enquirers to make application when they see on the application form that five references must be provided and that an enquiry will be made in person to the references.

This is not such a problem to men who have relealed to friends or employers that they have a criminal record of if they feel close enough to tell their story to friends and ask them to stand as references. In such cases direct enquiry does not create a problem provided it is discreetly done by non-uniformed police. In our experience this has been the case, and we have had no adverse comments as to the procedure followed by the police.

However, when a man has completely changed his life style and successfully hidden a past criminal record even from his family, this does present a problem as he is most reluctant to reveal his part to friends or business associates as references.

In such a situation it would make little difference if it were police, parole officer or John Howard Society representative who made the enquiry of the reference since the purpose would automatically stand revealed.

It is our understanding that the Pardon Section of the Parole Service will, in exceptional cases, accept open testimonials or general references and forego the direct equity of references. This practice is to be commended and should be extended.

It is our view that the man should continue to make application on an individual basis as this has meaning to him in this reinstatement in society. It would be numerically impracticable to make an automatic review of all ex-offenders at the end of five years years and it would also, we believe, detract from the sense of achievement and regained worthy citizenship on the part of the applicant.

However, we suggest that the application form be changed by removing the initial request for references and that the applicant be requested to appear in person at the nearest District Office of the Parole Service. This would clarify the actual value of the pardon and through the personal interview much of the necessary information as to the applicant's community status would be obtained as well as providing opportunity for a personal evaluation by the Parole Service representative.

We see no reason, however, why applications, when received by the Parole Service, should not be referred to the R.C.M.P. who, in consultation with the local police, could determine the status of the applicant in regard to criminal activity. The local police have developed intelligence squads and are usually in a position to make such an assessment. If there is no question in their mind, then surely the pardon should be granted without any further investigation. If they have proof of criminal activity or reservations as to good citizenship, the applicant should be faced with this information and given an opportunity to discuss the matter with the police and the Parole Service when, if he satisfies them, the pardon should should be granted.

In doing this he should be allowed to give references if he wishes or to supply open testimonial and proof of employment and acceptable citizenship activities.

Such a procedure would almost entirely obviate the need of personal interviewing of references, except with the applicant's knowledge and consent and only as a last resort. It would obviously relieve the fears of many would-be applicants and encourage them to make use of this symbolic reinstatement in society.

Trusting that these suggestions may prove of interest and be of assistance to your Committee.

John Howard Society of Ontario.

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

Available from Information Canada, Ottawa, Canada.

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT
1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable A. W. ROEBUCK, Chairman
The Honourable A. HARPER PROWSE, Acting Chairman

No. 10

THURSDAY, SEPTEMBER 30, 1971

Complete Proceedings on Bill C-243,

intituled

"An Act to amend the Judges Act and the Financial Administration Act".

REPORTS OF THE COMMITTEE

(Witnesses:—See Minutes of Proceedings)

23337—1

THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS

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

The Honourable E. W. Urquhart, *Deputy Chairman.*

The Honourable Senators:

Argue
Belisle
Burchill
Choquette
Connolly (*Ottawa West*)
Cook
Croll
Eudes
Everett
Fergusson
*Flynn
Gouin
Grosart
Haig
Hastings
Hayden
Laird
Lang
Langlois
Macdonald (*Cape Breton*)
*Martin
McGrand
Méthot
Petten
Prowse
Roebuck
Walker
White
Willis

(Quorum 7)
**Ex officio member*

Orders of Reference

Extract from the Minutes of the Proceedings of the Senate, Wednesday, September 29, 1971:

"With leave of the Senate,

The Honourable Senator Cook moved, seconded by the Honourable Senator Lang, 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 Cook moved, seconded by the Honourable Senator Laird, that the Bill be referred to the Standing Senate Committee on Legal and Constitutional Affairs.

The question being put on the motion, it was—

Resolved in the affirmative."

Robert Fortier,

Clerk of the Senate.

23337—1½

Minutes of Proceedings

Thursday, September 30, 1971.

(12)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators: Choquette, Cook, Eudes, Gouin, Laird, Langlois, Prowse and White—(8).

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

On Motion of the Honourable Senator Laird, the Honourable Senator Prowse was elected Acting Chairman.

The Committee proceeded to the consideration of Bill C-243, "An Act to amend the Judges Act and the Financial Administration Act".

The following witnesses were heard in explanation of the Bill:

Mr. D. S. Maxwell, Deputy Minister of Justice and Deputy Attorney General of Canada;

Mr. H. A. McIntosh, Director, Privy Council Office, Department of Justice.

On Motion of the Honourable Senator Cook, 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.

Report of the Committee

Thursday, September 30th, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs to which was referred Bill C-243, intituled: "An Act to amend the Judges Act and the Financial Administration Act", has in obedience to the order of reference of September 29th, 1971, examined the said Bill and now reports the same without amendment.

Respectfully submitted.

J. Harper Prowse,

Acting Chairman.

The Standing Committee on Legal and Constitutional Affairs

Evidence

Ottawa, Thursday, September 30, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill C-243, to amend the Judges Act and the Financial Administration Act, met this day at 10 a.m., to give consideration to the Bill.

The Clerk of the Committee: Honourable senators, in the absence of the Chairman of the committee is it your pleasure to appoint an Acting Chairman?

Senator Keith Laird: Honourable senators, I move that Senator Prowse be appointed Acting Chairman of this committee.

Senator Langlois: I second the motion.

Motion agreed to and Senator J. Harper Prowse appointed Acting Chairman.

Senator J. Harper Prowse (*Acting Chairman*) in the Chair.

The Acting Chairman: Honourable senators, we have Mr. Maxwell as our witness this morning. Would it be your wish that he give a brief explanation or, following the explanation we had last night, would you prefer to ask questions on particular matters you have in mind?

Senator Choquette: I think that we received a fairly full explanation yesterday in the Senate from Senator Cook, and that we should limit ourselves to questions that were perhaps not asked of Senator Cook or that were asked but to which we did not receive answers.

Senator Cook: That is a fair comment!

The Acting Chairman: Is it agreed that we adopt that procedure?

Hon. Senators: Agreed.

Senator White: I would like to ask Mr. Maxwell a question regarding section 20A, which deals with supernumerary judges. When it speaks of "or courts of the province" does that mean the county court? This is page 8, section 20A(1)(*a*).

Mr. D. S. Maxwell, Deputy Minister of Justice and Deputy Attorney General of Canada: In some provinces you have one superior court and in others you have two. For example, in British Columbia you have two separate courts: a court of appeal and a trial court. In Ontario you have one court that has two branches. So, in order to make sure you cover the situation, you have to use both the singular and the plural. That is why it is written like that, but it does not include the county courts.

Senator White: So there will be no supernumerary county court judges?

Mr. Maxwell: Not under this bill, sir.

Senator Cook: I have been asked by several honourable senators about the removal of judges. This act does not interfere with section 91(1) of the British North America Act, does it, if the Canadian Judicial Council does recommend a removal, which then goes to the Governor in Council? I am referring to section 33(3), which reads:

> A judge who is found by the Governor in Council, upon report made to the Minister of Justice of Canada by the Council to have become incapacitated or disabled from the due execution of his office shall, notwithstanding anything in this Act, cease to be paid or to receive or to be entitled to receive any further salary if the Council so recommends.

In that case the salary would cease, and what would happen to the appointment of the judge?

Mr. Maxwell: First of all, the Act cannot interfere with any provision of the Constitution, and it is not designed to do that. What it does do is permit this body to make recommendations to the minister. Then, of course, if the Government sees fit to accept the recommendations of this body—and it is open to the Government to reject them, if it thinks it should, but I do not imagine that would happen very often—and assuming the recommendations for removal are made and accepted by the Government, it would have to proceed before the two Houses.

Senator Cook: To remove?

Mr. Maxwell: Yes.

Senator Cook: But not to cease.

The Acting Chairman: There is subsection 7.

Mr. Maxwell: Subsection 7 reads:

> Any order of the Governor in Council made pursuant to subsection (5) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made, or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

The Acting Chairman: Subsection 5 refers to subsection 1, which would cover the situation, so that any action taken by the Governor in Council to cut a judge's pay would have to be laid before Parliament under subsection 7.

Mr. Maxwell: I would point out that subsection 5 deals only with the removal of county court judges; they are not protected as to tenure in the same way that superior court judges are at present. As a matter of fact, subsection 5 merely carries forward the provisions of the present statute.

Senator Cook: That is county court judges.

Mr. Maxwell: That is county court judges only. When dealing with superior court judges, they would have to move before the two Houses.

Senator Laird: There is nothing to stop a resignation, of course.

Mr. Maxwell: Oh, no.

The Acting Chairman: But the Governor in Council can stop the pay of a judge.

Mr. Maxwell: As the bill reads, the pay of a judge can be stopped if the Judicial Council so recommends.

The Acting Chairman: That is what I mean.

Mr. Maxwell: Yes, but only then, which of course affords a good deal of protection to judges, I would think.

Senator Choquette: I have several questions here that were left with me by Senator Flynn, who thought he could be here but is not. While we are dealing with that point, I notice there is one question on it. He asks: What if the Governor in Council reduces the salary of a given judge to $1 per annum and that particular judge refuses to resign, will that judge be prevented from occupying his office, and will the fact that he refuses to resign prevent the Minister of Justice appointing a judge to replace him?

Mr. Maxwell: In answering that question it has to be borne in mind that there are two separate matters here: one is salary; the other is tenure. The reduction of salary does not result in depriving the man of his office. The only way he can be deprived of his office is pursuant to the provisions of the British North America Act, which involves an address of the two Houses. One may ask what good an office is if there is no salary, and that is a good point. The fact is that technically he remains in office until removed if he does not resign, so that reduction of salary does not affect his tenure as such.

Senator Langlois: And he cannot be replaced.

Mr. Maxwell: He cannot be replaced because there is no vacancy until his tenure is ended.

The Acting Chairman: Presumably this brings it to everybody's attention.

Mr. Maxwell: Yes.

Senator Cook: While we are on this section, Mr. Maxwell, in case you do not get an opportunity to read the remarks I made last night, I should like to bring this passage to your attention. The bill says that the Canadian Judicial Council can act of its own volition, or must act at the request of the Minister of Justice of Canada or an attorney general. I said in my remarks:

> A difficult point which may well arise is how the Minister of Justice of Canada or attorney general of a province will know that undue delay is taking place until the matter has become more or less of general complaint, and in the nature of a public scandal. It seems to me that one way to safeguard against this situation is for our courts to file something in the nature of an annual report. Every type of operation, from the biggest down to the smallest bulls-eye shop, has to file reports and facts and figures with government departments. I see no good reason against requiring our courts to do the same. I therefore suggest to the Minister of Justice that during the next session of Parliament the act be further amended to provide that the registrar of every court be required to file each year with the Department of Justice of Canada and the Department of Justice of its own province information giving the number of cases tried, when heard and when judgment was given. It would then be easy to spot any undue delay and the judge or judges causing it. Such other important information showing how many days the court sat and so on could also be included.

I am not asking you for any comment on that. I am sure it is a matter of policy, but I would like that to be made part of the record and drawn to the attention of the minister.

Mr. Maxwell: That is a very interesting suggestion.

Senator Langlois: There is no provision in this bill dealing with compulsory tabling in the house of any report from the council—am I right in that?

Mr. Maxwell: That is true, with one exception. We visualize, of course, that the ordinary meetings and deliberations of the council will be confidential.

Senator Langlois: So the Minister of Justice could forget about any report and the public would never know that such a report had been made, and the bad judge would remain functioning.

Mr. Maxwell: I would not think so.

Senator Langlois: But it is a possibility.

Mr. Maxwell: It is a possibility, I suppose, but I would think that if a minister became seized of a report that obviously indicated that action should be taken, he would be in very serious difficulty if he did not do something about it.

Senator Cook: He may be anticipating a change of government.

Mr. Maxwell: In practical terms, I do not think that would ever happen. I do not think a minister of justice could very well ignore a report given to him by the council.

Senator Langlois: What was the reason behind not having such a provision in the act, for compulsory tabling of the report?

Mr. Maxwell: You mean automatically?

Senator Langlois: Yes.

Mr. Maxwell: I think the feeling is that generally speaking we do not want the deliberations of this council to be made public. We think it should ordinarily hold *in camera* sessions. One of the problems with the judiciary is that a public inquiry can destroy a reputation even though there is basically no ground for taking any action. We are trying to protect the judiciary in this regard.

Senator Langlois: I understand that, but once an investigation has been carried out and the report made to the minister, why is not this report tabled in the house? If the report is against the judge, then he is a bad judge anyway, so what are we losing by making it public?

The Acting Chairman: Suppose he is a good judge and the accusation is a nasty one?

Mr. Maxwell: I would think that until the government decided it had something before it requiring action it would be very unwise to make anything public, generally speaking.

Senator Langlois: I remember one case in which a judge was removed on a joint address, but the whole thing was made public in the press even before a report was made.

Mr. Maxwell: I know, that is one of the problems.

Senator Cook: In that case the man was destroyed as a judge as soon as the case opened; his usefulness as a judge was destroyed in the public mind. I must say I entirely agree that it should be confidential.

Mr. Maxwell: We think that it is the better policy.

The Acting Chairman: Clause 32 subclauses 4, 5 and 6 seem to provide that the minister may require that it be held in public.

MboMr. Maxwell: Yes, that is a power the bill reserves to him. I would doubt very much that would ever be exercised, unless there was a most remarkable set of circumstances surrounding the matter.

Senator Cook: Which provision is that?

The Acting Chairman: Subsection 5 provides for confidentiality, and subsection 6 provides that the investigation may be held in public or private. The council can decide to have it in public if they want; and, in any event, at the demand of the minister it has to be public.

Senator Cook: I think this is a very worth while reform, but, like all other reforms in new legislation, it may require amendment from time to time. In my view it is a great step forward, although it may need to be amended from time to time as circumstances dictate, when we see how the council works. I certainly think as a first effort it is very commendable, as I have already said. The minister should be commended.

Senator Choquette: Senator Benidickson left a moment ago and asked me to pose this question to the witness: Why are county court judges treated any differently from supreme court judges? There is one respect in which they are treated differently, the question of retiring at age 70.

Senator Cook: They can also be removed.

Senator Choquette: Yes, they can be removed.

Mr. Maxwell: Their tenure is not the same. They are not protected in the same way under the British North America Act and, of course, they are not paid the same amount of money. I suppose the only answer I can give is that they are different. Their function is somewhat different.

The Acting Chairman: They are entirely the creatures of the provincial legislation.

Mr. Maxwell: The county courts are.

Senator Choquette: They are federally appointed.

Mr. Maxwell: Yes. They are appointed under section 96 of the British North America Act. They are different; their functions are different. They are not superior court judges.

Senator Choquette: I do not know if we can establish that difference, because I am aware that the county court judges, on consent of both counsel, can hear supreme court cases.

Mr. Maxwell: Yes.

Senator Choquette: Every now and then we give them new functions, by legislation, like the right to hear divorce cases. I do not see much difference in their functions. They hear criminal cases with a jury. One exception is that the amounts involved in the suits differ. There is a limitation. If you go before a county court judge with a claim of $5,000, that might be the limit. Over and above that you might have to go to a supreme court judge. But if both counsel agree, they can hear any case, even if it is $100,000. So I do not see that they are different in the sense in which you put it.

Mr. Maxwell: Senator Choquette, I can say this to you, that over the years more and more jurisdiction has been given to the county court judges in one way or another. It is quite true that in some provinces—not in all, but in some provinces—there is this consent jurisdiction that relates to monetary amounts. On the other hand, I think there are certain kinds of subject matter that county court judges really do not hear. For example, I do not think they have the power to grant injunctions, except in a very temporary sort of way nor do they grant prerogative relief. There are some limitations on their jurisdiction that do not apply to superior courts. I agree with you, that they are less different now than they once

Senator Choquette: Yes.

Senator Laird: Also, is it not a fact that they cannot appoint a county court judge unless the province indicates that one is required? Let us say there are two in an area of a county and they want three. The third one cannot be appointed unless the province requests it.

Mr. Maxwell: That is true. The province has to establish the office.

Senator Langlois: That applies to superior court judges as well.

Mr. Maxwell: Yes, that also applies to superior court judges. In short, the province establishes its requirements for superior court judges and for county court judges for its courts, and then these appointments are made by the federal authority.

The Acting Chairman: Was there an age 75 provision for retirement, or any provision for retirement, in the B.N.A. Act? I guess there was none. Were they appointed for life?

Mr. Maxwell: At one time the superior court judges were appointed for life; but some years ago the B.N.A. Act was amended to provide for their tenure to cease at 75 years of age. That is still so, and a superior court judge holds office until he is 75.

The Acting Chairman: My recollection is that in Alberta—and I would presume in other jurisdictions as well—the age 75 point of retirement went through for district court judges a very long time before it did for the senior court judges. This was a matter of some concern, for example, until they got the B.N.A. Act amended. I assume that the period of tenure for county court judges was not protected by the provisions of the B.N.A. Act amended. I assume that the period of tenure for county court judges was not protected by the provisions of the B.N.A. Act.

Mr. Maxwell: That is right. That is why we are dealing with it. The tenure of the county court judge was established in the Judges Act, not in the Constitution. What we are doing here is re-establishing that tenure to end at age 70 rather than 75, whereas the superior court judge's tenure is established by the Constitution.

Senator Choquette: Why do we not follow the Constitution? Why do we make the change? Why do we make a difference in the retiring age? That is beyond me.

Mr. Maxwell: You mean, between county court judges and others?

Senator Choquette: Between county court judges having to retire at age 70, instead of age 75, when they had to retire at 75 so long ago, as our chairman has just told us. I remember Judge Proulx in Sudbury. He resigned when he reached 75, about 20 years ago. That was a known fact, that they had to retire at 75.

Mr. Maxwell: Yes.

Senator Choquette: I am asking why there is that change now in this act, making the retirement age of county court judges 70 instead of 75. Is there any reason?

Mr. Maxwell: The reason, sir, is that I suppose it is felt that the judiciary should retire at an age somewhat younger than 75.

Senator Cook: On that point, how does the Federal Court Act read—that they retire at 70?

Mr. Maxwell: Yes.

Senator Cook: Is that not under the Constitution?

Mr. Maxwell: No. The tenure for the federal judges—and what I mean by "federal judges" here is judges of the federal courts, including the Supreme Court of Canada, I may say—is prescribed by acts of Parliament and can be changed by Parliament. When the new Federal Court came into existence, we changed their retiring age to 70. No attempt has yet been made to do that in the case of the Supreme Court of Canada. I could not say whether such an attempts will be made. Of course, we cannot deal with the provincial superior court judges, because their tenure is constitutionally controlled; but we can deal with county court judges.

Senator Cook: They are the ones that you control, inasmuch as Parliament decided that the Federal Court retiring age should be 70. I suppose Parliament has now decided that there is no difference between the Federal Court and other courts in that respect. I suppose the point is that they should be equated, that they also should retire at 70.

Mr. Maxwell: Yes.

Senator Langlois: Could you tell us why this decision on the tenure of office for judges was made? Was it made after having received representations to that effect from the chief justices across Canada?

Mr. Maxwell: I cannot honestly say that that was the situation. There are many who feel that the age of retirement should be reduced. I think many people feel that perhaps the superior court age should be changed from 75 to 70. It is not easy to do that when the retirement age is embodied in the Constitution. It is not so easy to amend the Constitution. So, although we cannot easily do that with them, I suppose the thinking was that we would do it where we could. I think that is what it boils down to.

Senator White: Were there any recommendations from any bar association?

Mr. Maxwell: Yes, I would say so. The retirement age of the judiciary is a matter over which there is some controversy. Certainly I believe that most people today feel that the retirement age should be lowered. The fact is that there are still many people who are quite active and function well after 70; and of course, there are quite a few people who do not. Sometimes it becomes a problem.

The Acting Chairman: The difficult one is not going to listen.

Senator White: Mr. Chairman, may I refer to page 11, section 10, where provision is made for a pension to be paid to the widow of a judge? It refers to the children of judges in certain cases. Perhaps Mr. Maxwell could tell us what a judge gets, his widow gets, and what a child would get under that section.

Mr. Maxwell: May I ask Mr. McIntosh to answer that? He has worked it out, but I cannot read his figures.

Mr. H. A. McIntosh, Director of Legal Services, Privy Council Section, Department of Justice: Based on the 1972 salary of $38,000 for a superior court provincial judge, that would be the $35,000 plus the $3,000 additional sum, the annuity for the judge himself would be two-thirds of that, which would be $25,333.33. The widow's annuity, if he dies in office, would be two-ninths of that, which is $8,444.44.

If the judge died after he retired, the widow would get one-third of his annuity, which is one-third of $25,333.33, which is the same amount, $8,444.44.

The children would each get one-fifth of the widow's annuity, which would give them up to a maximum of $1,688.88 each.

Senator Cook: Up to what age?

Mr. McIntosh: Until they reach the age of 18 or go on to university, until age 25. This is in the definition of dependent children in the bill itself.

Senator White: One child will get one-fifth of $8,444; is that right?

Mr. McIntosh: Yes, which would be $1,688.88. The maximum is for four children. If the widow is dead or dies, the annuity to the children is doubled, which would make it $3,377.76 each.

Senator Cook: It would pay him to stay at university.

Mr. McIntosh: Yes, I suppose it would.

Mr. Maxwell: There are some conditions attached to that. You cannot go beyond 25, and there is a requirement that they remain unmarried.

Senator Choquette: Senator Flynn left a few questions. The first is: Are the pensions of widows or widowers increased in proportion to increases in judges' salaries?

Mr. Maxwell: Yes. By that I mean that as the salary of a judge goes up the proportionate share to the widow goes up with it. It is based on a percentage of the salary.

Senator Choquette: The next question is: What will be the basis used in calculating the pension payable to those who have become or will become widows or widowers of judges between January 1, 1971 and the time when this bill is given Royal Assent?

Mr. Maxwell: We have included a provision that will enable the pensions awarded in that period to be revised on the basis of the new salary structure.

The Acting Chairman: In other words, they get higher pay.

Mr. Maxwell: Yes. The reason is that the salaries themselves are retroactive to the first of the year. Anyone who has retired and who has been given a pension will have that pension adjusted on the basis of the new salary structure.

Senator Choquette: The next question on behalf of Senator Flynn is: Does the superior court judge's accession to the post of supernumerary judge come automatically upon his election to give up his regular judicial duties?

Mr. Maxwell: Yes, I would say so. He has to elect to become a supernumerary judge if he is entitled to become one—that is, once a province passes the supporting legislation.

The Acting Chairman: Have any of the provinces passed the legislation yet?

Mr. Maxwell: I do not think they have. I know that several provinces contemplate passing it.

The Acting Chairman: If it were not limited, and without suggesting anything nasty about judges, you could have the whole court decide to be supernumerary, in which case they would draw their salary and could become supernumerary also.

Mr. Maxwell: You have to meet the conditions in order to become a supernumerary. You have to be 70 years of age and have served for 10 years.

The Acting Chairman: Yes; but there are a number of them in that category. I think of practically the whole Appeal Court of Alberta, with one or two exceptions.

Mr. Maxwell: Yes, there are a certain number there who could qualify.

The Acting Chairman: Would a province provide so many supernumerary positions?

Mr. Maxwell: No. The way this legislation is written, a province would have to provide a supernumerary position for each ordinary position on the court. You could not very well have a situation where one judge is permitted to become a supernumerary if he meets the conditions, and some other judge is not permitted to become a supernumerary if he also meets the conditions. That would hardly be fair. The option has to be open to all judges to become supernumerary if and when they meet the requirements.

I do not know that that should be of great concern, because the Chief Justice of each court can assign work to supernumeraries. It is not necessarily a holiday, by any means.

These provisions merely permit greater flexibility in the court structure. We think it will mean that there will be less requirement for continually adding positions, which seems to happen year after year.

Take the Ontario court, for example. There will be a number of supernumerary judges if the Ontario Government introduces legislation. Those judges will be available to help existing judges. There should always be a certain group, perhaps three or four judges, who are supernumerary on the court and available for other things.

We think it will lend flexibility. I know that Chief Justices are very pleased at the prospect of having this kind of talent available to them, to be tapped if needed.

Senator Cook: On that point, would a supernumerary judge have to accept an assignment as a royal commissioner?

Mr. Maxwell: No, I would not say that he would have to, but he would have to accept a judicial assignment.

Senator Cook: Any cases assigned to him, he would have to try.

Mr. Maxwell: Yes.

Senator Cook: But he would not have to become a royal commissioner.

Mr. Maxwell: No.

Senator Choquette: Continuing with Senator Flynn's questions, may a Chief Justice decide not to use his services?

Mr. Maxwell: Yes, it is within the discretion of a Chief Justice. I imagine what will happen is that those judges who are capable of performing good service after 70 years of age will be used, and some of those who perhaps are not so fit in this regard will not be.

Senator White: Mr. Maxwell, a few minutes ago you were pointing out that many people thought the arrangements had been made for judges to retire at 70.

Mr. Maxwell: Yes.

Senator White: Under this you are doing the contrary and are providing supernumeraries who cannot act until they reach age 70, but then they are going to carry on. One does not seem quite consistent with the other. Seventy is the age and that should finish it, if they are no further good or people think they have gone downhill.

Mr. Maxwell: The supernumerary system will permit those persons who are fit and useful, of whom there are quite a few, to perform services until 75; whereas it will also permit those who are not too fit and useful not to attempt to perform the services.

Senator Cook: To retire on full pay for five years.

Mr. Maxwell: It is just as well to have them on supernumerary as to have them on full pay and occupying an ordinary position.

Senator Cook: I could not agree more, but that is the other side of the coin.

Mr. Maxwell: Yes.

Senator Langlois: Could they also act on a part-time basis?

Mr. Maxwell: Do you mean, get full pay on a part-time basis?

Senator Langlois: Yes, suppose a supernumerary judge acts for three months in a year, he would not be paid for the whole year.

Mr. Maxwell: On that basis they probably would not become supernumerary.

The Acting Chairman: They have full pay and all the prerogatives, except they do not have responsibility for being ready for the regular roster.

Mr. Maxwell: That is right.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel: Is there any way in which a supernumerary judge could be relieved of that responsibility?

Mr. Maxwell: Of what responsibility?

Mr. Hopkins: Could he be removed as a supernumerary before he reaches 75?

Mr. Maxwell: He can always retire or resign. No, there is no way.

Senator Cook: If he became head of a separatist movement he could be removed.

Mr. Maxwell: Yes, he could be removed from office, of course.

The Acting Chairman: For cause.

Mr. Maxwell: Yes, for cause. They retain their status as a judge. All the things that apply to a judge apply to them, but the only thing is they would not normally be expected to do the regular work of the court, unless the chief justice requested they do so.

The Acting Chairman: Or if you have special cases that a particular judge is a good man to put on.

Mr. Maxwell: Exactly.

Senator Choquette: May I pursue the questions of Senator Flynn? Will this judge receive the same salary as an ordinary judge?

Mr. Maxwell: Yes.

Senator Choquette: Will his duties be the same?

Mr. Maxwell: To the extent they are assigned to him, yes.

Senator Choquette: Senator Flynn asked: If affirmitive answers are given, then what is the difference between a judge who remains in office past the age of 70 and one who decides to become a supernumerary judge?

Mr. Maxwell: The only difference is that the one who does not elect to become a supernumerary will have to continue to take his ordinary assignments on the rolls, and so on, just as any other judge; whereas a supernumerary judge will have to hold himself open only for special assignments.

The Acting Chairman: Unless you have an overloaded docket somewhere, and this would then give the chief justice some leeway in order to get that cleared up.

Mr. Maxwell: Yes.

Senator Cook: A supernumerary judge, for instance, could not go down to the Barbados for six months, but he would have to stand by.

Mr. Maxwell: That is true.

The Acting Chairman: He would have to let them know where he was.

Senator Choquette: Is the only advantage the fact that if one opts to become a supernumerary judge the way is thus cleared for the Minister of Justice to appoint someone to the post this new supernumerary judge had vacated?

Mr. Maxwell: That is right. Once he becomes a supernumerary judge, then he leaves a regular post open for a fresh appointment.

The Acting Chairman: But he has to make the decision.

Mr. Maxwell: Yes.

Senator Gouin: Mr. Chairman, I would like to make sure I have understood the system of supernumerary judges. It is what I would call the case of a voluntary retirement or election to become a supernumerary judge once they have reached 70 years, and it will be for a maximum period of five years, to age 75.

Mr. Maxwell: That is true.

Senator Gouin: Am I right in saying that they may even resign during that period?

Mr. Maxwell: Yes, they may.

Senator Gouin: At their will?

Mr. Maxwell: Yes, at their will.

Senator Gouin: In Quebec, concerning our Court of Queen's Bench, we have a great many cases; at present 750. In criminal matters they are up to date because they are heard by preference. This system of supernumerary judges would facilitate the work. They could have more sittings and so on. However, in addition to that there are a certain number of additional judges appointed. Is it three or four for our Court of Queen's Bench?

Senator Cook: There are three additional provided for for the Court of Queen's Bench for the Province of Quebec.

Senator Gouin: And for the superior court, how many?

Senator Cook: Five.

Senator Gouin: And with regard to supernumerary judges, it is the province which has to decide?

Mr. Maxwell: If the province wishes to have the system apply to its courts, it will have to enact supporting legislation, which would be fairly general and would simply create supernumerary office for each judicial office they already have. Once that is done—and I imagine that will be done in most provinces—when the judge becomes 70 and has served a sufficiently long time, he can then elect, at his option, to become a supernumerary. That is the status that is in between retirement, on the one hand, and being a full-time judge, on the other.

Senator Gouin: He will receive full pay?

Mr. Maxwell: Yes, he will receive full pay.

Senator Gouin: For 1971 at a certain scale, and for 1972 the salary will increase, as is provided for other judges?

Mr. Maxwell: That is right. You see, senator, at the present time when a judge becomes 70 he can elect to retire, but then he is a retired judge and cannot do anything any more. He has either to retire or remain as a full-time judge carrying the full-time load. This supernumerary status will enable him to elect something that is in between. He does not have to remain a full-time functioning judge, yet he does not have to retire; he can accept an in-between stage and can continue to function as a judge, at the request of his chief justice.

Senator Gouin: The incentive is that as a supernumerary judge he receives full salary and might otherwise get two-fifths?

Mr. Maxwell: Yes, exactly.

Senator Langlois: Such election by a retiring judge upon reaching retirement age would have to be for not more than five years and not less than one year, I understand.

Mr. Maxwell: There is no limitation on how long he may hold the office, except that he cannot go beyond the five years. He cannot elect until 70 and has to retire at 75, so the maximum period for which he could be a supernumerary judge is five years. He could elect to be a supernumerary judge, act as such for six months and then decide that maybe he should retire, that he does not want to be even a supernumerary judge.

Senator Cook: But he cannot opt in and out.

Mr. Maxwell: Oh no. Once he is a supernumerary he cannot go back to being a full-time judge; he cannot do that.

Senator Choquette: It really creates a vacancy, and you will have many judges appointed as supernumeraries.

Mr. Maxwell: I should think there will be a number of vacancies.

Senator Choquette: I think it is a five-year holiday for which they are getting full pay, and the Government will appoint a lot of their friends to the bench. That is my opinion.

Senator Cook: That is a policy matter.

Senator Choquette: Maybe I should not express that opinion.

The Acting Chairman: That is a suspicious opinion.

Senator Choquette: Mr. Maxwell, does your department take recommendations now from local bar associations, or is it still a political appointment? Are you getting away from political appointments?

Mr. Maxwell: This is a rather delicate area. I can perhaps say that the Minister of Justice certainly does a great deal of consulting with the Canadian Bar Association committee. I do not want to get involved as an official in a political controversy, but I think a serious attempt is made to appoint without reference to political affiliation, as I see it. I would think a good many of the appointments demonstrate that. Perhaps I am wrong about it.

Senator Cook: That seems a good point at which to move that we report the bill.

The Acting Chairman: Yes, it is unfair to ask Mr. Maxwell to comment on that.

Is it agreed that we report the bill without amendment?

Hon. Senators: Agreed.

The Acting Chairman: Thank you, Mr. Maxwell, and your associates, for having come before the committee and cleared up these matters that have been bothering us.

The committee adjourned.

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

Available from Information Canada, Ottawa, Canada

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable J. HARPER PROWSE, *Deputy Chairman*

No. 11

WEDNESDAY, DECEMBER 15, 1971

First Proceedings on the examination of the parole system in Canada

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(Witnesses—See Minutes of Proceedings)

STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable J. Harper Prowse, *Deputy Chairman*

The Honourable Senators:

Argue	Haig
Belisle	Hastings
Burchill	Hayden
Choquette	Laird
Connolly (*Ottawa West*)	Lang
Cook	Langlois
Croll	Macdonald (*Cape Breton*)
Eudes	Martin (*Ex officio*)
Everett	McGrand
Fergusson	Prowse
Flynn (*Ex officio*)	Quart
Goldenberg	Thompson
Gouin	Walker
Grosart	White
	Willis

30 Members

(Quorum 7)

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 19, 1971:

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Laird, seconded by the Honourable Senator Cook:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada.

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 15, 1971.
(17)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 2:40 p.m.

Present: The Honourable Senators: Prowse (*Deputy Chairman*), Argue, Fergusson, Goldenberg, Haig, Hastings, Laird, Langlois, McGrand, Prowse, Quart and Thompson—(12).

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; Mr. Réal Jubinville, Executive Director; Mr. William Earl Bailey, Staff Member.

The Committee proceeded to the consideration of the following Motion by the Senate:

> "That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada."

The following witnesses, representing the Department of the Solicitor General of Canada, were heard in explanation of the motion:

The Honourable Jean-Pierre Goyer, P.C., M.P.,
Solicitor General of Canada;

Mr. J. L. Hollies, Q.C.,
Departmental Counsel.

At 4:00 p.m. the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard,

Clerk of the Committee.

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Ottawa, Wednesday, December 15, 1971.

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 2.30 p.m. to examine the parole system in Canada.

Senator J. Harper Prowse (*Deputy Chairman*) in the Chair.

The Deputy Chairman: Ladies and gentlemen, we are waiting for the minister, whose brief you have before you.

For the benefit of those who were not at the earlier committee meetings, I may say that our procedure will be the following. Today we shall hear the Solicitor General. Tomorrow we shall hear Mr. Street, the Chairman of the National Parole Board. Then we shall not hold any further public hearings probably until about February, depending on when Parliament returns from the Christmas recess. At that time we shall have some further presentations, perhaps including one from the Penitentiary Service, although we may not hear from them until later.

During the intervening period it is our intention to get in touch with the Attorneys General and Ministers of Justice of the provinces, and their correctional institutions, and to extend to them an invitation to appear before the committee. We shall also be in touch with the various voluntary agencies, of which there are about one hundred, presently engaged in what is called the after-care of prisoners, which would involve the parlle and probation periods.

Following that we propose to invite organizations such as the chiefs of police associations, certain provincial courts' associations and other persons involved who might care to make representations to the committee.

In the meantime we hope to receive a number of representations from interested and interesting individuals, before winding up our proceedings by the end of April or early in May. We propose also to invite to appear before the committee certain people from whom we will have heard earlier, but from whom we may wish to hear further before the hearings conclude.

As our target, we hope to present a report before the summer recess. That is the general picture, which will be subject to change as the hearings continue.

Senator Hastings: So far we have two meetings scheduled, one today with the minister and one tomorrow with Mr. Street. I do not think that one meeting with the Chairman of the Parole Board will be sufficient, and perhaps we should schedule a meeting for Monday in order to complete our discussion with Mr. Street before the Christmas recess.

The Deputy Chairman: Mr. Street is here, and he and I have had discussions on this matter. The persons involved have intimated their willingness to place themselves at our disposal on any reasonable basis. It is Mr. Street's intention to be present, or to have a representative present at all of the hearings, as he has a prime interest in what we are doing.

If it is impossible for us to complete our hearing with Mr. Street tomorrow, it will be possible for us to hold a further meeting with him. I will ask Mr. Street right now whether he will be available if we do not complete the hearing tomorrow.

Mr. T. G. Street, Q.C., Chairman, National Parole Board: Yes, of course, Mr. Chairman.

The Deputy Chairman: If we are unable to conclude the hearing tomorrow, there will be no problem. Thank you very much.

Are there any further questions from the committee arising from what I have said?

Mr. Minister, we are glad that you were able to obtain your parole from the other place for the purpose of attending this hearing.

Some Hon. Senators: Hear, hear.

The Deputy Chairman: Honourable senators, we have with us the Solicitor General of Canada, the Honourable Jean-Pierre Goyer. He will make an opening statement regarding the position of the Solicitor General's Department. Accompanying Mr. Goyer, to assist him in answering questions, is Mr. J. L. Hollies, Q.C., Departmental Counsel, Department of the Solicitor General.

Without further ado, I now call on the Solicitor General to make his opening statement.

[*Translation*]

Hon. Mr. Goyer: I welcome the study on parole that you have initiated especially as the study occurs at a time when we are undertaking a total revision of our departmental policies.

The Department of the Solicitor General is essentially a social defense department aimed at crime prevention, protection of the society and the rehabilitation of social deviants. There are three agencies responsible for these objectives, the R.C.M.P., the Canadian Penitentiary Service, and the National Parole Board and Service.

The Parole Board and Service being an essential part of this social defense network, it goes without saying that any reforms or changes implemented in either of the three agencies will certainly affect the policies and activities of the Parole Board. Therefore, the study that this committee

has initiated must take into account the overall objectives and reforms of my Department.

When the Parole Board was established in 1959, the Canadian Penitentiary Service was a highly centralized and rigid service whose aim was chiefly the punishment of the individual. A direct consequence of this was that there was practically no communication between the inmates and personnel, very little participation from the general public, and very few programs carried out inside the institutions. Also, at that time pre-release programs were non-existent.

However, we have recently reviewed our policies and the result is that the penal system is now oriented toward the resocialisation of the individual, and, this on a more decentralized basis, in various types of maximum, medium, and minimum security institutions, pre-release centres and half-way houses.

In recent months, we have increased the application of the "living unit concept" and the result will be that the inmate will no longer be depersonalized as he will be in constant communication with his correctional officers.

The Canadian Penitentiary Service has also developed temporary absence programs and pre-release programs, in order to facilitate the inmate's re-integration into society.

We have also recognized the need for public participation in opening the institution to visitors and to those interested in inside programs for the inmates. In addition, my Department has negotiated a general agreement with volunteer agencies whereby the Federal Government purchases services from approximately 40 private agencies across the country to help in the rehabilitative process of the inmate.

For these reasons, it is imperative for your Committee, at the outset of its study of the National Parole Board and Service, to take that new fact into account. I humbly submit that our guidelines in the field of parole must be reviewed throughly. At this stage, we cannot be satisfied with mere amendments to the Law or changes in regulations, as it was done in the past.

There has certainly been a lack of rationalisation in this field and there is an obvious gap between the Parole Board and its services and the Canadian Penitentiary Service.

The system is very intricate as both the Penitentiary Service and the Parole Board have jurisdiction, although according to different regulations, to release, the inmates, in some way or the other. For example, the Parole Board has certain day parole programs, the Penitentiary Service has temporary absence programs. Should these not be integrated?

The Parole Board has the exclusive jurisdiction and absolute discretion to grant, refuse or revoke parole for any adult inmate in a federal or provincial institution who is serving a sentence under federal statute. Now that correctional officers are "living" with inmates and that psychiatric and psychological services are more adequate, perhaps we should establish local "parole boards" with the possible participation of penitentiary authorities and other advisers that deal with the inmates (volunteers, educators, specialists . . .)

May be then, the National Parole Board could develop parole criteria and directives, supervise the system to assure uniformity and efficiency, act in certain categories of crime, or in cases where parolees have violated their parole, and also serve as an appeal board.

This raises the question of the amalgamation of the Canadian Penitentiary Service and the National Parole Service. If this amalgamation is to take place we are faced with deciding the best means for its implementation.

This more unified system would perhaps help avoid the feeling of insecurity which the inmates develop when faced with this compartmentalized administrative structure. We must not forget that many inmates have committed crimes as a result of insecurity and surely we do not want to intensify and perpetuate this feeling.

As a result of various legislation, for example, earned remission, statutory remission, or parole itself, the sentences imposed by judges become practically meaningless and are more and more equivalent in the mind of the judges to indefinite sentencing. Coordinated release criteria would have a direct effect on sentencing. Once the accused has been proven guilty through the normal judicial procedures the legal conception of the criminal act should then be parallelled by the subjective element, that is, the examination of the personality of the offender in order to decide what specific treatments will effect his re-education and resocialization and thus better protect society in the long run.

One thing is definite: penitentiaries are necessary. Many social deviants need to be isolated from society, both to protect society and to help them to resocialize themselves and to become law-abiding citizens. The public has been very critical of our penal system but society must also play its role. The Government has a key role to play but I think that society has a duty to participate to help change the system.

In fact, the public is an indispensable partner in the programming and testing of social reforms. I do not think that the government should expand its administrative structure by employing a large number of civil servants but rather that society should undertake to develop and implement programs. These contacts that the inmete has with individuals outside the institution are necessary if he is to rehabilitate himself. I would therefore like the committee to consider the question of public participation and to determine whether maximum use is made of volunteers.

The importance of employment in the rehabilitation process has always been understood. Are employers sufficiently informed of the activities of the parole services? Are employers encouraged, as much as possible, to participate in rehabilitation programs?

I believe that it is extremely difficult to assess some of the programs already undertaken because of a lack of statistical data in the area of parole. The Department, however, needs to know what are the best statistical tests for gauging the success and failure of parole and I look forward to any recommendations your committee might have on these matters.

I have established within the Department a task force which will look into the problems of the parole system and at the same time study the responsibilities of the penitentiary services with regards to release programs and granting of parole, problems mentioned earlier.

I do not want a duplication of studies. The task force will serve as a complement to the work of your Committee in that it will research in greater depth certain problems which require close attention.

I hope that this brief exposé has give you an insight into our problems as they exist at the present and has indicated questions on which we need suggested answers if we are to remain at the vangard of reform and progress.

[*Text*]

The Deputy Chairman: Thank you very much, Mr. Minister. I presume that you will now be available to answer questions from the committee.

Hon. Mr. Goyer: Yes, Mr. Chairman.

The Deputy Chairman: May I suggest that the questions be directed to the minister? Then, if he wishes, he may have Mr. Hollies answer.

I will call on Senator Laird to lead the questioning.

[*Translation*]

Senator Laird: I would first like to express our appreciation, Mr. Minister, for your appearing before this Committee. Frankly, I shall put the questions in English, if that is acceptable to you—

Hon. Mr. Goyer: Certainly.

Senator Laird: —because I know you have a thorough knowledge of the other official language of Canada.

[*Text*]

The first thing this committee would be interested in, since we will receive details of operations from the Parole Board, is to have you go as far as possible in matters of principle. For example, what relationship do you contemplate between the federal and provincial authorities in connection with the whole problem of parole?

[*Translation*]

Hon. Mr. Goyer: This question is of interest to us and, of necessity, to the provinces also. Unofficial consultations have been held during research carried out in co-operation with the provinces, but financed by the Solicitor General's Department.

For example, I think we can say that generally the provinces would like to have their own parole services.

Once again, the informal consultations which we have held have shown us that, in the case of New Brunswick, for example, that province would be interested in having its own parole jurisdiction and service.

Saskatchewan has not yet said exactly where it stands.

Prince Edward Island presents a special problem. It appears that at this point the parole service and the provincial probation service could be united to become a single integrated service, financed by both levels of government.

The case of the Northwest Territories naturally presents some difficulty.

Alberta appears to favour a provincial parole board.

In Ontario, of course, and in British Columbia, because of existing provisions in the law, these two provinces have their own parole services, but only for indefinite sentences. Ontario clearly indicated that it wished to extend its jurisdiction over all sentences of provincial right—so, I think, did British Columbia. — —

In view of this, I feel that this could certainly be the subject of a discussion, at a federal-provincial conference, to decide on just what shape it would take. In any case, this would implement one recommendation of the Ouimet Report. I think it would also be in accord with a new spirit which could be introduced into the parole system, if we accept as a basic principle—this question is undoubtedly central to your study—if we accept as a basic principle that the services of the National Parole Board should be decentralized, and a certain measure of jurisdiction conferred on local authorities, in which there could possibly be participation by citizens.

If I may, I will take the opportunity presented by your question simply to add this: in my opinion, participation by citizens is absolutely necessary. The Board's work as a whole has often been subject to criticism by the public, often because the public has been poorly informed. The best way to inform the public is still to have them participate in decisions, and if a way could be found—and I feel this is a question that would definitely interest your committee—if a way could be found, if we are agreed at the outset that the system should be decentralized, or that citizens would be asked to participate in decisions, then the public would feel it was much more involved, and much more capable of assessing the difficulties presented by parole.

To conclude my answer to your question, I would make a comparison. In our legal system, in criminal cases, provision is made for a jury, and this jury is of necessity composed of ordinary citizens who are nonetheless frequently called on to decide cases which are of paramount interest to citizens, and yet we rely on them to do so, under the Court's guidance of course. Well, I wonder whether we might not find a similar concept that would apply to parole cases.

Senator Laird: Thank you. Next question, please.

[*Text*]

The National Parole Board, of course, comes within the purview of your department. However, as we read the act, it seems to be an autonomous body. Is it a fair question to ask whether or not you give any guidelines to the National Parole Board in carrying out its work?

[*Translation*]

Hon. Mr. Goyer: I would not like to set myself up as a legal adviser, because I think there might then be a conflict of interests, and I feel that, to describe the Department's responsibility towards the Board, Mr. Hollies, the Department's legal adviser, could answer you; then perhaps I could comment on my working relations with the Board, if of course this is all right with you, Mr. Chairman.

[*Text*]

Mr. J. L. Hollies, Q.C., Departmental Counsel, Department of the Solicitor General: I am not sure whether I should thank you or not for suggesting that I add a few comments as to what the future might be.

I think it is beyond doubt that the exclusive jurisdiction in any particular case to grant parole, to revoke parole, to suspend parole or declare parole forfeited, to issue the necessary warrants of apprehension or parole certificates, as the case might be, rests with the National Parole Board.

The acts setting up the agencies with which the minister is charged—that is, the Royal Canadian Mounted Police, The Canadian Penitentiary Service and the National Parole Board—differ in one particular aspect. With respect to the Royal Canadian Mounted Police and the Canadian Penitentiary Service the words "under the direction of the minister", or equivalent words, are used. The act setting up the National Parole Board does not use these words. I would suggest that this is a clear expression of the intention of both houses that the board be autonomous. Nevertheless, I would submit that the view in law, and necessarily in practice, is that the Solicitor General is charged with the overall direction of management of the National Parole Board in the same way as he is with any other agency entrusted to his care and direction. Does that answer your question?

Senator Laird: Yes it does, thank you.

Mr. Chairman, I will pass now, and give others an opportunity to ask questions.

Senator Quart: I have a question Mr. Chairman.

[*Translation*]

Mr. Minister, you spoke—I know you are bilingual and you speak English much better than I speak French—so I am going to continue in English.

[*Text*]

Hon. Mr. Goyer: I do not want to contest this.

Senator Quart: Oh yes, I do. You mentioned about volunteer agencies and the fact that you wanted more public participation. You went on to say that the Government purchases services from approximately 40 private agencies across the country to help in the rehabilitation process of inmates.

Is that all set up now?

[*Translation*]

Hon. Mr. Goyer: Yes, I think that two years ago we made an arrangement with private agencies, and we have come to complete agreement with all the private agencies in Canada; this has worked very well for two years. As a matter of fact, there are private agencies which now call on us for more financial aid, and we hope to provide this if possible. Moreover, if we really believe in participation by the public, I think we should not only finance the professional services provided by the agencies, but perhaps we should also finance promotion agents who could assist these agencies in developing programmes involving volunteers, in such a way that the public is really prompted to take an active part in parole, and that this might not be merely a matter for the experts, but also for the ordinary citizen who feels he has a duty to perform to the society he lives in, namely to help the less fortunate; I am speaking here in a social sense.

Senator Quart: Among the 40 organizations, do you have associations like, I mean social clubs, like the Kiwanis, the Optimists and others, because during the war I know they did a lot of rehabilitation, that is, among the 40 agencies have you many social clubs?

Hon. Mr. Goyer: No. Up to now social clubs have financed themselves, and I would add, very well indeed. It is very desirable that this continue along these lines, and though social clubs do not supply professional service as such, they do, I repeat, have an extremely important role to play in the rehabilitation field, and they perform it on a voluntary basis, which sets a great example.

Where private agencies are concerned, since they often provide professional services which also involve voluntary programmes, they must be given funds for professional services. Here, again, our financial aid will perhaps have to be increased, to help them improve their organization and do their recruiting in their working environment. I think that, whether we like it or not, people want increasingly to be paid for the work they do, and it is to be expected that professional services should be paid for. If we do not pay the voluntary agencies we have no choice at this point but to recruit more personnel. I think, personally, in the îsocial field we work in, with people we are trying to recycle or resocialize, I think that, basically, the public has a very important part to play. I don't think this problem can be solved by paid government officials. They may serve simply as staff, they may furnish expert advice, they may possibly act as a promotional force, but essentially the work has to be done by the public itself. Personally, in this field of government I do not believe in an administrative superstructure made up of a huge staff.

Senator Quart: Thank you, Mr. Goyer. I have other questions, but I shall wait till a bit later.

[*Text*]

The Deputy Chairman: Senator Fergusson, do you have a question in the same area?

Senator Fergusson: In reply to Senator Laird the Solicitor General referred to studies that had been done in various provinces and in the Territories. I would be interested to know if the results of those studies are available to the public.

[*Translation*]

Hon. Mr. Goyer: Yes, they are. As a matter of fact, we have published the findings of this research, and we will certainly be sending you copies, as well as to any member of the public who is interested in the matter.

[*Text*]

Senator Fergusson: I was interested in the one from New Brunswick. I have been trying to get it, but I have not been able to lay my hands on it.

[*Translation*]

Hon. Mr. Goyer: Ah yes, well, that is a department which is often obsessed with secrecy, as you know; you will certainly have an answer to your question today.

[*Text*]

Senator Quart: I would like to ask one small supplementary.

[*Translation*]

Could we have a list of the 40 agencies?

[*Translation*]

Hon. Mr. Goyer: Certainly. With the Chairman's permission, we will table this document.

[*Text*]

The Deputy Chairman: Would it be possible to give us an idea?

The committee would appreciate that. We will have it distributed when we receive it. The same applies to reports. The Committee's staff will contact the Solicitor General's staff, will pick up any reports that are available, and will distribute them.

Senator Thompson: I wonder if I may come back to the answer given by the Solicitor General with regard to the autonomy of the Parole Board. It was suggested that there could be a conflict of interests involving the chairman and the members of the Parole Board, in that the chairman is also responsible for parole services. Would the Solicitor-General care to comment on that?

[*Translation*]

Hon. Mr. Goyer: Yes; I think that the two services—that inside the Department at this time we are too compartmentalized. It is something like Brel's song about the boss women, each of whom has her own charges, is jealous of her charges, and doesn't want anyone else to discuss them.

I think that this, to some extent, is what you find not in a malicious or destructive way, but you know to what extent the departments, and agencies, are jealous of their rights; it is always a problem to get the departments and agencies to co-operate. There are good reasons for this. I think it is quite natural for this to happen. I think the difficulty right now is that prisoners come under the penitentiary services when such prisoners are in an institution, even when they occasionally have leave, or even when they go to work outside, and stay in pre-release centres; or, because the National Parole Board has decided to allow certain individuals to move to a pre-release centre that is under the National Parole Service, or because the iindividual has been let out on parole. At this point, he is confronted by another organization, by other individuals. I feel that this makes for a climate of insecurity in an individual; with some members of the society, this is serious. It is because of this that I submit to your Committee that it would be worth looking into this question, namely, whether there would be any advantage, or what the disadvantages would be; in combining both services, making the National Parole Service part of the Penitentiary Service, in such a way that there might be the same real continuity of interest, so that the prisoner always feels quite secure, and does not experience any sudden break in the treatment that begins as soon as he receives his sentence, until he is free from any restriction, until he becomes a free man.

[*Text*]

Senator Thompson: Mr. Minister, I appreciate this emphasis on team work, even as regards probation officers at some point having the experience of working in an institution.

Perhaps I did not express myself properly. My concern is that the Parole Board is in a sense a quasi-judicial board and, therefore, I am wondering whether or not you have a situation where the judge of this quasi-judicial board, Mr. Street, is also in charge of administration.

Do you see any parallel between this type of situation and that where a judge is also responsible for the policing of the community?

[*Translation*]

Hon. Mr. Goyer: Basically, no. I think that there was justification at that time for the National Parole Service to come directly under the Chairman of the National Parole Board, because of the situation I described, that when the Board was established in 1959 the Penitentiary Service was certainly not what it is today, but was centralized, rigid, lacking communication with the prisoner, etc. Hence, it was on the whole an oppressive and punitive service.

I do not think such people would have been able to do positive work with the prisoner. If, however, we take the approach, from this point, that a positive work of rehabilitation must be done in institutions, this would square very well with the functions of the National Parole Board from his administrative responsibilities, and enable him to concentrate on decisions to be taken regarding release of prisoners.

Is that more precise, this time, Senator?

[*Text*]

Senator Thompson: Thank you very much, sir.

I have another supplementary on this subject, Mr. Chairman, but perhaps someone else has a question.

The Deputy Chairman: The practice we are going to try to follow is to stay with one subject rather than having one person speaking on several subjects. If you have another supplementary on this subject, Senator Thompson, I suggest you put it to the minister.

Senator Thompson: Mr. Minister, is there the right of appeal from a Parole Board decision; and, if so, to whom?

[*Translation*]

Hon. Mr. Goyer: At the present time there is in fact no appeal from the Board's decisions. You could say that in specific cases there are reviews of the Board's decisions; this happens when a person is sentenced to death, and his sentence is commuted to life imprisonment; or when his sentence is life imprisonment. In such a case, if the Board's decision is unfavourable, it must be submitted to the Cabinet which, as you are aware, makes the decision in the last resort. Otherwise, there is no appeal. This is undoubtedly a matter of interest to your Committee, that is, should there not be an appeal from the Board's decisions? This is why it is connected with the problem of whether the system should be decentralized, and whether a system of local parole boards is acceptable. Then the National Parole Board, as it now exists, could act as an appellate court or appeal board, or some other arrangement could be considered. However, I think that, basically, in our political system, it is a good thing for decisions to be

reviewed, because all of us, individuals and agencies, are subject to error, and I think we must accept the fact that our decisions may be reviewed.

Senator Goldenberg: Mr. Minister, the Act creating the Federal Court gives it the right to review administrative decisions. Doesn't this cover the National Parole Board?

Hon. Mr. Goyer: I will let Mr. Hollies reply to that question, Senator.

[*Text*]

Mr. Hollies: In reply to the honourable senator's question, I must, with the greatest deference, say that my understanding of the Federal Court Act differs in one material respect, and that is that the provisions vesting the Appellate Division with the power to review decisions arrived at by boards, tribunals, or other emanations of the Crown are, according to my understanding, limited to those decisions which must be arrived at on either a judicial or a quasi-judicial basis. I believe it is section 28 of the act which says, and I am paraphrasing it, "other than a decision which is not required to be taken on a judicial or quasi-judicial basis".

When that act was in the process of being developed and when the regulations under the act were in contemplation, we inquired of the senior law officers of the Crown as to whether an exemption should be sought specifically for decisions by the National Parole Board. We were assured at that time that because of the way the act was framed such a specific exemption was quite unnecessary because the board was not acting in a judicial or quasi-judicial capacity.

I mean no disrespect to Mr. Street, who I see sitting at the back.

Senator Goldenberg: But he was a magistrate.

Mr. Hollies: Yes, and he would now be a provincial judge.

In law I believe it is recognized as an administrative decision reached by the National Parole Board and, therefore, is not within the ambit of the review provisions contained in the Federal Court Act.

The Deputy Chairman: Are there any other questions in this area?

[*Translation*]

Senator Hastings: Mr. Minister, excuse me if I do not speak in French, but when I finish my French courses, I will speak in French, very soon.

Hon. Mr. Goyer: I hope, nevertheless, that your work will be completed before you have finished your courses.

[*Text*]

Senator Hastings: Mr. Minister, I would first like to express to you, on behalf of my "constituents," the 7,000 inmates across Canada, their appreciation for the steps you have so boldly taken within the last six months with regard to penal reform. I was in Stony Mountain last night and they are all awaiting the time when you will start paying them the $1.75 an hour.

Hon. Mr. Goyer: Out of my own pocket?

The Deputy Chairman: They really do not care!

Senator Hastings: Is there any consultation, Mr. Minister, between the federal and provincial cabinets with respect to the parole of offenders? Specifically, I am thinking of imprisoned members of the F.L.Q.

[*Translation*]

Hon. Mr. Goyer: No, there is no policy set by the federal Cabinet. Therefore, no consultations took place between the federal Cabinet and the provincial cabinets. The government has never indicated to the National Parole Board how it should deal with these problems. That is, I guess the Board considers such cases to be ordinary cases.

[*Text*]

Senator Hastings: I stand to be corrected, but I believe the Board consulted the Minister of Justice of the Province of Quebec with regard to a recommendation in connection with parole. I understand it is the only province in which the Attorney General or Minister of Justice is consulted. I wonder why this procedure is used with respect to Quebec?

[*Translation*]

Hon. Mr. Goyer: The Board obviously made that decision on its own. I can not speak for my predecessor but, as far as I am concerned, I have assumed my present position, given directives requesting that a province or the Minister of Justice of any province, be consulted. As a matter of fact I have never given directives to that effect which would apply in any general way or in any particular instance.

Now, should the Board resort to such practices? I would imagine that the Board wants to be well informed before making a decision and therefore if it considers that it requires additional information from a police chief, or a minister of Justice, or from ordinary citizens, then, I believe, it is up to the Board to decide of the procedure to follow.

[*Text*]

Senator Hastings: In the fiscal year 1970-71 the Province of Quebec, which has approximately 30 per cent of your 7,000 prison population, runs below average with respect to number of day paroles granted. Only 11 per cent were granted day paroles in the province. 10 per cent of the temporary absences in the same period were granted in the Province of Quebec and 25 per cent were granted parole, which is considerably below average. I believe they have just as good an inmate as the rest of Canada.

I wonder if you would make an observation as to why that condition would exist?

[*Translation*]

Hon. Mr. Goyer: I admit that I am still at the stage of asking myself that question. I still have not found an answer, which is a matter of concern, because I see no particular reason why, as you have pointed out, prisoners in federal institutions in the province of Quebec are more special cases than anywhere else. It could perhaps be explained on sociological grounds, which affect our staff

as much as the prison environment, and this is perhaps attributable to our political society, which is less willing to take part in the rehabilitation field; I don't know. Like you, I am simply asking myself this question. At the administrative level, I have already asked the penitentiaries' Commissioner, in consultation with the staffs in our institutions, to give me a report on the matter, but I have not yet received it.

[*Text*]

Senator Hastings: You mentioned in your remarks, sir, that you still believe that penitentiaries are necessary. Do you believe that 400-man institutions serve any useful purpose or function in fulfilling the objectives of the Penitentiary Service?

[*Translation*]

Hon. Mr. Goyer: No—and we have received the Mohr Report on maximum security institutions. I hope to be able to make this public during January. I think we will then be better informed on what an institution should be from now on. It is with this in mind that we have, as you know, held up work at Mission, in British Columbia, so as completely to review our building programme, as it does not seem to correspond at all to the concept of modern phrenology (sic).

I say that prisons are necessary—we could say unfortunately necessary—but I think that the qualifier would be pejorative. If they are necessary, they are necessary, that is a fact; they are needed for a certain class of individuals who take advantage of their fellow-citizens, because they do not know how to make use of their freedom or because they have no respect for the laws which society has set up for itself.

There will then be the job of re-education, and I think this must be undertaken with some measure of security. Unfortunately, our society has not developed to the point where it can absorb every type of criminal. I don't know whether some society will one day be able to do so.

However that may be, we are dealing with the reality that these individuals must be kept in prisons, and even in maximum security institutions. I have no objection to this. I have no hesitation in saying that our penitentiaries must have full maximum security in the case of difficult criminals who are dangerous to society, so that such individuals cannot contemplate escaping from these institutions. The reason is quite simple: experience has shown that, if security measures are not properly enforced, are not satisfactory, and do not guarantee that escape is practically impossible, the prisoner thinks only of making plans to escape, and he greatly reduces his participation in the program inside the institution.

Experience therefore has shown that if the area is very well guarded, then the individual inside the institution will be more likely to find out for himself that he must resocialize himself, and that he must learn to live in society, to respect the country's laws and respect his fellow-citizens. This is what I meant when I said that prisons were necessary. It is simply a question of adapting the prisons to each individual.

This means that great flexibility is definitely the answer to our needs, providing maximum, medium and minimum security institutions, pre-release centres and halfway houses, etc. The more we can meet the needs of each individual, the closer, I feel, we will be to the possible re-adjustment of that individual.

[*Text*]

Senator Hastings: I agree with you, sir, that institutions will always be necessary. My question, however, was: Will 400-man institutions serve a useful purpose? From my experience and limited knowledge I believe that society completely defeats its purpose by putting men into these institutions and expecting them to re-orientate or re-socialize themselves.

As a parallel, surely we have learned from our experience over the years during which we admitted our mental patients to huge, monolithic structures and assumed they would be looked after properly. We did not know what was being done or how that goal would be accomplished.

We are living in a more enlightened age, with more enlightened procedures regarding patients; we keep them close to their families and society. In the Province of Alberta, or in Calgary at least, they are not even going to have psychiatric wards; they will be kept in the hospital, close to society.

[*Translation*]

Hon. Mr. Goyer: With regard to psychiatric cases, this is now under study. I have formed another task force, this one made up of psychiatrists, on the recommendation of the Canadian Psychiatric Association. This group will submit a report during December or January as to the type of institution that should be developed. Should we hire the provincial services? Should we have separate units? Should we have hospitals attached, for instance, to veterans' hospitals? Should there be hospitals inside the institutions themselves? Could we use the equipment we now have? etc.—the whole range of possibilities. This work is being done in close co-operation with another task force consisting of three economists, which will study the financial implications of the psychiatrists' proposals, because the psychiatrists could present us with ideal solutions, of course, but it is very important to have an estimate of the cost, not only of construction of these institutions, but of operating them as well.

When I took on the office of Solicitor General, we were going to inaugurate a program of building psychiatric centres, and when I asked how much it would cost, I was given figures, whereas, when I asked how much the operating expenses would be, no figures were available. It was at this point that I decided to form a task force to study this question.

An experiment is under way in Quebec, where a psychiatric institution has been built; operating expenses are about $29,000 a year per prisoner. Perhaps this is the cost that must be borne. However, I think we must be given more information, that the public must be given more information, if we are prepared to make this expenditure, and if it is among our priorities. This is why I am awaiting the report; then we will definitely consult to decide what type of policy we will establish.

[*Text*]

Senator Fergusson: This deals with the matter of penitentiaries and their size. I believe there are many studies which show that very few women convicts are dangerous and require to be kept in maximum security. Mr. Minister, why is it that in Canada we continue to keep our few women convicts in maximum security fortresses?

[*Translation*]

Hon. Mr. Goyer: We have examined that problem. There are various solutions available: some entail difficulties because legislation would be necessary, and others because we would have to invest in new equipment. Certainly—I think there are 97 women at Kingston—but certainly as a general rule, these cases, I would not say as a general rule, perhaps 50 per cent of these cases present serious difficulties, in the sense that it is very unliekly that the provinces will agree to accommodate these persons in their institutions, for two reasons that I can think of. The first is that the provinces have simple and short term cases in their institutions. Thus, bringing a really hardened criminal into the environment, this person would be subject to continuous confinement in the solitary block. Also, if such a person is in prison for a long term, this may destroy his morale, when he sees that the turnover throughout the provincial prison, which is perhaps from a year to 18 months, at the outside, when he sees, I say, everyone leaving and himself always being left behind, this could create a moral problem for the individual. I think this is why it will always be necessary to have a central institution, central because the number is very limited, to treat very difficult cases.

However, in order to hire provincial services, there would have to be legislation. Until legislation can be obtained, I think that an effort must be made to improve the conditions at Kingston, to make them as humane as possible. We have been working overtime on this problem, and have made a much larger investment of money this year than in previous years to improve prison conditions. I think that, for the moment, it is not practical to legislate simply to settle a problem of law, because, when you legislate, you must nevertheless have sufficient problems to submit to Parliament to propose a law, and then make possible general discussion on all the implications of that law.

[*Text*]

Senator Fergusson: Mr. Minister, I cannot see how any changes which might be made in Kingston will make it a suitable place to keep women prisoners. I do not feel it is the kind of institution in which you should keep women prisoners.

[*Translation*]

Hon. Mr. Goyer: I agree with you that this is not the ideal solution. The same thing could apply, for example, at Dorchester; as you know, we do not have any plans for changing Dorchester in the near future; this will perhaps be in a couple of years. Further, if you look carefully at what we do know, Merivale, not Merivale, but New Westminster, there is a decision in that matter that will be made very soon. This means that, in the case of the women's prison, I hope that a couple of years hence the matter of jurisdiction will be settled and we can look forward to a complete change, not only in the institution, but also in internal arrangements, between governments.

[*Text*]

Senator Fergusson: Thank you, Mr. Minister.

Senator Thompson: Pursuing this matter, to a degree I think you have answered the Ouimet Report which suggests that instead of bringing women to Kingston you make arrangements with the provincial services. With regard to French-speaking people, and especially women with children, who would normally go to Kingston, this is a onley experience, and it is felt that they should be kept near their homes.

From the point of view of rehabilitation, I appreciate your answer. I understood that two years-less-a-day was going to be the responsibility of the provincial government, and that the federal government would take over the other areas. What is your feeling with respect to tthat situation? Have negotiations begun with respect to the jurisdiction of prisons?

[*Translation*]

Hon. Mr. Goyer: Well, exactly, this extends the scope of the question that was asked, namely: is it worthwhile to change a law when you simply want to alter one or two sections? To my mind, and I have not yet made a decision on this, but at any rate the direction, if you will, of my thinking on this matter is that it is time for us to sit down with the provinces and give general consideration to the correctional question in Canada, that is, the Canadian correctional system, and ask ourselves questions that are as basic as those you indicated. Should jurisdiction be based on the length of sentences, or should it be on the type of sentence, or on some other basis, namely, when the sentence is purely punitive, this could be, internally for instance, the responsibility of the provinces; when the goal is rehabilitation, this could be under federal jurisdiction, etc. So, I think it is time for these questions to be asked.

There have been various recommendations, the latest in the series, I think, being to make sentences of two years or more federal, and those for one year or less provincial. In addition, that the courts not give sentences of between one and two years. Now, there are various methods. I would not like to get into this, only to say that I think we are coming to this juncture.

[*Text*]

Senator Thompson: Could I just follow up on what Senator Hastings said? I noticed that in your last annual report there was a breakdown of maximum and minimum security; I think it was something like 25 per cent, or it could even be 50 per cent, minimum security, and then other areas were dealt with. As I understand it, in other jurisdictions, in Britain and so on, in the breakdown of offenders into maximum and minimum there is not as high a proportion of maximum as in Canada; there is a considerable difference. I realize it is not satisfactory to make comparisons with other jurisdictions, yet I wonder if you feel our method of assessing whether a prisoner should go to a maximum security prison is entirely satisfactory, and

whether any research is being done to get a better assessment in allocating where a prisoner should be.

[*Translation*]

Hon. Mr. Goyer: As Mr. Hollies mentioned, it is difficult to make comparisons since England has a unitary form of government while we have divided jurisdictions; anyway, I believe that there is a consensus among our staff, experts and private agencies that there are too many people in our maximum security institutions and that we could easily reduce the population of such institutions.

I believe that the Mohr Report discussed this matter and made recommendations which, in my opinion, may be the answer to the problem we are faced with.

[*Text*]

Senator Quart: Mr. Minister, over the last several months you have been making a great many statements about penitentiary inmates, pay provisions, grooming regulations, and perhaps even wall-to-wall carpeting, although perhaps I am exaggerating in saying that. Except for one or two instances, you have not mentioned the Parole Board or parole matters. Was there any reason for that? Have you had any special criticisms about the Parole Board?

[*Translation*]

Hon. Mr. Goyer: No, this is simply a matter of priorities, therefore of practical necessity, for it was really impossible to tackle all these things at once. I thought it was more logical and practical to undertake penitentiary reform first. This is the very basis of the whole system, because, if the penitentiary personnel are only making inmates into criminals again, then this of necessity will have repercussions on the work of the National Parole Service. So, an environment had to be created which would make the work of resocialization possible from the outset, and this could be followed by other services. So, on these lines, I thought it was preferable to undertake a thorough reform of the penitentiary system. This we did. This does not mean that everything is set up, but we are now functioning on the lines I described to Parliament a month or two ago. What we have to do now is follow up, in the same spirit, observing the same basic principles, and bearing in mind the new order we will be establishing inside the institutions. We now have to tackle the question of the National Parole Board and the National Parole Service.

Having said this, I am not in the least criticising the way in which this was done in the past. I think that, in 1959, that was the statute which best suited the situation at the time, and within the meaning of that statute, under its terms, with the powers conferred by the statute, the National Parole Board and the National Parole Service have done an excellent job. I think they deserve our support, and the public should be better informed on the work which has been done by the Board and the Service.

Having said that, as I mentioned in my statement, conditions have changed in the penitentiaries, and in the due course of things this should be reflected in the parole system. I hope you will approach your work with this in mind because, once again, I think there is unity, there has to be unity of thought within my department. It is not merely a department for "hardware", but also for "software".

[*Text*]

Senator Thompson: I should like to ask a supplementary question on that. With your emphasis on parole, I very much admire what you are doing, but I should like to ask whether your department or other government departments employ parolees.

[*Translation*]

Hon. Mr. Goyer: That is another very good question. You might also ask me, do you have a woman in your senior staff? There is one on the National Parole Board; there are some in our penitentiary services, but on the level, of necessity on the employee level, for example, nurses and classification officers; but there are no senior officers. This is unfortunate in both cases. Experience shows—in Canada, where we have had very limited experience, as in other countries, Holland, for instance, where wide use is made of women, to an increasing degree, the experiment has had very positive results. At the Pinel Institute, in the province of Quebec, for instance, where the most difficult cases are treated, the most difficult psychiatric cases of a criminal nature, there are many women working in a community environment, that is, having direct contact with sick inmates. The experiment has had very good results.

I think that having people who have done time in institutions could also clarify our thinking in many areas. For example, I am thinking of just one possibility. It seems that many of our ex-inmates return from time to time to the institutions to talk with the staff, and especially to prerelease centres to see the staff, etc. You have to conclude that such people, their basic problem is often a problem of insecurity. Many such persons have asked for accommodation, because they doubtless felt they were in a crisis situation, in a state of temporary insecurity. Unfortunately we do not have, it is not possible, under the regulations as they now stand, to provide it. However, I don't see why we could not let, why we could not provide such individuals with the possibility, when they themselves feel they are in a crisis situation, of re-entering an environment in which they feel more comfortable, and perhaps the ex-inmate could work there in a way that would rebuild their morale. I think they would be in a better position there to play positive roles.

[*Text*]

Senator Thompson: You are a very enlightened minister.

Senator Fergusson: When an inmate comes up for parole, does he have any legal representative with him or does he just plead his own case?

[*Translation*]

Hon. Mr. Goyer: No, there is no representative, there is no lawyer, as such. Further, as Mr. Hollies pointed out, the decision taken at that time is not a judicial, but an administrative, one. However, when decentralization has taken place—this has been decided upon, if this is one of your recommendations—if the system is decentralized, then it will perhaps be possible, not to provide a lawyer's

services, as such, but perhaps social workers could help the inmate in whatever steps he might take. That remains to be seen. This will of necessity depend on what organization can be established.

[*Text*]

Senator Fergusson: The minister mentioned social workers and also the possibility of employing women. However, I do not know in what capacity he meant. When I was in Australia I visited a penitentiary that had women social workers in the men's penitentiary. I was told it was a most satisfactory arrangement. Has the minister ever considered that?

[*Translation*]

Hon. Mr. Goyer: That is correct. As I mentioned, we already have women reclassification officers. Further, since we are now introducing the idea of the "living unit concept", I don't see why at that time women would not be able to, since it is not merely the job of guarding people, but rather of trying to help them re-socialize themselves; I do not see why, I repeat, women would not be able to do that work; these people often have problems deriving from their mothers, or they often have some resentment against women. The fact that they are attended by women may teach them how they should behave towards women. The same is true—women have been mentioned, ex-inmates have been mentioned—the same is true for Indians, for example. I don't see why we could not have a special accelerated program to attract more native Canadians of Indian extractions to our staff. The same thing applies to the Doukhobors. There have been local difficulties in British Columbia, where there is an institution which for a long time has accommodated Doukhobors only. I don't see why today we have a penitentiary system, in that area, which includes no people who believe, who are of that faith. It is a poor indication of what Canada stands for.

[*Text*]

Senator Hastings: I should like to ask a question of the minister pertaining to compulsory supervision. He said that we could not be satisfied with mere amendments and changes. In my opinion, this present change is likely to prove, and is proving, a very unsatisfactory one in the operation of the Parole Board. I submit that the Parole Board must be a rehabilitative organization. By involving them in the field of compulsory supervision they will become a police force, wasting their time with men who have been refused parole. A man who has twice been refused parole is suddenly told that it is good for him. We are turning out a great many resentful men.

Would the minister consider delaying implementation of this program until the committee has had a chance to study the whole field of compulsory supervision? You delayed it once, sir. Could you not delay it another six months?

[*Translation*]

Hon. Mr. Goyer: My legal adviser tells me this is absolutely impossible, because the statute has been passed, and the law must necessarily be observed, must be enforced.

[*Text*]

Senator Hastings: Did you not delay it once?

Mr. Hollies: It was to come into force on proclamation, and that proclamation has been issued. I think the honourable senator would agree that once a law has been proclaimed in force, that is it. One would have to provide legislation to change the effective date. I am assured that once a proclamation is issued, there is no way to change the effective date. Indeed, there will be cases of mandatory supervision and they are arising now.

Senator Hastings: How many are failing?

Mr. Hollies: Senator, I am only the departmental counsel.

The Deputy Chairman: I gave an undertaking, after discussing the matter with a number of committee members, that we would conclude our hearing at 4 p.m. There will be opportunities later to question persons who are more directly concerned with these detailed matters. The minister has suggested to me that he would be pleased to return at any time satisfactory to us.

On behalf of the committee I would like to thank the minister and Mr. Hollies for their attendance, and for their very helpful presentation.

The committee adjourned.

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

Available from Information Canada, Ottawa, Canada.

THIRD SESSION—TWENTY-EIGHTH PARLIAMENT

1970-71

THE SENATE OF CANADA

PROCEEDINGS OF THE STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable J. HARPER PROWSE, *Deputy Chairman*

No. 12

THURSDAY, DECEMBER 16, 1971

FRIDAY, DECEMBER 17, 1971

Second Proceedings on the examination of the parole system in Canada

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(Witnesses and Appendices—See Minutes of Proceedings)

24245—1

STANDING SENATE COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable J. Harper Prowse, *Deputy Chairman*

The Honourable Senators:

Argue	Haig
Belisle	Hastings
Buckwold*	Hayden
Burchill	Laird
Choquette	Lang
Connolly (*Ottawa West*)	Langlois
Cook	Macdonald (*Cape Breton*)
Croll	Martin (*Ex officio*)
Eudes	McGrand
Everett	Prowse
Fergusson	Quart
Flynn	Thompson
Goldenberg	Walker
Gouin	White
Grosart	Williams*
	Willis

*Appointed to the Committee on December 17, 1971

Order of Reference

Extract from the Minutes of the Proceedings of the Senate, October 19, 1971:

Pursuant to the Order of the Day, the Senate resumed the debate on the motion of the Honourable Senator Laird, seconded by the Honourable Senator Cook:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada.

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

Robert Fortier

Clerk of the Senate

24245—1½

Minutes of Proceedings

Thursday, December 16, 1971.
(18)

Pursuant to adjournment and notice the Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:00 a.m.

Present: The Honourable Senators: Prowse (*Deputy Chairman*), Fergusson, Goldenberg, Gouin, Hastings, Laird, Quart and Thompson. (8)

In attendance: Mr. Réal Jubinville, Executive Director; Mr. William Earl Bailey, Staff Member.

The Committee proceeded to the consideration of the following Motion by the Senate:

"That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada."

The following witnesses, representing the National Parole Board, were heard in explanation of the Motion:

Mr. T. George Street, Q.C., Chairman;

Mr. F. P. Miller, Executive Director;

Mr. W. F. Carabine, Chief of Case Preparation;

Lt. Col. Paul Hart, Director, Administrative Services.

On Motion of the Honourable Senator Hastings it was *Resolved* to print the Brief of the National Parole Board as an appendix to these proceedings. It is printed as Appendix "A".

On Motion of the Honourable Senator Fergusson it was *Resolved* to print the "Memorandum to All Parole Officers—August 11, 1970" as an appendix to these proceedings. It appears as Appendix "B".

At 12:00 Noon the Committee adjourned to the call of the Chairman.

Friday, December 17, 1971.
(19)

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

Present: The Honourable Senators: Prowse (*Deputy Chairman*), Buckwold, Fergusson, Goldenberg, Gouin, Hastings, Laird, Quart, Thompson and Williams—(10).

In attendance: Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel; Mr. Réal Jubinville, Executive Director; Mr. William Earl Bailey, Staff Member.

The Committee proceeded to the consideration of the following Motion of the Senate:

"That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report upon all aspects of the parole system in Canada."

The following witnesses, representing the National Parole Board, were heard in explanation of the Motion:

Mr. T. George Street, Chairman;

Mr. William F. Carabine, Chief of Case Preparation;

Mr. B. K. Stevenson, Member;

Mr. F. P. Miller, Executive Director;

Mr. J. H. Leroux, Assistant Executive Director, Parole Service Administration.

On Motion of the Honourable Senator Quart it was *Resolved* to print the document entitled "National Parole Board—Agency Contracts—Payment Record 1971" as an Appendix to this day's proceedings. It appears as Appendix "C".

At 12.10 the Committee adjourned to the call of the Chairman.

ATTEST:

Denis Bouffard

Clerk of the Committee

The Standing Senate Committee on Legal and Constitutional Affairs

Evidence

Ottawa, Thursday, December 16, 1971

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 10 a.m. to examine the parole system in Canada.

Senator J. Harper Prowse (*Deputy Chairman*) in the Chair.

The Deputy Chairman: I call the meeting to order.

In the questioning yesterday I feel that at times, went beyond our terms of reference, but I allowed the questions because I felt the ensuing evidence provided valuable background information. It is not my intention at this stage to try to limit the areas of questioning, although we are dealing with the parole system.

If there are problems in the general correction field that can in any way be related to the parole system, I feel the committee should be allowed to question on such areas, so in the questioning this morning we will do that, we will follow the same procedure as yesterday's.

I have asked Senator Hastings to begin.

Senator Quart: You are invoking a type of closure on us too. Did I understand you to say we are not allowed to ask additional questions?

The Deputy Chairman: No, senator, what I said was that we did go beyond our terms of reference yesterday in our questioning, but that the questions that were asked, in my opinion, had indirect application to the parole system. What I am saying now, senator, is that it will not be my intention, as chairman of this committee, to try to restrict the areas of questioning as long as we are dealing with penitentiaries and the parole system.

Our witness today is Chairman of the National Parole Board and he is here with expert and special knowledge in that area.

Senator Quart: I apologize, Mr. Chairman. Closure is on my mind these days!

The Deputy Chairman: We will commence the questioning with Senator Hastings, and as he nears the end of a particular point I would ask any honourable senator who wishes to put a question to the witness to give me a signal. I will see that everyone has his day in court, so to speak, or an opportunity to ask questions.

I think it highly improbable that we will be able to finish this area today with Mr. Street. Mr. Street tells me he is prepared to be here tomorrow morning and, as we have to be here anyway, I feel we should finish this area tomorrow morning. I would rather do it that way than have too long a run in one session. Such a long run would be too heavy a burden on the reporting staff and, for technical reasons, our reports would of necessity be delayed.

We have had Mr. Street's report for three or four days, and we will take it for granted that it has been read.

Having divested myself of all those gems of wisdom, I suggest that Mr. Street now make a brief opening statement, after which Senator Hastings will start the questioning.

Senator Hastings: Will the brief be attached as an appendix to the Proceedings?

The Deputy Chairman: That is a good question. Probably this brief should be, and I would entertain a motion to that effect.

Senator Hastings: I so move. I do not know whether I can move that yesterday's brief be printed as well.

The Deputy Chairman: No, it was read.

Senator Hastings: Then I so move with respect to this brief.

Hon. Senators: Agreed.

Senator Quart: I understand that the estimates sent to the Standing Senate Committee on Internal Economy, Budgets and Administration, as was discussed yesterday, contemplated that all the briefs would not be published in our Proceedings, as with other committee.

The Deputy Chairman: I think that is generally correct. I do not know of any committee that has published all briefs.

Senator Quart: I think the Special Committee on Poverty did.

The Deputy Chairman: I do not want to set a precedent here by undertaking to publish all briefs, because I can tell you that in the estimate that we worked out with the Standing Senate Committee on Internal Economy, Budgets and Administration about two-thirds of our costs are now related to printing. If we need to have additional expenditures, I would sooner have them available for research rather than printing. At some stage of the proceedings there will be merely repetitious statements, but not at this basic stage. Certainly the Solicitor General's statement yesterday and Mr. Street's statement today should be part of the record, because Mr. Street will generally tell us, if I can anticipate him, what it is they think they are doing and how they think they are doing it. This is the basis of the inquiry. Perhaps we can leave it there and deal with the other problems as they arise. Is that agreed?

Hon. Senators: Agreed.

Senator Hastings: Mr. Chairman, you have accepted the motion?

The Deputy Chairman: I accepted the motion, and it is carried.

For text of brief see Appendix "A"...

The Deputy Chairman: I now call on Mr. Street, who is the Chairman of the National Parole Board and is a man who has had a lifetime of experience and interest in the problems we are dealing with today.

Mr. T. G. Street, Q.C., Chairman, National Parole Board: Thank you, Mr. Chairman and honourable senators.

[*Translation*]

To start I would like to say a few words in French. The objective of the National Parole Board is to select from the penitentiaries in Canada, the prisoners who clearly indicate that they have the intention to rehabilitate themselves and thereby help them by granting them a parole.

To prove to you that I am truly bilingual, I will continue in English.

[*Text*]

Honourable senators, as you have said, Mr. Chairman, we have submitted a brief that gives you an outline of how the parole system operates and that tells you something about our policy and procedure. Since you all have copies of this, I will not take the time to go over it again, but I would like to emphasize certain points, and then I would, of course, be pleased to answer any questions you may have or discuss in greater detail any particular features of the system.

The dual purpose of parole is the protection of society and the rehabilitation of inmates. It is a matter of helping those who want to help themselves. The protection of the public, of course, is paramount, and we do not grant parole unless we think there is at least a reasonable chance of success. When a person is granted parole he is put under supervision, and we are especially careful with inmates who are or maybe potentially dangerous.

There are about 7,000 inmates in our federal prisons and about 15,000 inmates in our provincial prisons. As you know, we have jurisdiction in both federal and provincial prisons. Since over 80 per cent of those people have been in prison before, it seems fairly apparent that the sentence of imprisonment for them was not particularly beneficial.

Most of the inmates in prison, however, are not dangerous or vicious or violent, and we believe that most of them could be kept under control in the community. Therefore, I suggest that there should be more treatment and control in the community, that the sentence of imprisonment should be used only as a last resort, and then only if no other form of treatment or control is available.

I think it is important to remember that almost all prisoners will come out of prison sooner or later anyway, whether we like it or not and whether they are rehabilitated or not. I therefore suggest it is surely more beneficial to have them come out under supervision, where they can be helped with their problems and can be controlled so that they cannot easily return to crime.

If the people whom we select for parole under our selective system need the guidance and counselling treatment, advice and surveillance that go with good parole supervision, the prisoners who do not get parole need that even more. It is because of this kind of reasoning that there will be a system of mandatory supervision, which will come into full effect some time next month, so that all prisoners coming out of federal prisons who have been sentenced since August, 1970 will be under a form of mandatory supervision for their remission time. While it will not be called parole but mandatory supervision, they will be subject to the same conditions and restrictions as parolees are.

Besides the fact that it is desirable that as many people as possible should come out of prison under supervision, they are under control not just for the extra time they would have spent in prison but for the remission time also, which is one-third of their sentence. This means that they are under control for a much longer period than they would be if they remained in prison, and I suggest that as a result the public is much better protected.

Since both probation and parole are about 75 per cent successful while they are in effect, I think they should be used more often. There should be more treatment and control in the community, and parole is one of the ways in which this can be accomplished.

Even at the best of times I am sure you can appreciate that operating a parole system is very difficult. Criminals are just naturally not a popular cause, and everyone has different views about them. The police, for instance, have a certain view of criminals and how they should be treated, and we try hard to work with the police and co-operate with them, and convince them that what we are doing is effective. The judges also have a certain point of view, and we keep in touch with them to explain to them our function. The public is also concerned; sometimes the public is inclined to be punitive, and we are at great pains to try to explain to the public that the only way they can be properly protected is by the rehabilitation of inmates coming out of prison, or at least having them under control. The prisoners themselves have a different view, as you can imagine, of how the parole system does or should operate.

Our job is to try to satisfy all these conflicting views in order to have the idea of parole accepted and to try to make the system work. Actually, in doing so we receive a great deal of criticism from all sources. We are criticized for paroling too many people, and we get just as much criticism from many sources for paroling too few. We are criticized sometimes for paroling people too early, and again just as much for paroling people too late in their sentences. It seems apparent almost that we are damned if we do and that we are damned if we don't.

As you can appreciate, this is not a popularity contest. We are quite accustomed to being criticized, because there does not seem to be any easy way in which we are going to make everybody happy. Naturally, there are a great many people with different points of view who think they can do our job better than we can. It is a matter of trying to do the best we can and keeping in touch with all the people I have mentioned, because we believe that what we are doing is effective, and we try to satisfy as many people as possible.

However, I assure you, honourable senators, that none of us in the parole system thinks that our system is perfect, or that there is any magic in our system, or that it cannot possibly be improved. We are constantly reviewing and

asssessing our operation, trying new projects and new procedures to improve the effectiveness of the system. Despite, of course, our sincere belief in the efficacy of parole and our efforts to improve it, there is still bound to be some criticism, because, as I said, prisoners are not a popular cause, it is a very sensitive thing and we are dealing with people and not just with numbers.

In the first 153 months of our operation we granted parole to 38,444 inmates in the various federal and provincial prisons across the country. During that time, of those 38,444 inmates we have had to return to prison 5,250, of whom 3,180 committed indictable offences while on parole and had their paroles forfeited; 2,070 failed to abide by their parole conditions or may have committed a minor offence and had their paroles revoked. This means that, on the average, for the first 12 years and 11 months nearly 87 per cent of all those 38,000 persons granted parole completed their paroles without causing trouble or misbehaving.

This, honourable senators, is our record to date, and is one of which I think we may be justifiably proud. Despite our successes so far we are always anxious to find new and better ways to operate the system because, as you can appreciate, there is no exact science about it; it is a matter of using our best judgment and obtaining the most comprehensive information possible. We shall naturally await the outcome of your deliberations with a great deal of anticipation. We expect that your findings and recommendations will be helpful, and we hope that the result of your inquiry will mean a better understanding of the problems involved in the parole system and will provide us with some more support, which we surely need.

Senator Hastings: Thank you very much for your comprehensive brief and also for your opening statement. I might say that while I have been one of your critics I have also been one of your best supporters, and I hope you accept that in the spirit in which I am saying it.

Mr. Street: Certainly.

Senator Hastings: I am a great believer in parole, in you and the board, and in the job you have done.

Mr. Street: Thank you.

Senator Hastings: I believe that parole is the only instrument or tool that goes anywhere near filling the objective of rehabilitation, the bringing of the man into society. You are removing the man from the milieu or environment where rehabilitation is impossible or next to impossible. You bring him back into or closer to society, to the natural surroundings where rehabilitation becomes possible. Naturally, you are going to have failures, but we surely must be prepared to assume that risk in this day and age of enlightened treatment of individuals and fellow human beings.

I said your brief was very comprehensive and, if your budget will stand it, I suggest that you print about 7,000 copies for the inmates of Canadian penitentiaries and for every Canadian newspaper editor.

My first question is directed to your involvement with or consultation with provincial governments or cabinet ministers, and consultation with respect to parole. Do you have consultations and discussions with or advice from provincial cabinet ministers or departments?

Mr. Street: We are in constant touch with all the provincial authorities across the country who deal in any way with prisons. One of the functions of our men in the field is to keep in touch with the attorney general's department or whichever department operates the prison system—it varies a little, as you know. When we are in touch with them, or when I visit an area, I never fail to pay my respects to the attorney general or the person in charge of prisons. So there is constant communication or liaison with them.

We also have contact with them in special cases, such as when the Dukhobor problem arose in British Columbia. As you can imagine, that was a very tense and serious situation, when something like 200 Dukhobors were locked up. We have had and continue to have meetings with the police, the attorney general people, and so on. As a result of all this we had police conferences and we started paroling them and it worked out very well.

We had the same thing with the province of Quebec when we were dealing with the F.L.Q. cases. Then we were dealing with special categories of cases. Otherwise we just keep in touch with them, because we are paroling people out of their prisons. Is that what you mean, or was there something else you had in mind?

Senator Hastings: I am asking specifically: Do you consult the Minister of Justice or a minister of the Quebec Cabinet with respect to a recommendation of granting or withholding parole?

Mr. Street: No, but we have an understanding, especially with Quebec and certain other provinces, and especially with police forces. If they have any special information about a criminal who may be in organized crime or who may be more dangerous than his record indicates, the provinces are invited to get in touch with us and then we get their information. But we do not consult them each time we want to parole someone. They are invited at any time to make representations to us, the same as anyone else. They know when people have got in prison and when they will be considered for parole; and, if they want to, they may get in touch and may make recommendations. We do not necessarily consult them in each case.

Senator Hastings: I am wrong in my suggestion, then, that you do consult the Justice Minister of the Solicitor-General in Quebec with respect to each case from the province of Quebec, and that he does in fact have a printed form which he supplies you with, giving "yes", or "no" or "maybe"?

Mr. Street: No, we do not consult them, but they are invited or encouraged to consult us, if they wish, and make representations in special cases. We cannot very well consult them about each case. What I am thinking about is the more dangerous cases, persons engaged in organized crime or something like that.

Senator Hastings: You do invite them then to make representations?

Mr. Street: Yes.

The Deputy Chairman: Is that in a general or in a specific way?

Mr. Street: In a general way.

Senator Thompson: If I may follow up that question, you are in a sense a quasi-judicial person, a judge with respect to the lives of people. You get letters from people such as myself, a senator, and a number of others?

Mr. Street: Yes.

Senator Thompson: I would think it quite improper for me to write to a judge concerning clemency, or otherwise, when a case is in court. I do not think it improper to write to you. Can you explain to me, since you must get a number of letters from politicians, do you feel like saying, "To hell with them"?

Mr. Street: I would say that there is nothing improper, senator, about getting a letter from a senator or a member of the House of Commons. When we are regarding a case or considering a man for parole, we seek and obtain reports and information from anyone we can. We do it ourselves. We get information in the community, in the prison, and so on. If someone knows him in the community, they are invited and encouraged to write us and say that they know this man, that they are willing to help him. If they are able to do it, there is no reason why a member of Parliament would not be able to do it. Most letters we get from members of Parliament—that is, from senators or from members of the House of Commons—are just asking for information. They do not really know the person. It is not very often that a senator will write and say he knows this person and his family and knows he can get a job here, or something like that. That does not happen very often. He is usually inquiring because a constituent, presumably one of the prisoner's family, has asked him for information. They do not know how to do it, so they ask us. I do not see anything improper about that. We want all the information we can get, and if the man's mother, someone in the community or a friend of the family wants to make representations, he or she is invited to do so. The only difference is that he or she may be doing it through his or her member of Parliament.

What we do object to is if the individual thinks, and sometimes this is apparent, unfortunately, that he can obtain parole by influence. There is nothing that can do a prospective parolee more harm than to try to obtain parole by influence. I am not suggesting that a member of the House of Commons, a senator or a minister would attempt to try to use influence—they do not—but these people do not seem to know it, and I would regard it as a negative factor if a person thinks that is the way parole is granted.

Senator Thompson: Have you ever had the Attorney General or the Minister of Justice write to you or speak to you and say, "I want those people not on parole"?

Mr. Street: Not on parole?

Senator Thompson: Or, "I want them to stay in jail for a longer period"—and that would be done?

Mr. Street: I do not recall getting letters . . .

Senator Thompson: Not a letter, but representations?

Mr. Street: . . . or a representation or communication of any kind like that. But since the Attorney General is in charge of the administration of justice in the province, we are concerned with whatever his opinion may be as to the dangerousness or otherwise of the inmate, so there would be nothing improper in making representations.

I do not recall getting a communication in the exact fashion you say, but it could happen that the police would write to us and say that a particular man was in organized crime and that they regarded him as a potentially very dangerous individual. They would tell us about his connections, and so on, and we would consider all that information along with any other information we had. So, if it is police information or information from the authorities, we are interested in having it.

Senator Thompson: I am thinking of political influence. What you are saying to me is that any political person can make his representations, but he is treated just as anyone else is and you are not influenced by the political situation.

Mr. Street: No. And it does not happen often. I cannot say that it never happens, but it does not happen often. Members do not try to influence the Board. They are usually just inquiring about the status of a particular case, and we write to them saying that the man, so-and-so, will be eligible at such-and-such a time and that we will leave their letter on file. By that I mean the letter that the member got from whoever wrote to him, presumably making representations that the inmate has a job or a place in the community to go to. It is a means of getting information about inmates through members of Parliament. As I say, the one thing that is not helpful is that even if the inmate thinks he can get it by influence this is a negative factor.

Senator Laird: Mr. Street, if I understood you correctly, when you were speaking to Senator Hastings a few minutes ago you said that the provincial authorities knew when a man was due for parole. How would they necessarily know, and do you think any formal steps should be taken to notify them?

Mr. Street: Well, if they are concerned with a particular case, they know he is in prison because it is their authorities who put him in there, the police and so on, so they know he has been put in prison. If they care to make representations, they are allowed to do so. We encourage them to, if they want to. Is that what you mean?

Senator Laird: No. Let us follow your procedure as set out in your brief. How would they know, for example, that at a certain stage a hearing was going to be held regarding the parole of a person who was applying for parole?

Mr. Street: If nothing else, they would know that every inmate would be considered for parole after he had completed one-third of his sentence.

Senator Laird: Right. But the onus there is on them to keep track of that situation. You do not do anything specific to alert them to that situation.

Mr. Street: Well, in the province of Quebec we do have an arrangement by which we notify them of any application for parole in respect of a person who is serving a sentence of five years or more. They asked us to do that, and so we

do in that case notify them. I had meant to mention that to Senator Hastings previously.

Senator Laird: That is what I was trying to get at. Thank you.

Mr. Street: We let them know in that case, but other than that it is left to them to get in touch with us.

Senator Goldenberg: Are you saying that that is confined to the province of Quebec, Mr. Street?

Mr. Street: It is now, senator, but anybody could do it. In respect of British Columbia, as I mentioned, we certainly had very special arrangements with British Columbia because of the Doukhobor situation. But I would say, so far as I know now, that Quebec is the only province where we notify them on long sentences.

Senator Hastings: So you do invite the Attorney General of Quebec, he is given the opportunity to oppose parole.

Mr. Street: He could oppose it. He could give us information or make a recommendation that he was not in favour of parole. In that case we would expect some information about it. We would expect to know why, and usually the reason why is that they suspect the inmate is in organized crime or something like that.

Senator Hastings: Well, during the October crisis last year the government of Quebec issued a public statement to the effect that the government would not oppose parole with respect to the 13 alleged political prisoners. They said they would not oppose parole. By inference, that means that they could oppose parole.

Mr. Street: I think the unfavourable impression created by that press release was not entirely fair. In those cases, as I indicated, we are at pains to seek them out and have conferences. This was a tense situation in which we were dealing with an abnormal class of persons. We were glad to have those conferences. But I think the cases to which that article referred concerned some people who were eligible for parole, and perhaps some of them would have been considered for parole if the whole thing had not flared up again.

Senator Hastings: Yesterday I tried to get an answer from the minister, but without success. Perhaps you can enlighten me. Why did the province of Quebec, with 30 per cent of the inmates, have only 11 per cent granted day paroles during 1970-71? Twenty-five per cent were granted parole. In other words, there seems to be an unfairness about this. I will not use the word "discrimination", but there seems to be an unfairness towards the inmate in the province of Quebec, and I am wondering if there is an inference to be drawn here.

Mr. Street: Day people depends on so many factors. For instance, it depends upon co-operation of the prison authorities themselves because they have to let the men out during the day.

Senator Hastings: I am dealing only with federal penitentiaries, sir, not provincial.

Mr. Street: Then it depends not only on the co-operation of the institutional people but on whether the man has a job or a school to go to or some kind of training that he has accepted.

The Deputy Chairman: Senator Hastings, you gave us some percentage figures with respect to the province of Quebec. I think you said 11 per cent got day parole, and then you gave another figure of 25 per cent, but you did not tell us what that figure referred to.

Senator Hastings: Twenty-five per cent of the paroles granted were granted to Quebec inmates.

The Deputy Chairman: But you did not give us any comparative figure there, although I am quite sure it was in your mind. In order to complete the record, would you tell us why the 11 per cent and 25 per cent figures lead you to say that there seems to be some discrimination, or unfairness, as you put it?

Senator Hastings: Well, the Maritimes, with 9.6 per cent of the prison population, sir, were granted 11 per cent of the paroles. Ontario, with 28 per cent of the prison population, was granted 26 per cent of the paroles. The western provinces, with 32 per cent of the prison population, were granted 37 per cent of the paroles.

The Deputy Chairman: That is what I wanted. That completes the record. Thank you.

Senator Hastings: And then, along with this goes the temporary absence. In the province of Quebec, with 30 per cent of the prison population, they were granted only 2,000 temporary absences, which is 10 per cent of the temporary absences granted during 1971.

Mr. Street: It is certainly not a matter of discrimination. It must be because we did not get that many applications which could be favourably considered. A man is not allowed to go on day parole unless he has a job to go to or a school or training to go to. We do not give him day parole just to wander around. Inmates can get temporary absences for other reasons, and they do get them rather freely in some cases, but it is certainly not a matter of discrimination.

Senator Hastings: I should not have used the word "discrimination". Unfairness—let us put it that way.

Mr. Street: I do not know if I could produce statistics with respect to the inmates who applied for but did not get parole. However, I will try to get that information for you.

The information I have about day paroles granted this year is that in the province of Quebec in the first nine months of this year there were 158 out of a total of 1,000 across the country.

Senator Hastings: I am gald you brought up that figure, because the figures I have, granted by months, are 4, 9, 7, 7, 7, 11, 9. Then in October it jumped to 22 in the province of Quebec. I thought that was a significant increase in that month.

Mr. Street: Well, this depends on so many things, such as whether a person has a job organized, and so on. One of our officers in Granby has done quite an extensive job recently in the field of day parole. He has been at some pains to arrange this for 30 inmates, if I recall correctly.

This has happened recently because he went out of his way to try to find jobs for them. Somebody has to do this. They either have to find jobs themselves or else somebody has to arrange it for them.

The Deputy Chairman: Mr. Street, I think I am in error in that I did not ask you to introduce your staff, and I think that rather than formally introducing them all now, I might say that on any one of these questions dealing with detail you are quite free to call on any member of your staff, and as you do that to each one you can introduce him and then he becomes a witness before the committee for that particular question.

Senator Hastings: I will not labour the point, Mr. Street but I thought that I might take credit for the increase, in the light of the memorandum I gave you and the Commissioner of Penitentiaries.

Senator Thompson: I want to follow up on this point, Mr. Street. We have been given, as one of the reasons why they are not on parole, the unemployment situation, but I would suggest that in the Maritimes they also have a tough unemployment situation and so I question the validity of that alone. Could you give us other reasons why Quebec seems to have a lower figure, and is there some research being done with respect to the fact that Quebec has a very low percentage of people coming out on day parole in comparison with other provinces?

Mr. Street: That is right; they had 149 in Nova Scotia and New Brunswick. I will see what Mr. Miller has to say about this and if he can add anything to what I have said. It depends, of course, on whether somebody gets these things organized. As I have said, just recently one of our officers in Granby went to some pains to do this. The same thing happened in Dorchester. Our officer down there, with help from other people, got things organized. It is not a matter of discriminating; it is a matter of organizing.

Senator Thompson: Are you suggesting that parole officers are more organized in other provinces than they are in the province of Quebec?

Mr. Street: I do not think that is the situation. I think it could happen, but in some places it is a little easier to do it. It is not so easy to do it, for instance, in Dorchester because it is a long way from town. It is also not as easy in Stoney Mountain, although we do it.

Mr. F. P. Miller, Executive Director, National Parole Board: I think the main thing Mr. Street has said is that the complex of factors is most important. When one does isolate a single factor such as employment as having a bearing on it, then the attention goes to that as the main cause, whereas it is not necessarily so. Your point as to whether one office is better than another raises an interesting possibility. Without making a comparison, it is possible that a total situation in a particular area can be much more conducive to having such a thing as day parole take place. I am confining my remarks at this point to day parole because that is where the interest is. In Winnipeg it has turned out—and I am not necessarily giving bouquets to Winnipeg as opposed to any place else—that there is a complex of factors that makes for a building up of day parole.

Senator Thompson: I am sorry for interrupting you, but here we would like to know what that complex of factors is. We know that one factor is the employment picture, but what are the others? Because if we know those things we will know how to better the situation regarding parole.

Mr. Miller: A total interest by the officials and by the community there, having people in the community who are willing to assist, the existence perhaps of residential facilities that might be of some consequence, all officials at all levels concerned at a particular time to bring about a result. If that implies a criticism of some other area that does not have all these things working together, it is not intended in that way. Over the years one finds a waxing and waning of interest in particular areas.

Senator Laird: What about the existence of a family, as opposed to the release of a single prisoner with no family—in other words, an unmarried prisoner? Does that enter into the picture?

Mr. Miller: Well, there could be circumstances favourable to both and there could be circumstances unfavourable to both, but with a family and a job possibility this might be a good thing, while on the other hand for a single person, a number of day paroles are for educational and training purposes. In these cases what matters is the man's capability to benefit from the program and the existence of the program.

Mr. Street: One of the factors that is very important, senator, is whether or not the local authorities co-operate. Senator Hastings was telling us in his case about federal prisons, but we have just had a letter from the attorney general of a province complaining that there are too many day paroles. He does not like seeing people on the street; he prefers to see them in his crummy prison. This is the kind of thing we have to contend with. Now we have gone to some trouble to promote this, especially in some of the provincial prisons which are not very good institutions in which to keep them and where they have no training and no program, and we think it is better to have them out working and doing productive work during the day and coming back at night, or at least on weekends. That is better than having them sit in these places, particularly if it is safe. However, that has not been an easy product to sell and in at least one province they do not like it.

Senator Goldenberg: Did they give reasons for not liking it?

Mr. Street: They thought it was being done too freely. They saw somebody sentencing a person and the next day saw that person on the street, and they just did not like it.

Senator Goldenberg: How many parolees do not come back as expected from day parole?

Mr. Street: I do not think we have had very many failures on day parole.

Senator Hastings: I think it is about 1 per cent with respect to temporary absence.

The Deputy Chairman: I understand there are two bases for day parole: some of them are organized by the prison system itself; and some are organized by yourselves. Am I correct in that assumption?

Mr. Street: Yes.

The Deputy Chairman: So you will have figures on the paroles arranged by the Parole Board. But do you have figures on the paroles arranged by the system in the penitentiaries themselves, where they handle their own?

Senator Hastings: I think it is 2,200.

The Deputy Chairman: This is a question that may be addressed here, and perhaps you would indicate to us the areas where you do not have information or which you feel you ought not to speak about, and then we can arrange to get that information later, without confusing the picture by having two situations in people's minds without a clear understanding that there are two situations.

Mr. Street: Thank you, Mr. Chairman, that is a very important point. In the first place, I do not think I could tell you who arranged for all these various paroles. As I have indicated, some times our officer did and some times the prison warden did. For instance, your friend at Drumheller has gone out of his way to arrange for quite a few paroles, and some others have done so also. The warden at Drumheller has taken quite an active interest in this program. The result is that Alberta has a very high number of parolees as compared to some of the other provinces. You might confuse this form of absence with a form known as temporary absence, which can be granted by a prison warden for up to 15 days. I think a three-day leave can be granted by the warden and 15 days by the commissioner. This is for compassionate purposes and reasons like that.

If it is for a period of 15 days it might be under a temporary absence. There are many temporary absences being granted, but we are not involved in that. When we began our day parole program, for reasons which I have already mentioned, and Senator Laird has been kind enough to say he agrees with, we spoke to provincial authorities about the program and, since then, some provinces have begun programs of their own. They have the authority to do this. Ontario, Saskatchewan in particular, and Alberta are a few of the provinces which have done this on their own by use of temporary absences. This is fine with us. It does not matter who does this as long as it gets done.

Senator Thompson: There is a question which has not been answered regarding the number of day parolees who have not returned.

Mr. Street: We have no exact figures. My associates will correct me if I have said something which is not correct, but I can safely say that very few have failed to come back when they were supposed to or return to the prison that evening.

Senator Quart: Mr. Street, you mentioned that a few of the day parolees failed to return. If they do not come back, what do you do about it?

Mr. Street: We revoke their parole and pick them up again.

Senator Quart: I am very new in this business, and I have not been in prison before.

The Deputy Chairman: No bragging, please!

Senator Quart: In the meantime, if an inmate applies for parole is he or she entitled to any legal counsel or to assistance in answering questions which are put to him or her by the National Parole Board, or is the inmate left on his or her own?

Mr. Street: He is entitled to consult a lawyer at any time and the lawyer can do anything he pleases, but he is not entitled to have a lawyer present at his parole hearing. We do not feel this is necessary, or that a lawyer can usefully add anything to the parole hearing. Whether a person is granted parole or not is not a legal matter; it is a matter of assessing the individual, as to whether we feel he can be safely released and live in the community under supervision. It is not a legal matter or a judicial decision; it is an administrative decision. We do not feel there is any useful purpose in allowing lawyers to attend parole hearings. They are encouraged and invited to write to us any time they desire and make representations on behalf of an inmate. As I have indicated to lawyers, one of the best ways they can help, if they desire to help, is to advise inmates to take advantage of whatever is going for them, to educate themselves and overcome any problems they might have, and help them by gaining community support. This is very important. A lawyer can help in that way. This is not a legal matter; it is a social matter. We do not allow lawyers to attend parole hearings.

Senator Thompson: There would seem to be a number of administrative responsibilities when a prisoner is granted leave on parole. Apparently, the prison itself can grant this leave so we cannot get accurate figures of those who are on day care parole since there are other means by which an inmate can be granted this leave. Do you feel that this should be better co-ordinated? Your parole officers know the resources in the community. I wonder if the prison personnel know the resources as well. Should there not be consultation with the parole officers? Would you like to see that better co-ordinated?

Mr. Street: Yes, I would. There has been, and there needs to be, more co-ordination. However, consultation is going on now to decide exactly where temporary absences end and day care paroles begin. I would say that temporary absences could be granted for compassionate reasons, or because a man has done particularly well and deserves a weekend at home with his family. This could be handled by the warden. If it is for less than 15 days, I feel it could be handled by the warden. If it is for the purpose of working or going to school, I feel we should be involved in that decision. It would then be a matter of weeks or months. This is roughly the division of responsibility. Since there has been more use of this temporary absence program recently, we intend to consult with those in charge of penitentiary services to decide exactly on the division of responsibility. As I have said, some of the provinces have already used these powers by establishing a work-release program or a day parole program. We do not mind that, so long as it is being done.

Senator Laird: I feel this is relevant, Mr. Street. I am looking at an article that appeared in the Windsor *Star* on November 15, 1971, taken from the *Washington Post* under

the by-line of Alfred Friendly. The headline reads, "British Plan Substitute for Jail". I have no intention of reading the entire article, but the first paragraph reads:

> The British government proposed last week its first experiment in treatment of petty criminal offenders by sentencing them to community service work instead of jail.

Would that proposal appeal to you?

Mr. Street: Yes, it would very much. As I indicated in my opening remarks, I feel we should have more community service work programs and use the prison only as a last resort. I feel we need more probation, more community work programs, and as the British have, more detention homes because, as we have said, 65 per cent of those in prison are not dangerous. I am certainly in favour of things such as that.

Senator Thompson: How do you determine that 65 per cent are not dangerous? I realize that this is a human aspect, but you obtain reports from psychiatrists and others. How scientific is this?

Mr. Street: I meant that most of the 65 per cent commit property offences rather than offences against the person. They are not offences of violence. There is no violence in the record. It is break, entry and theft, simple theft, fraud, and offences such as possession of stolen goods. They comprise the majority of inmates, and I say they are not dangerous in the sense that they are not likely to offer violence or assault anyone.

Senator Thompson: I am really inquiring as to how you assess a person for parole. What factors do you consider? Does the psychiatrist's report carry more weight with you than the fact that he could gain employment?

Mr. Street: We consider many, many factors, as set out in our brief. If the man is dangerous, naturally we are more careful. If he has a mental illness or psychiatric problem, we consult a psychiatrist, although I think it is fair to say only 10 or 15 per cent have such problems and need psychiatric treatment. In such cases, we certainly consult a psychiatrist. Then, if it is a serious case we form a panel of three psychiatrists from outside, in addition to the prison psychiatrist, and obtain their opinion. If any psychiatrist told us a certain individual is dangerous, naturally we would not be likely to parole him.

Senator Thompson: I am sorry to interrupt, but do you have the assistance of such a panel of psychiatrists in every province?

Mr. Street: Yes, and we would certainly obtain it in every murder case or in the case of a dangerous sexual offender. We will not parole a man until we do have this report. We hire these extra psychiatrists ourselves, and we always have access to a psychiatrist in the prison system. Does that answer your question, senator?

Senator Thompson: It does to a degree, Mr. Street. I think, however, that it is a very important area in which to reassure the public. We are developing new psychological tools and so on, and it is my opinion that we have overemphasized the diagnostic abilities of some psychiatrists. One will act for the defence and one for the prosecution, and some of their reports, in my opinion, are very vague in order to guard themselves, and you are left to take the responsibility. They weasel out of it. I am not that fond of the "*psychiatric forte*", but if I were newly appointed to the Parole Board, could you give me help by indicating the characteristics and other important aspects in the assessment of a person's entitlement to parole? Do you do that?

Mr. Street: Yes, we do. When we have occasion to consult a panel of psychiatrists we have a list of questions to put to them. We try to pin them down as much as possible but, as you know, some of them do not pin down as easily as we would like. Naturally we have our own opinions of different psychiatrists as to who are good and who are not so good. We once had a certain amount of difficulty in obtaining unequivocal reports from certain psychiatrists. Now we know those upon whom we can depend. As you know, it is not an exact science, but we give them a list of questions and ask for answers.

Especially in potentially dangerous cases, murder and if there are psychiatric problems involved, we like to send them to a mental hospital for a month or two for observation. Then the panel of psychiatrists, which may be more than but is at least three, would have occasion to treat and observe the case for 30 or 60 days and provide a case conference report and a separate report from each psychiatrist, which we would then consider. In a case of an ordinary type of offender with a psychiatric problem which leaves us unsatisfied, in addition to the psychiatric report from the prison we would obtain three from outside.

Senator Goldenberg: Mr. Street, you have spoken of murder two or three times. Do you have different policies for different types of offences?

Mr. Street: In this sense we do. If it is murder, he has to serve seven or ten years, and then the case goes to Cabinet.

Senator Goldenberg: Excuse me, but that was not what I had in mind. I meant, in determining whether a man should go on parole, do you have one policy governing sex offenders, another for drug offences, and so on, or do you apply the same general principles?

Mr. Street: I would say we apply the same general principles in all cases, except with dangerous and sex offenders and especially dangerous sex offenders. We are more careful with such cases than we would be with the property type offender. We do not have any different stated policy with respect to different types of offences, except in a general way. If they are dangerous, we are much more careful; and if there are psychiatric problems we obtain psychiatric opinions. Then it is a case of judging each individual case according to the individual merits and circumstances and the information that we have as to what is going on in the community, the same as all the others.

The Deputy Chairman: May I suggest that it would be helpful at this point if the witness were asked—I would sooner not do it—what criteria are used in determining whether a person does or does not receive parole? Will a member of the committee volunteer to do that, please?

Senator Thompson: That is really what I was endeavouring to ask earlier, but I did not express it as well as you, Mr. Chairman. What are the criteria?

The Deputy Chairman: I have the advantage of being just a watcher.

Mr. Street: The criteria, are set out in page 6 of our brochure, "An Outline of Canada's Parole System for Judges, Magistrates and the Police". The paragraph states:

> These are some of the factors that help the Board decide:
>
> (a) the nature and gravity of the offence, and whether he is a repeater;
>
> (b) past and present behaviour;
>
> (c) the personality of the inmate;

Of course, that involves a great deal, such as the presentence report at the time he was committed and any previous record. In addition to that, we would consider any psychological tests, such as IQ and MPI, which were taken in prison. We would have a general assessment of how he behaved in prison and another assessment from all who dealt with him inside and outside prison.

> (d) the possibility that on release the parolee would return to crime and the possible effect on society if he did so;
>
> (e) the efforts made by the inmate during his imprisonment to improve himself through education and vocational training and how well they demonstrate his desire to become a good citizen;
>
> (f) whether there is anyone in the community who can—and would—help the inmate on parole;
>
> (g) the inmate's plans and whether they are realistic enough to aid in his ultimate rehabilitation;
>
> (h) what employment the inmate has arranged, or may be able to arrange; steady employment must be maintained if at all possible as one of the most important factors in his rehabilitation;
>
> (i) how well the inmate understands his problem; whether he is aware of what got him into trouble initially and how he can overcome his defects, and, how well he understands his strengths and weaknesses.

That is a general outline of the criteria which we would be interested in knowing. We try to find this out, and we get most of the information from the people who deal directly with them. We have to hear from everybody who deals with him, what the classification officer says about him and his assessment of him, his workshop instructor, how he gets along in his work, whether his behaviour, attitude and conduct are satisfactory, what the psychologist or psychiatrist says about him, personality tests. These are all things that we obtain in almost every case.

Senator Thompson: The fellow who comes from a middle-class background has a better chance than a fellow who comes from a tough economic background.

Mr. Street: He may have more going for him on the outside: more people may be willing to help him; he may have a job arranged more easily. We find that 78 per cent of those on parole in Canada are working. It would be fair to say that if a man has a lot going for him on the outside, a lot of family and community support, and a job, that might turn the borderline case into a parole. But if he does not have anything like that and is doing well in prison, we would somehow find something for him. EVen if a man had nothing going for him within the community, we would do whatever we could, through our own officers and through community resources, to try to get something organized for him. It just makes it a little easier if he can do it himself.

I suppose that a person who comes from a middle- or upper-class background might have a better opportunity in the community. However, if a man has nothing going for him , we will do our best to assist him. We are looking for an indication of a change in attitude. We know what he was like before; we can tell by his previous record what he was like. In all these reports we are looking for an indication of a change of attitude.

It involves no exact science. It is a question of how everybody assesses him, what they think of him, and what he says himself. When the Board members examine him, they obtain a good deal of information. Sometimes they get information about him that perhaps they did not have before.

Senator Thompson: Let us take an extreme case. An inmate of Belsen who adapted and conceded to the horrible conditions would achieve recommendations to the effect that he may get out. You yourself would say that many persons, in order to get out, have to play ball and obtain a good report from the prison staff. If a man has a little bit of spunk he may end up in isolation, which means that he will not get out. In order to help your work, some prisons should be improved a great deal.

Mr. Street: Federal prisons are pretty good. I do not want to over-emphasize just good conduct in prison, because that by itself does not mean much. Some of the worst criminals are the best behaved in prison because they know how to do time and they do not go out of their way to cause trouble and make it difficult for themselves. As you indicated, a youngster who is inclined to be rebellious may not conform to the system too well; but the fact that he did not, may not mean that he cannot be controlled outside. Good conduct by itself is not really that important. It is a matter of assessing everything a man does and everything about him in prison, to try to determine whether he seems to have changed his attitude. There is no exact science about it; it is a matter of assessing people.

I do not know how to express it any better than that. We secure information from everybody who has been in contact with him from the time he first got into trouble until the present day.

Senator Goldenberg: I understand that an inmate may be paroled prior to his normal eligibility date. Is that right?

Mr. Street: Yes, sir.

Senator Goldenberg: What criteria do you use in a case like that? I will be frank. I have in mind the recent case of the kidnappers who were released on parole in Toronto.

Mr. Street: As I have indicated, the parole regulations provide that if there are special circumstances the board may make an exception to the regulations and parole a man ahead of one-third of his time. This is one of the good things about Canada's parole legislation, because we are able to be flexible. We are dealing with human beings, and it is a matter of trying to get them at their best time, at a time which would be best both for them and the public, having always in mind the protection of the public, rather than being concerned with arbitrary rules. We are dealing with people, not numbers. I do not believe in arbitrary rules, and fortunately Parliament did not when it passed the legislation, which provides for flexibility.

In the case which you mentioned, unfortunately there has been some reaction about that. While the offence of kidnapping is a very serious matter, I submit that it was not an ordinary case of kidnapping. I suggest it was more a stupid prank than anything else. I feel sure, and so do my colleagues, that those men will never commit that or any other offence again. It was the first time for them. Because of what I consider to be very special circumstances—as I say, I think it was more of a prank than anything else—we thought they should be paroled before their eligibility date. We are satisfied that they will not misbehave again.

Perhaps I should not make statements like this, but I am prepared to say that if it were an ordinary case of kidnapping, such as we read occurs in other countries, I do not think the Board would ever parole people who did anything as dangerous as that. But I do not think that victim was ever in any danger, and I am satisfied, for the reasons I have mentioned, that those were special circumstances. Unfortunately, the reaction was not all that favourable. We received some criticism over that.

Senator Hastings: How many times have you used your early parole discretion the past year?

Mr. Street: I do not think we can tell you for this year, but on the last occasion that I heard, less than 10 per cent of cases were released before eligibility date, and of that 10 per cent some were released only a month or two ahead of their time usually because they wanted to attend school. If we have a university student who is not eligible for parole until October, if we can get him out and back to school in September, we will do so. If he has a definite, steady job-offer, he might be released a month or two early, but his would be an exceptional case. In another well-known case we released a young woman four months ahead of time in order that she might attend university. Unfortunately, some of the public do not appreciate this sort of thing and think that we should extract our pound of flesh.

In answer to special circumstances, the Board gave some indication to its staff of what it considered to be special circumstances:

> (6) "Special circumstances" can never be precisely defined in advance. Any evaluation of what single factor, or combination of factors, in a particular case at a particular point in time may constitute "special circumstances" is of course a matter of individual discretion and judgment.
>
> (7) A general principle is that no deserving case shall be allowed to suffer through rigid adherence to arbitrary time rules, where the best interests of the inmate and community would be served by his earlier release on parole. The case concerned should offer a unique justifiable ground which could not be contemplated by the Regulations. It is not, of course, the Board's duty to review the propriety of sentences.

We have set out some of the factors which we consider to be special circumstances. Some of them have to do with clemency or compassionate grounds, such as a death in the family or the birth of a baby or at Christmas time. Here I am referring to release 30 days ahead of time. They can be released to accommodate a deadline for school or seasonal employment; to preserve a particular job, especially if handicapped; inmate indispensible for certain specified duties; inmate a student prior to short sentence, and his return to school expedited; meritorious service to administration during an institutional riot; sentence being served in default of non-payment of fine when non-payment results from general financial hardship; time in custody prior to sentence; changes in the law following conviction; minimum mandatory sentences—and quite often what happens in those cases is that the judge writes us and informs us that he had to give him a certain period of incarceration but if he had had a choice he would not have done so, and so he asks us please to parole him. There are other such factors as, for example, administrative inequity—two equally culpable accomplices, different judges, different dates of sentence and different sentences for the same type of offence; accomplices released by exception for any reason but especially if relative to the present case; to provide identical eligibility dates for accomplices in light of information not available to the court; extenuating circumstances in the offence, and various other things. We set all these factors out in this memorandum. If you wish, I could leave a copy with you.

Does that answer your question, Senator?

Senator Goldenberg: I would like to have a copy of that.

Mr. Street: I have just given you a rough outline of some of the things. I do not think I should take any more time reading the rest of this, but I would be glad to give you whatever number of copies you require.

The Deputy Chairman: I wonder if we could have a motion to print this memorandum as an appendix to today's proceedings?

Senator Fergusson: I so move.

Hon. Senators: Agreed.

(For text of memorandum, see Appendix "B")

Senator Goldenberg: Mr. Street, one can understand the layman's criticisms when he reads the newspapers. The public reaction to the case I referred to was, "Here are five or six members of the community "—I forget how many there were—"who are fairly well off, middle-class people who kidnapped a girl as a so-called prank." My question is, Mr. Street, would you have applied the same test or would you have made the same decision if it were five or six unemployed persons who decided to play this prank?

Mr. Street: If we thought it was more of a prank than a real case of kidnapping, and if we were satisfied that they

would not do it again, which we were in this case, and if the reports which we got as to their conduct and progress in prison were favourable, yes, we would.

As I say, some people have more things going for them on the outside and that is a beneficial factor. If they do not have things going for them on the outside we have to get them going, but all people are certainly treated the same.

Senator Goldenberg: But they had more going for them on the outside.

Mr. Street: Yes. As I said, they all came from middle-class families, they all had jobs and a good many people helping them.

Senator Hastings: Quite apart from the reaction of the public, Mr. Street, I feel even more important is the reaction of the inmates who see this type of thing going on. The man whose wife is on welfare just does not have the resources, and so forth. You must consider the bitterness and the resentment which you create in the inmate population when they see these special circumstances or these special regulations being utilized.

The Deputy Chairman: That is hardly a question.

Senator Hastings: I am just making an observation.

Mr. Street: We are not unconscious of this. We have had experience with this before. There was criticism from one person who thought it was wrong, and this person was not only potentially dangerous but he had killed one person and maimed another, and now he is annoyed because we will not let him out. I do not think he will get out before eligibility because he is potential risk.

As I said, this is no popularity contest. It is hard to keep everyone happy. We are not oblivious to the views of the inmates because we have to keep some peace in the family, but, as I say, you are criticized for too much and you are criticized for too little.

One of the first times we tried day parole we got a terrible reaction from the inmate population. We allowed one young man to attend university, which was right next to the prison, and we were critized for that.

Senator Hastings: You cannot win!

Senator Laird: As I understand it, Mr. Street, as a class, murderers are the best risk for parole. Is that so?

Mr. Street: The ones we do parole are, yes.

Senator Laird: How do you account for that?

Mr. Street: Well, in the first place, we only parole the good ones; we do not parole anyone who is potentially dangerous.

When the Board came into operation 12 years and 9 long, tough months ago, the people we were dealing with at that time, and for a certain length of time thereafter, were convicted murderers who had not been hanged. The dangerous, vicious, deliberate, violent type of murderers were hanged, so we did not have to contend with them. However, since we do not hang murderers any more we do have to contend with the more dangerous type, and as a result of this we are more careful in our selection process. If we do not recommend parole, the Cabinet never hears about them, but if we do recommend parole, then, the Cabinet has to approve their release. It is somewhat more difficult now because we are dealing with the more dangerous type of murderer.

Senator Laird: Perhaps I am wrong in my understanding, but I believe I read somehwere that murderers, as a class, are the best parole risk.

Mr. Street: The ones we parole are, yes.

Senator Laird: The ones you parole are the best risk as a class?

Mr. Street: Yes, senator.

Senator Fergusson: I would like to say to Mr. Street that I certainly think that the document which he has presented to us will be most valuable to us in our study of the parole system, and we will depend on it for information. In my opinion, it should have a great deal more publicity. If people who now criticize the National Parole Board were aware of all the facts which are brought forth in this brief, there would be much less criticism. I am thinking particularly of those who are interested in the economic aspect. If they could read page 14 of this brief, where the figures are presented of how much more expensive it is to keep people in jail and how much we lose economically by doing so, I believe they would be favourably influenced.

Mr. Street, your percentage of 87 per cent success in your 12 years and 9 hard months you spoke of is really quite astonishing, and it seems strange to me that in view of that there is so little publicity given by the media to the 87 per cent success rate and so much publicity given to the few cases or the much smaller percentage of cases that are unsuccessful. I hope that the work of our committee will bring these things to the attention of the public. Those are my comments, Mr. Street.

There are two or three other matters I would like to ask you about. I would like to know about the panels of the Board that now travel throughout Canada. Do you find this more successful; and how did you come to decide to send panels from the Board out to investigate the cases?

Mr. Street: May I first comment on your very kind remarks, senator? The brief you referred to in your comments was prepared by Mr. J. H. Leroux, Assistant Executive Director, Mr. W. F. Carabine, CHief of Case Preparation, Mr. G. Genest, Chief of Parole Supervision, and other members of the staff.

As for the failure rate, I do not wish to mislead you. Out of 38,000, or whatever number I said, only 5,000 or 13 per cent went back; that is over a period of 12 years. Lately, because we have literally trebled the number of paroles, that failure rate is going up. That is an average over 12 years. Last year, for example, we paroled 65 per cent at a failure rate of 25 per cent. I hesitate to make comparisons, but the United States Federal Board of Parole had a failure rate just as high as ours. They only paroled 45 per cent. Anyone can say no; I think the test of a good parole system is how many you have on parole and how many you refuse. I am beginning to wonder whether we parole too many. We still think this is a good way to do it, because they are going to come out anyway and we still have our

failure rate within reasonable limits. We watch this carefully every week. Any member of my staff will tell you that I watch the statistics all the time. In any event, I still say that it is within very reasonable limits.

To answer your question about panels, we started this because we think it is more satisfactory for the members actually to see and talk to the person to whom they are considering granting parole. I am not suggesting that they necessarily in all cases or in most cases are able to make a more intelligent decision than they would from reading the carefully prepared assessment or reports in the file. But it is beneficial to talk to the inmate.

Senator Fergusson: Someone interviewed them before?

Mr. Street: Yes, they are always interviewed.

Senator Fergusson: Someone from your office?

Mr. Street: Yes. The case is still prepared in the same way. He is interviewed by all concerned, especially the regional officers in the field, under the direction of Mr. Carabine, and they give us thier assessments, the same as they did when we dealt with the files here. The only thing that is added is that now the Parole Board can see them and they are able to ask questions and bring out things that they like to and form their own assessment—although I think they could make a decision on the file, too.

It seems to me the most important feature of it is that the inmate has an opportunity to make his pitch, as it were, to those who are actually going to decide. It is much more gratifying and satisfying for him to appear and state his own case and have his day in court, as it were.

As far as the decision is concerned, I do not think it matters too much, if you are going to give him a parole, whether you give it to him in that manner or hand it to him on a platter by two members of the board, or send it through the mail. The most important thing of all, apart from the gratifying aspect of seeing the inmate and the inmate seeing us, is that if he does not get a parole he is told why and he knows exactly why. He does not have to guess or speculate any more, and they are able to give him some guidance and advice about it. Besides this, it keeps our members, in their travelling, not only in touch with the prisoners, which is important, but with all the federal institutions. It is onerous for them, but they try to keep in touch with the institutions and the institution heads, and they are able to discuss and meet classification officers, psychologists, psychiatrists, wardens and so on, and the result of it has been very gratifying, although it is very strenuous and they have to travel much of the time.

Senator Fergusson: And you feel it was a very worthwhile decision?

Mr. Street: Yes, I do, senator, and it has been very favourably received by, as I say, almost everyone, and I do not know of any unfavourable comment. Everyone likes it—the prisoners and the institutions.

Senator Fergusson: The prisoners certainly would prefer to talk to someone from the Board, than talk to the staff.

Mr. Street: Yes, and it is less impersonal.

Senator Quart: This is a supplementary question, before the subject changes. Prior to the interviews with the travelling panel that you now have, it was a responsibility of the regional parole officer, was it not, to interview the inmates regarding parole?

Mr. Street: Yes. It still is.

Senator Quart: Does that officer still do it?

Mr. Street: Yes, he still does it in the same way, and, in fact, he is at the panel hearing with them, to give them detailed information.

Senator Quart: I did not realize it was the regional officer.

Mr. Street: The only change is that the Board interviews and makes the decision on the spot.

Senator Quart: Yes.

Mr. Street: The regional officer still interviews them throughout the whole report. Incidentailly, as you know, the Ouimet Committee recommended this use of panels, but we started it before their report was in.

Senator Quart: I might just add that having travelled, as Senator Fergusson knows, across Canada to hearings held by the Committee on Poverty and by the Committee on the Constitution, the travelling across the country is not so pleasurable as the public think.

Mr. Street: No, it is not.

Senator Quart: You have not time to change your mind before you have to do it in another place, sometimes.

The Deputy Chairman: I am not sure, senator, that that is completely relevant, but we will accept it, anyway.

Senator Quart: I know, but I always go outside the lines.

Senator Fergusson: This is a question I particularly want to ask. On the amount of remuneration you give to agencies and provinces, when you changed from giving them an annual grant to paying them by the case, was this decision made on the basis that you could not afford to pay them as much? For Instance, I know of one agency, the Elizabeth Fry Society, which does work for you. They do not have very many cases but they do good work, and I think they now get $30 per person; and they have to give about six hours a month for each one of those parolees. They find they are much worse off than they were when they got an annual grant. I wonder if you discussed this with the agencies that work for you, before you changed the method.

Mr. Street: Yes, we did.

Senator Fergusson: You did? And did they prefer that?

Mr. Street: Yes.

Senator Fergusson: I can see how a large association works, where they have a whole lot of cases.

Mr. Street: It certainly was discussed. In fact, Mr. Miller and two other members from the department travelled all across the country and discussed it in some detail with all the agencies involved. It is unfortunate if there is an

agency which is not doing as well as it did under the grant system.

Senator Fergusson: They are certainly not getting as much money as they did under the grant system.

Mr. Street: Unfortunately, I suppose that is so in the business of supervising women, when we do not have any women on parole. I did not realize until you told me. For all the others it is a very beneficial system.

Senator Fergusson: Do you not have any women on parole now?

Mr. Street: Yes, but we do not have as many. There are only 100 women in federal prisons.

Senator Fergusson: I know.

Senator Quart: It cuts down the investigation.

Mr. Street: If we paroled them all, there would be only about 100.

Senator Fergusson: It is not so much the investigation; it is the work with them. It is not an investigation. The investigation is over by the time they are sent to them on parole.

The Deputy Chairman: Is it the after-care, perhaps?

Senator Fergusson: Yes.

The Deputy Chairman: I think this is another factor that we will have to deal with.

Senator Fergusson: It is certainly one that I would like to see dealt with.

Mr. Street: Unfortunately, this agency is not doing as well now. Agencies are now being paid $800,000. I think, according to the figures for last year. I am not sure if that is for last year or for the first nine months of this year, without checking. It is one or the other.

The Deputy Chairman: You might check it and give it to us, so as to keep the record straight.

Mr. Street: Mr. Paul Hart, do you have the answer to that question?

Lt. Col. Paul Hart, Director, Administrative Services, National Parole Board: The $800,000 is the estimate of what we will be paying in this fiscal year.

Mr. Street: Do you know what we paid last year?

Mr. Hart: Something around $700,000, I believe.

The Deputy Chairman: Thank you.

Senator Thompson: When you pay them that amount, Mr. Street, there has always been an apprehension on the part of some voluntary agencies that the man who pays the shot calls the tune. The voluntary agencies may feel this. I think we should give them credit. They have been criticial in the past of the lack of reform and have been pushing for reform. Do you see, in paying the agencies, a danger that you might drown out that spirit of reform?

Let me include another question and take another area in particular. Assuming that there was a situation with one of these agencies, where you felt really that the case workers or after-care workers were really not quite competent but these people had community sanction and punch, could you go to them and say, "You must have certain standards with respect to your after-care workers, and if you do not have those standards you do not get a grant"? Are there standards that you set up and require before they get a grant?

Mr. Street: That is one of the problems, senator. It is not easy. Even though it is a contract and provides for certain control, and so on, it is not just feasible to insist on and enforce the kind of high standards which we would like to have. But we had, for example, to give 50 per cent of our cases to them anyway. It is not that easy. Some of the agencies, through no fault of their own, are not able to have the same high standards that some of the others do, because they are not as big or do not have as much money, and so on. This is a problem.

Senator Thompson: What are the guidelines set down by the department before you give money to them? What are the standards required, or are there any standards required?

Mr. Miller: The agencies that are given supervision and that are asked to do community investigations are agencies that have been working with us for a period of time. In the last year, since we introduced this contract, there have been two or three new agencies that have been introduced, and we go through a preliminary period of our local office assessing the particular kind of service they can give. If we feel the service is likely to be adequate, then we move to a contract. In negotiations at the local level we do endeavour to improve the standards of performance. If the performance is not up to standard, our district representative meets with the head of the agency on a particular case and points out where, in our opinion, the work was inadequate.

Senator Thompson: Have you ever said to an agency such as the Elizabeth Fry or the John Howard Society that the individual agency was not up to the standard in the particular area and that, therefore, you would not give them a grant?

Mr. Miller: Well, we are now on a fee-for-service basis, and so on a particular case it may very well be that we would say we would handle that case ourselves. Usually in such a situation as that the agency itself would agree that we were the ones who should be handling the particular case. It may vary from area to area on just how that decision is made.

Senator Thompson: But you have no code of standards. There is nothing set out with respect to this public money which goes to the agencies.

Mr. Miller: Yes. The contract sets out certain requirements.

Senator Thompson: What are those requirements?

Mr. Miller: The requirements are that they will make an investigation, and appended to the contract is an outline of

what we require in our community assessment. A copy of such a contract could be given to each of you, I am sure.

Senator Thompson: I am more interested in the qualifications of the person making the investigation. What are the standards you set for that?

Mr. Miller: No, I am sorry. I now understand you. We do not insist that they have any particular qualifications.

Senator Thompson: Why?

Mr. Miller: Because across the board, in the general view that we have, from anywhere in the community can arise a way of helping in this field. A particular kind of agency may not have what we would call a professional type of employee, but it can be very supportive and we would be giving them the cases in which they could be supportive.

Senator Thompson: Do you have qualifications for your parole officers before you hire them?

Mr. Miller: Indeed, we do.

Senator Thompson: Then, since 50 per cent of the people are going to be with the after-care agencies, why do you not require qualifications for their staff?

Mr. Miller: Our qualifications are set for us under the Public Service Commission Standards and in negotiation. The essence of this co-operation with the community is to be sufficiently flexible to allow for different kinds of things.

Senator Thompson: I am concerned about the qualifications of people who are handling the ex-offender. We all want to get community support, but I am talking about where public money is given to the personnel of these agencies, and you have no qualifications that you demand of the after-care agencies.

Mr. Miller: That is right. We do not have those qualifications.

Senator Quart: Mr. Chairman, I know very little about this aspect of the subject, but, since there are different standards in different agencies as regards case workers or after care and so on, would it not be better to have employees in the department who would be more qualified to deal with these cases and not deal with any agencies at all? Or is there some advantage in having outside agencies that for other reasons I know nothing about? Perhaps there are contacts or something of that kind.

Mr. Street: Well, that is a rather delicate question.

Senator Quart: Do not feel you have to answer it.

Mr. Street: We have been told to give 50 per cent to the agencies. The agencies vary from very good to not very good. For the reasons mentioned, it is not feasible to insist on as high standards as we would insist on in our own service. Most of our men have masters' degrees in social sciences. At any rate, we have been told to give 50 per cent, and we have to deal with it the best way we can. If it is a very difficult case we can supervise it ourselves, but we do have to give 50 per cent to people outside.

Senator Fergusson: Mr. Chairman, is this not a matter of policy? We can hardly require an answer from Mr. Street on questions of policy. If the minister were here we could put questions to him on this, but I do not see why we should ask Mr. Street these questions.

The Deputy Chairman: It was a rather detailed question which perhaps involved policy, but Mr. Street is giving us the reasons that they do this. Perhaps there are one or two questions which would make the matter clearer. For example, am I correct in assuming, Mr. Street, that the reason you use these private agencies and do not insist too much on high professional standards is that, particularly in smaller communities, you are better off with something than with nothing? Is it not also true that the astronomical cost of supplying staff in places that would not require staff could not be justified?

Mr. Street: Those are good points, senator. Certainly, there are small towns where there would be no use in having either a parole office or a parole officer. There would not be sufficient numbers of cases to justify that. In those places you need somebody else's help. Usually, however, the after-care agencies for the most part have their offices in the centres in which we have ours. They have them in the larger centres. They do not always cover the small towns either, presumably for the same reasons that we do not, although I should say that in some places they do have what they call a volunteer supervisor, who is a person with no particular qualifications but who is interested in the work and does it for them

Even if we were allowed to, we could never put parole officers in all of the different places, but where we do not have offices we do try to get someone else, such as a provincial probation officer. That would answer that, because in a little town like Wetaskiwin, in Alberta, there are not enough paroles to justify an office, but we have to do the best we can.

Senator Thompson: Mr. Street, I think I speak for all here when I say that we have a high admiration for the way you have tackled this very tough job.

Mr. Street: Thank you.

Senator Thompson: What do you think has been the greatest asset for you in assuming this position so far as your background is concerned? Was it your experience as a magistrate, for example? What do you think has helped you the most?

Mr. Street: In my personal background?

Senator Thompson: Yes.

Mr. Street: I always had these views about imprisonment when I was a magistrate, and I used to use probation even before we had a probation officer. I always felt strongly about more control in the community and giving discipline that the individual did not get before, and things like that. What I have found useful in this particular job is the fact that I was a magistrate for 11 years and was stuck with the job of deciding and sentencing, and the more I knew of this business the more I realized how difficult that is. It makes it easier for me to go and talk particularly to the chief justices in Canada and the judges of the courts of

appeal, judges, magistrates and provincial judges because they know that I was one myself and have legal training which they have. I think it would be more difficult for a social worker, if he were Chairman, to go and talk to a chief justice of a court of appeal and all these other judges about sentencing, because it is a delicate matter. It is their responsibility, and yet we are working with them. I think it is easier for me, and that is the most important thing about it. The Fauteaux Committee recommended it should be a judge, a supreme court judge, but somebody realized that magistrates have more experience with crime than they have. I suppose that is how I was stuck with the job.

Senator Thompson: Do you think that a background as a magistrate should be a qualification for one member of the panel or for all members of the parole panel?

Mr. Street: No, not all.

Senator Thompson: Just one then?

Mr. Street: Just one, I think. I would not object if there were two, but I think we should represent different disciplines, which we do. At one time, out of five of us, four were lawyers, which I think was not particularly desirable in the sense of not having enough of the other disciplines represented. Now we do represent other disciplines: we have social workers, criminologists and an ex-chief of police. We are well represented now. There is also room on the Parole Board for a member of the public who does not have any particular training or experience but who could represent the public point of view, and we do have such a member.

The Deputy Chairman: Perhaps with good common sense and public sympathy.

Mr. Street: That is right. That is perhaps the best qualification for any job, sir. Does that answer your question, Senator Thompson?

Senator Thompson: Yes, it does, but in a sense I have been unfair to you. May I say that if some of these questions we ask refer to matters of policy, as Senator Fergusson has suggested, in no way do I want to put any one on the spot. If you just tell me that you cannot answer the question, then I shall understand.

What happens in the appointment of members of the Parole Board? I suppose it is a political selection?

Mr. Street: No, not in that sense. They are, of course, all appointed by the Government, but of the ones we have on the Board, three were members of our staff who were regional representatives before, and they are not in any sense political, certainly not in the sense that they had anything to do with politics. In some cases I was fortunate enough to have made a recommendation and the Minister agreed with it and, certainly, these were not what you could call political appointments.

Senator Thompson: But you can make recommendations for people to be appointed to the Board?

Mr. Street: Well, I always did, yes.

The Deputy Chairman: I am not about to let this go, the point where anybody is going to knock politicians.

Mr. Street: We have a couple of ex-members of Parliament on the Board and they are both very good members. I am delighted to have them both. One of them represents what I call the public, and the other was a magistrate, but both are very fine members and I am delighted with both of them. I should be glad to get a couple of dozen more.

Senator Thompson: There is some suggestion in regard to the appointment of judges that apart from the Minister of Justice making an appointment, there are recommendations made by the law societies.

The Deputy Chairman: You are getting right to the edge of irrelevancy here.

Senator Thompson: Well, there are professional associations in connection with parole. Now I do not know if you can answer this, but do they make recommendations with respect to appointments?

Mr. Street: Yes, I guess they do, but I have been fortunate in that I have made certain recommendations and most of them have been accepted, and I have no cause for complaint.

Senator Thompson: Does the Canadian Corrections Association recommend people who they think should be appointed to the Board?

Mr. Street: Not that I know of, no. I suppose that if they had any ideas they would come and speak to me or to the Minister. I do not know if they ever did speak to the Minister.

Senator Quart: You have two former members of Parliament that you mentioned. One we know, but who is the other?

Mr. Street: One was an M.L.A.

An hon. Senator: A member of the Alberta Legislature.

Senator Quart: Oh, just Alberta!

Senator Hastings: I should like to return to Senator Fergusson's views on the hearings. We got sidetracked. Leading up to the hearings, Mr. Street, as you outlined the procedure as followed, there is one thing that disturbs me and disturbs most of your clients. That is that, as you state, you get a police report and a report from a judge. You said a short while ago that the most important criterion was some indication of a change of attitude on the part of the applicant. In other words, had he faced his problem and was he doing something about it? I just cannot understand what contribution a judge or the police could make in arriving at resolving that problem when they had seen the man perhaps two, three or seven years ago.

Mr. Street: Well, that is a good question, senator. For the sake of co-operating with judges we have always invited them to write us and give us information, if they wish. Some of them like to do this, but not very many, and we invite them to do it if they wish. Quite often a judge will say that he recommends an early parole because he felt he had to give this sentence as a public deterrent or because it was a minimum sentence, but he recommends early parole. Then if he wishes he can give us his assessment of the man as he found him at the time of trial. Some of them

give us details of the offence, the background, and so on. When we get reports, generally speaking they are helpful, but when we first started, we started asking judges for reports, and we even had a form to make it easier for them. Even then, many of them did not fill in the form, and even if that was all they did it was not all that helpful. The form was designed to give a maximum of information with a minimum of inconvenience. But since so few of them did this, we changed the policy some years ago and we just sent them a letter saying that we would be glad to hear from them if they wished, and so they will feel that we are trying to work with them in trying to fulfil the purpose they had in mind in giving the sentence they did. Quite often their reports are very helpful, but we do not get very many reports from judges.

Senator Hastings: But when your officer goes out to carry out his community investigation, why does he go to the police?

Mr. Street: We want to know about the circumstances of the offence and we want to know whatever information the police have about the man's background, if any.

Senator Hastings: But you have that on file at the start of his incarceration.

Mr. Street: That is what I am talking about.

Senator Hastings: I am speaking of the community investigation before he goes up for his hearing. Why go to the police at that stage when all they have are bad memories of the man three, four or five years ago?

Mr. Street: That is not a regular thing. Perhaps it has happened in some cases, but it is not part of the regular community investigation report. In some cases it may have been done because it was thought that the police might have useful information about the man. I do not know why they did it, but it is not the usual thing to consult the police when making a community investigation report.

Senator Hastings: I wish you would convey that information to your officers in the field.

Mr. Street: Do you have any comments on that, Mr. Carabine?

Mr. W. F. Carabine, Chief of Case Preparation, National Parole Board: I believe it is stated in the brief, sir, that the main emphasis regarding community assessment is on the family and the close relationship of the family, but there may be collateral interviews with the police. It can be extremely useful to have interviews with the police regarding an individual returning to a community. They are an integral part of the community. The police could very well have information regarding the community situation to which the inmate is to return. This is particularly useful in smaller areas.

Senator Hastings: I disagree with you, but, nevertheless, you say this is a minor matter.

I am reading from the Kingston *Whig-Standard* of November 13, 1971, where one of your officers said:

> It might require four months to prepare a case to present to the board as it entails gathering information from the police, judges and other bodies, as well as checking home or community conditions.

He turns it around by starting with the police, the judge and other bodies. I feel that it is probably issues such as this that contribute a great deal to the misunderstanding on the part of inmates.

Mr. Street: Is he not talking about the general preparation of a case? We get police reports on all of these cases.

Senator Hastings: That is at the beginning.

Mr. Street: Yes, but it is not part of the community investigation report.

Senator Hastings: He says that it might require four months to prepare a case to present to the Board, as it entails gathering information from the police, judges and other bodies. If there is anything that will disturb an inmate it is to tell him that you are gathering information from the police.

Mr. Street: It is true that they do not like it, but we have to work with the police and we need to know what the police know about the man and the circumstances of his offence. We get that information; that is part of the work we do before we decide to grant parole. It is not part of the community investigation report to decide where an inmate is going to go in the community. We have police reports on almost every case.

Senator Hastings: He has said it is part of the community report to decide where a person goes.

Mr. Carabine: I feel that what Mr. Phelps (District Representative National Parole Board, Kingston) was referring to unquestionably was the normal four-months period we feel it takes to prepare a case. His comment regarding the police report was unquestionably in that context; it was not in the context which we are discussing now. As I have said, some of our staff, particularly in the smaller areas, contact the police as part of their investigation to gain an understanding of the community as it exists now, or perhaps, nine months or two years later.

Senator Hastings: Is the city of Calgary a small community?

Mr. Carabine: Perhaps by your definition, sir.

Senator Thompson: It is, in comparison with Toronto.

Senator Goldenberg: I do not feel that the quotation from the Kingston *Whig-Standard* necessarily says that. If an officer looks at a police record in preparing a case, that does not necessarily mean he would go to the police and ask for it. As I understood Mr. Street, that record is available and you have it as part of the Board's files.

Mr. Street: Yes, we can obtain the record from the records department of the RCMP. We get a report from the local police as to the circumstances of the offence.

Senator Goldenberg: When do you get that report?

Mr. Street: We get it right at the beginning.

Senator Goldenberg: That is what I mean.

Mr. Street: As both Mr. Carabine and I have said, in certain instances an officer making an investigation may have thought it appropriate to talk to the police because of certain information he thought they had, but it is not usual to consult the police in the case of a community investigation report.

Senator Hastings: It is not?

Mr. Street: It is not usual, only in preparing the case in the first place so we are aware of with whom we are dealing.

Senator Hastings: I am sure you do not want to mislead the committee. You have indicated that when a man receives his decision, and the reason for the decisions it is done right here. Many decisions are received by mail with no reasons, are they not?

Mr. Street: In dealing with provincial prisons we have to do it by mail. We are not able to visit all the provincial prisons. If we have a reserved decision it is probably conveyed by mail.

Senator Hastings: And there are no reasons given along with the decision?

Mr. Street: I do not suppose the notification would state the reason. If he wants to know the reason he is entitled to speak to one of the officers in the field who dealt with his case and that officer will give him the reason. He would be able to interpret the reason from the file.

Senator Hastings: I feel this is one of the great complaints. I know the Board is doing a good job; but it seems to me that at the particular instant he is denied parole he is under great emotional strain and is not listening to anything else. I feel the Board is perhaps telling him the reason but it does not get through to him.

Mr. Street: I am afraid that is right.

Senator Hastings: He does not hear anything after he is denied.

Mr. Street: The same thing is true when he hears the word "parole". He forgets everything you tell him after that.

The Deputy Chairman: It is after twelve o'clock and I imagine there are other areas we will want to deal with. You gentlemen will be available tomorrow?

Mr. Street: Yes, sir.

The Deputy Chairman: I will accept a motion to adjourn now until either 9.30 or 10 o'clock tomorrow morning, whichever is more convenient.

Senator Laird: I would move 10 o'clock.

The Deputy Chairman: Is that agreed?

Hon. Senators: Agreed.

The Deputy Chairman: Thank you for your assistance today gentlemen. We now stand adjourned until 10 o'clock tomorrow morning.

The committee adjourned.

Ottawa, Friday, December 17, 1971.

Senator J. Harper Prowse (Deputy Chairman) in the Chair.

The Deputy Chairman: Honourable senators, when we adjourned yesterday Mr. Street, the Chairman of the National Parole Board, was our witness, so I suggest that we continue from there. I notice there are one or two senators present who have not been here before. For their benefit may I say that the procedure we intend to follow is to use a lead questioner to get things started, and then at any moment any senator who has a question relevant to the subject being discussed may indicate that to me and I will recognize him or her. When we change the subject we will go through the same procedure again.

Senator Hastings, would you lead off, please?

Senator Hastings: Mr. Street, I wonder if with you and your staff we might follow the progress of one individual through the system until the Parole Board hearing, being on parole, perhaps parole violation and then back in prison.

Mr. Street: Certainly.

Senator Hastings: Let us start right at the beginning. I understand you have now commenced in the province of Alberta—maybe it is extended and, if so, I would like to know—coming into the picture right after conviction in court, interviewing the man and allocating him to a suitable institution to serve his sentence.

Mr. Street: The way that started was that we were asked to have our people in Edmonton screen men convicted in Alberta to decide whether they should go to Drumheller, which is a medium institution, rather than being taken over to Prince Albert, which means a trip there, having them screened there and then sent back to Drumheller. Our people are, in effect, screening these men ahead of time, so it saves the cost and trouble of taking inmates from Edmonton and Calgary over to Prince Albert to be screened and then taken back to Drumheller. This has worked out so well that the penitentiary people have aske dus to do this in Winnipeg, the Maritimes and Saskatchewan.

Senator Hastings: So the better inmate, or younger inmate, according to record, personality and characteristics, avoids the traumatic experience of Prince Albert, or a maximum institution.

Mr. Street: Yes. It means he does not have to go there at all, because he is screened immediately after conviction before being sent to any federal prison; he is sent to the one that he will end up in anyway, rather than being taken to a maximum institution, like Prince Albert, and then being brought back. This is just another example of how we work with the penitentiary people. They were so pleased with how it worked that they have asked us to do it in these other provinces.

Before going on with Senator Hastings other questions, there are two points I would like to clear up, to make sure the record is straight. Yesterday there was some talk—I am not sure whether I said it or not—of how we sometimes get bad publicity for things we have not done. We make

enough mistakes of our own, and I can hardly complain about being criticized when one of our parolees commits an offence. But sometimes, unfortunately, a person who is out of prison, other than on parole, commits an offence and the newspapers blame us for it. There was one bad case when a policeman was killed in Montreal and someone was held hostage. That man was not released by the National Parole Board and was not on any form of parole. There was another case of a man who killed three employees of a large company, and the newspapers indicated that he was, in some manner, a rehabilitated convict; I do not know whether they said he was on parole or not. That man was not on parole either and, in fact, the only time we had experience with him was about six years ago and he was refused parole. Unfortunately, we get blamed for those. While I do not mind being blamed for our own mistakes, I do not like being blamed for mistakes which we did not make.

The Deputy Chairman: May I ask one clarifying question? He was not paroled but he was released. Does this mean that he had completed his sentence?

Mr. Street: The one who killed three people?

Senator Hastings: Allegedly killed three people.

Mr. Street: As far as I know, he had not been in prison for a long time. I think it was five or six years ago when we denied him parole.

Senator Goldenberg: The story in the Montreal papers said that he was a parolee.

Mr. Street: I know. That is why I am complaining of it.

Senator Gouin: Then he was not on parole. The paper said he was on parole. Had he finished his conviction or was he an escapee? You mentioned two cases. I refer to the first one.

Mr. Street: The first one was released on some form of temporary absence release in order to get treatment, and it was while he was getting treatment that this happened. He was not on parole.

The Deputy Chairman: That temporary absence is something that is provided in the Penitentiary Act and not in your act.

Mr. Street: That is right.

There is another common mistake in that sometimes a man is released from prison because he gets time off for good behaviour. He gets about one-third off and is released, therefore, one-third sooner than he would if he stayed full term. Sometimes, if he commits an offence, they say that he is on parole. He is not on parole; he is released because of time off for good behaviour. Unfortunately, these mistakes occur from time to time.

Senator Thompson: It does show, Mr. Street, that there can be a duplication. There are people who are out of prison, getting their sentences finished without having gone through the scrutiny of your organization.

Mr. Street: Yes, senator. One of those cases was so.

Senator Thompson: Do you feel that this is poor? Could we tighten this up in some way, and, if so, how?

Mr. Street: No, sir, I am not suggesting anything like that. I think the idea of temporary absence, to allow a deserving inmate to go home for a weekend or to go for some compassionate reason or even to aid in his rehabilitation done by the institutions, is a good system. I am not complaining of it. Yesterday we were discussing the fact that we should get together and decide when we should do it and when they should do it, and there is a rough division of duties. I suggest, if it is a short term of three days or five days, it would be suitable for temporary absence, but if it is for more than 15 days then probably it should be done by the day parole method. We only give a day parole to allow a man to go to work or to school. We would not be allowing a man to go home for a weekend; that is not our job, but that is the proper thing to be done by them, that is what they do, and I think it is a good thing.

Senator Thompson: But in these two cases surely we need to assure the public. I appreciate that we are focussing on two which created a rather exciting situation. This is an important situation. How can the public be reassured that there is some type of scrutiny before a man is set free?

Senator Hastings: You cannot do anything about a man until he has completed his sentence.

Senator Thompson: I am not talking about a man who has not completed his sentence and apparently goes out. You are suggesting it was not under your jurisdiction? Whose jurisdiction is it under? Do they have the proper facilities?

Mr. Street: Yes, I think so. They know very well, the prisoners they are releasing, and they are able to decide whether it is a reasonable risk or whether he is liable to escape or is dangerous. This is a very unfortunate and extreme case of a type which is not likely to occur again.

Senator Thompson: Could I bore in on this a little? If they know the person and they can assess him, what is the need for your organization?

Mr. Street: Generally speaking, our job is to decide whether he should be released on parole. The idea is to have an independent parole authority outside the prison administration. This is the theory of it, but in that case to let a man go home for a weekend is not a very weighty decision, or to let a man go out to take treatment, that is not a weighty decision either, and they should be able to decide that themselves.

I have no complaint about that. I think that is a good system. We could hardly deal with all these little requests. We deal with about 15,000 cases a year as it is, without getting these little things. Before this power was given to them we had a great deal of difficulty, because the only way it could happen was under the royal prerogative of mercy. We had to screen them. We would suddenly get a request from somebody that his father or his mother or his wife had died, so that he could go home for the funeral. He might be a man who could be trusted, most times without guard but, if necessary, we could send a guard. We had actually to get that through the Solicitor General, to the Governor in Council, to get permission. So this power was

given to them to do that. It is much more efficient and much more expedient to do this way.

At one time a man phoned me in a hurry because he got 14 days in jail for being drunk—it nearly makes me cry to tell you about this one—and his little boy hanged himself because his daddy was in jail for two weeks. So we were not going to keep that man in jail when he had got three days more to go, and we were not going to keep that man in jail when his little boy was being buried. This has to be done quickly, though. With this system now, the warden can let him go.

Senator Laird: In regard to one answer, you mentioned the case of a person who, when he was out for treatment, shot a policeman. Was he a mental case and was it mental treatment that he was out for? Do you know?

Mr. Street: I think it was. I do not know.

The Deputy Chairman: Let us watch it. We are going to have the penitentiary people in later. I do not want to cut down questioning at this time because we are just getting started on as broad a basis as possible, but there are some questions that really it is unfair to ask Mr. Street, who is the head of one service, when the question and the answer really ought to be dealt with by another service. If we establish that practice, Mr. Street may be able to say that in some of these cases the answer ought to come from the head of the other service, and that will take care of the situation.

Mr. Street: I was not trying to blame anyone, because I think it is a good system; but there is some misunderstanding about these things, and that was only one of three different types of situation which can occur.

The Deputy Chairman: I do not want to interfere with that explanation.

Mr. Street: There was also some talk yesterday, Mr. Chairman and honourable senators, about payments to after-care agencies. I am not sure that that was fully cleared up. There was a question in regard to the time when the agencies were under the grant system and just got the grants. Senator Fergusson raised that question. In the last year they were under that system they got $165,000 from us.

Senator Fergusson: I am sorry, I did not hear you. Who got it?

Mr. Street: All the after-care agencies. It was $165,000. In 1965 that amount was just $96,000, so there has been an increase between 1965 and 1969. Then last year they received from us, in the way of payment for services, $700,000. This year we expect that they will be paid about $800,000, so they are much better off now than they were before, when they were under the grant system.

Senator Fergusson: That is, all agencies. That does not seem to work for a small agency.

Mr. Street: Yes, I did not realize that, and I am glad you have mentioned it. Other than that, they are, generally speaking, getting about three times as much as they did before.

Senator Fergusson: Certainly the agency that I know of is getting less than it got before.

Senator Thompson: Might I ask if you are happy with that situation, of 50 per cent of the parolees being handled by after-care agencies rather than by your organization?

Senator Quart: Yesterday I asked that question.

Mr. Street: As I said, I do not know whether I should comment on it any further. We do not have any choice in the matter.

Senator Thompson: I can comment on it, and I think that if we are setting up a professional parole system . . .

The Deputy Chairman: Senator Thompson, the purpose of the inquiry here is to have us ask questions. I have allowed a lot of comments from senators at this stage of the proceedings; but, properly, you are supposed to be questioning witnesses and not putting your own opinions on the record. With all respect, I make that suggestion.

Senator Thompson: I will put my own opinions later.

The Deputy Chairman: There will be full opportunity. Could we come back to Senator Hastings?

Senator Hastings: If we come back to the man, you have screened him as to the institution. He arrives. We will say his term is three years. He arrives at the institution, and I think your file is open. Could we continue from there?

Mr. Street: I will ask Mr. Carabine, who is in charge of this operation, to explain the various steps to you. Mr. Carabine is our chief of case preparation. He is a psychologist who, before he came with us about ten years ago, was the classification and treatment officer in Kingston penitentiary.

Mr. W. F. Carabine, Chief of Case Preparation, National Parole Board: Mr. Street has already spoken of the situation where we have our staff in the Alberta area do what could be called the pre-selection for the other institutions. He also indicated that this would broaden out. This, of course, is a relatively new approach. Normally, other than that type of activity, the first contact with the parole service staff would be at the time of the inmate briefing with respect to parole. This is done as part of the penitentiary intake orientation program.

As institutions differ in their intake, the timing of these briefings would vary in Montreal and Kingston. Kingston, of course, is approximately 100 a month, so you could not wait a month. But, at any rate, at given times all the inmates admitted in a specific period of time are brought together and they are briefed as to the meaning of parole. The time rules are explained, the conditions of parole are explained, and much of the time is consumed in overcoming the inmates' misconceptions about parole. Some of this is institutional folklore or inmate folklore and often there is a need to overcome the statements of those who have actually failed on parole. Normally, of course, people do not blame themselves for their failures. Neither do inmates, and, hence, this is something you have to overcome. You also have to overcome the idea that the inmate needs a job in order to get out. That is more or less but not entirely true. You have to overcome the idea that the

inmate needs to be married to get out, or needs to have influence or money to get out of the penitentiary, and so on.

These briefings last for an hour to an hour and a half, and the inmates are generally encouraged to think about and work toward parole.

Actually, except for isolated areas, there is no further contact by the parole service officer with the inmate body in general until such time as the individual applies for parole. Basically, the two jobs of the parole service officer are, firstly, the preparation of material and of reports and so on for presentation to the Board and, secondly, the parole supervision.

Senator Hastings: Can we just go back to the beginning again, to where the inmate has arrived and you open your file?

Mr. Carabine: Oh, I see; you want me to go through this step by step.

Senator Hastings: Yes. What does your file contain at this stage? He has arrived at the penitentiary.

Mr. Carabine: Other than in Alberta at this moment, and expanded, the only thing that the file contains at this stage is the admission form from the penitentiary, which is just a basic document giving the inmate's sentence, age and information of that kind. Then the first report to arrive after that is, generally, the R.C.M. Police fingerpoint section record, which is sent to us automatically in all penitentiary cases. That is an up-dated record. Following this, police reports are received. Certain large forces and, in fact, certain small forces send us reports automatically in cases of inmates sentenced to penitentiary. With respect to those which are not sent automatically we will request them from the force involved. So the file gradually builds up. I should say here that the file in the field and the file at headquarters are identical.

Senator Hastings: Am I correct that the first contact the inmate receives is a letter from Mr. Street advising him of his parole eligibility and when to apply?

Mr. Carabine: That is correct. The letter is sent to the inmate, with copies to the field staff, warden and so on, advising the individual. In the case you mentioned involving a three-year sentence, it would normally be at one year. He is advised to apply five months in advance of that date.

Senator Hastings: Would you explain to the committee the difference between earned remission and statutory remission on a three-year sentence?

Mr. Carabine: In effect, the statutory remission is granted upon admission. It is one-quarter of the sentence. Beyond that the earned remission consists of three days per month and must be earned. The net effect of that, as Mr. Street indicated earlier, is that approximately one-third of the sentence is remitted if the inmate earns and keeps all his earned remission.

The Deputy Chairman: Senator Hastings, there is an urgent request for a supplementary question from Senator Thompson.

Senator Thompson: Thank you, Mr. Chairman.

Mr. Carabine, referring to the file that you have initially and the sources from which you obtain information for that file, you omitted mention of the pre-sentence report or probation officer's report. Does the predisposition or the pre-sentence report form part of your file?

Mr. Carabine: Yes. Pre-sentence reports are received automatically from the various provincial probation services and are available both to us and to the penitentiary.

Senator Thompson: Do you get the pre-sentence report automatically or is it only available?

Mr. Carabine: We get it automatically, yes.

Senator Thompson: Is that report mandatory? In other words, in respect of pre-sentence reports made by probation officers, is it mandatory for these to be made before an inmate goes to the penitentiary?

Mr. Carabine: No, sir. That is at the discretion of the court.

The Deputy Chairman: Senator Thompson, I really do not think you ought to be asking the witness questions on that area, because that would depend entirely on the rules in each province, surely.

Mr. Street: If Senator Thompson means by the word "mandatory" that we get the pre-sentence report, the answer is: Yes, we get it, if there is one. However, we have no control over whether there is or is not a pre-sentence report made in the first instance. In some provinces there is not a pre-sentence report in all cases.

Senator Thompson: Surely, if we are going to assess a man in terms of rehabilitation it is vital to have the pre-sentence report? I am sorry if I appear always to be putting Mr. Street on the spot.

Mr. Street: I am used to it, senator.

Senator Thompson: In my opinion, the pre-sentence report is a useful document. Do you agree that it is useful?

Mr. Street: Yes, I most certainly do, senator. I regret to say that, even though it is done in all cases in some of the provinces, it is not done in all cases in all of the provinces. In fact, in the case of some provinces one could almost say that a judge is not supposed to sentence without a pre-sentence report, but, unfortunately, we do not get it in all cases.

As I indicated, if one has been made, we certainly get it. Incidentally, Mr. Carabine will be telling you in a few minutes about another method of obtaining information he has devised by which, in effect, we will have a post-sentence report and we will be able to start working on that.

Senator Thompson: I take it, then, that you would be happy if we recommended that pre-sentence reports be mandatory in all penitentiary cases and that copies of all such mandatory pre-sentence reports be automatically supplied to you? Would you be happy with that?

Mr. Street: Oh, certainly, sir; it is very desirable. I do not know if that is within the constitutional terms of reference because it is a provincial matter, but I would be delighted if you could do it.

The Deputy Chairman: Honourable senators, I wonder if we could follow this procedure? Would you make notes of the areas that you want to question the witnesses on? Because in this particular area I want Senator Hastings to lead the questioning so as to give us, first of all, a complete picture of what happens to the man from the time he is placed in custody until he is released on parole, and from then until total and final release. This is what the witness we have this morning is here for. I know that as a result of that there will be questions. So could you make notes, in order to get a sequence that everybody can follow? Then we can come back to any questions you have, and you can ask for any detail you wish.

Senator Hastings: Now we have the man arriving for a three-year term, and his first date is his parole eligibility date, which is one year hence. Then the other date would be his release date, three years hence less nine months statutory remission and his earned remission of three days per month. Now he proceeds through the first year towards his parole eligibility date. What reports do you receive from the Penitentiary Service during that period?

Mr. Carabine: Immediately upon admission the inmate is interviewed generally by a classification officer and in addition psychological tests and IQ tests are carried out. The report we get from the institution, since August, 1970, forms part of what we call a cumulative summary. This is a four-part document with four different time sequences. At any rate, the classification officer's report is done, and it is essentially a social history. If there is no pre-sentence report, it is in large measure what the inmate tells the officer about his family, his background, his criminal career and his work experience. In general, it is a social history. This is made available to us generally in the first 30 days of the individual's sentence.

In some institutions there are follow-up reports and in others there are not depending on the staffing and a number of other factors. The individual can be seen at any time in the institution by the classification officer or by the psychologist, and so on, during his sentence, and notes are taken of this sort of thing; but we do as a mater of routine receive additional reports along the way.

The inmate then applies five months in advance of his eligibility date. This again calls for action on the part of the classification staff who again interview the inmate.

Senator Hastings: This is the classification staff of the penitentiary?

Mr. Carabine: Yes, of the penitentiary. They will again interview the inmate. In addition to his comments and his reports about what the man intends to do, the classification officer's report will include the sort of things he has done in the institution, what he has learned, if his attitude has changed, if he has taken a trade, if he has been out on passes; and it will include comments from senior officials who know the individual, the padres, for instance, the immediate work supervisor, the officer in a particular cell block, if he is there, and so on. This attempts to give us a picture of the inmate as he progresses in the institution.

Senator Hastings: When he made that application, it triggered action by two elements: it triggered the classification staff; and it triggered your responsibility, did it not?

Mr. Carabine: Yes, immediately following or closely following on receiving reports from the institution.

Senator Hastings: His application form?

Mr. Carabine: Well, the application is simply acknowledged.

Senator Hastings: He makes application to his classification officer, who prepares a report as you have indicated?

Mr. Carabine: Yes.

Senator Hastings: And then it comes to you?

Mr. Carabine: No, we get a copy of it at the same time. This, as I say, triggers action on the part of the penitentiary classification office. Shortly thereafter this will trigger an interview by a parole service officer in the institutional area. This report will concentrate on the inmate's post-release plans, and the purpose of the interview by the Parole Board's representative is to give the Board the perspective or the picture from our point of view.

This is then followed by what we term a community assessment. The community assessment focuses mainly on the immediate family and close relatives. In some situations, of course, there is very little, really, because the inmate may not have any close relatives; he may be going to a halfway house or he may have plans to go to commercial accommodation. In any event, the normal situation is that the family, the wife or mother or father, as the situation may be, are interviewed. If the inmate so wishes, former employers could be interviewed. A great many factors are checked out, including what the attitude of the family is towards the individual. Sometimes it is very friendly and warm, but other times it is rather cool towards his return, and so on. In this situation our officers attempt to judge just how the community will react to his return, what are the supporting factors and what are the negative factors. Then once it is completed, it is sent back. If it is a different office that has done this community assessment—in Kingston, for example, it is most likely Toronto as the area where the majority return—that is returned to the parole service officer who did the interview. Meanwhile, of course, all this information is coming to headquarters and is available to the Board for study prior to their going out for a panel hearing.

Senator Hastings: I just want to clarify one point. You mentioned five months, but I think you should point out that it is nine months for murder. A man has made application five months prior in normal circumstances, and nine months prior where it is a case of murder.

Mr. Carabine: In life sentences, yes.

Senator Hastings: We have the opening file, we have the classification reports from the Penitentiary Service along with psychiatric and psychological reports. We now have

his application on file and we have an up-to-date report on the penitentiary service, and we have the outside or community report and now he is all ready for the hearing.

Mr. Carabine: At that point, yes.

Senator Hastings: Can we stop there? The only contact he has had has been with the parole service on his arrival, and then there was the briefing and now he has one more interview at the end.

Mr. Carabine: That is correct.

Senator Hastings: So, between the beginning and the end he has had no contact with the parole service.

Mr. Carabine: Not in the usual fashion, no.

Senator Laird: You have mentioned he was examined as to whether or not he had a trade. Let us suppose he does have a trade. What steps, if any, are taken either to have him continue in his trade or to learn a new trade?

Mr. Carabine: There again, we are talking about penitentiaries. As I have spent a little time with Penitentiaries, I suppose I can answer this. There are various institutions that are specifically designed for training inmates, for example, Collins Bay in Kingston, the Federal Training Centre in Montreal, and so on. Other institutions are geared more toward industrial production rather than training. However, good working habits are, in many respects, as important as a trade in the sense of employment. The classification team, classification board, or treatment team—they use a variety of names—interview the inmate and this interview concentrates on the inmate's interests. He will appear before a board of senior officials within the institution and they discuss with him what he wishes to do and how feasible it would be for him to do this.

Senator Thompson: Mr. Chairman, will you advise me regarding trades within the penitentiary which prepare a man for a job? Would you say that the equipment within the trades are up to date in comparison with the outside world?

The Deputy Chairman: I cannot allow that question, Senator Thompson. you know better than that.

Senator Thompson: I think it is a very pertinent question directed toward rehabilitation.

The Deputy Chairman: Let me make this point clear. We are not dealing with the entire question of correction. Our mandate is to deal with parole. I appreciate the fact that in order to understand parole we need to look at corrections, and I will allow some leeway here. However, to ask a member of the parole services whether facilities which are available within the prison services are adequate is a question he obviously cannot be expected to answer. That is the observation I make, at any rate.

Senator Buckwold: As I listen to the speakers, the classification staff within the penitentiary becomes a vital part of the whole program. In your opinion, how efficient and qualified are the classification staff members?

The Deputy Chairman: No, Senator Buckwold, I will not change my opinion. I intend to give complete leeway here. But as a general rule, our witnesses are members of the parole services, and it is unfair to ask them these questions because they have to refuse to answer them. How can they possibly answer that question? At some later date we might very well have witnesses who could. I imagine such a meeting would have to be held in camera.

Senator Quart: Mr. Chairman, it might give them food for thought.

The Deputy Chairman: The question gives them food for thought. However, I am sure they have already thought about it.

Senator Fergusson: Will you permit us to ask these questions of other witnesses . . .

Senator Hastings: . . . such as the Commissioner of Penitentiaries?

The Deputy Chairman: Right now, it is obvious that the next witness we will likely have will be the Commissioner of Penitentiaries. He has not been warned about this, but your questions have made this quite obvious. However, I cannot allow this witness to be put in the position you are putting him.

Senator Buckwold: May I ask another question?

The Deputy Chairman: You can try.

Senator Buckwold: In the final judgment, how important is the report of the classification staff?

The Deputy Chairman: That is a good question and it is acceptable.

Mr. Street: Senator, I think it is fair to say that all reports which we get within the institution are very important indeed, because if any change in an inmate is going to take place it will take place there. We are looking for changes in attitude. It is the duty of the classification officer to interview the inmate and assess and classify him. As Mr. Carabine mentioned, all these reports are very significant. Our officers interview the inmate and also interview other members of the staff, apart from any written reports they receive, to check on any deficiencies or other available information. We are dependent upon them to inform us how an inmate is getting along.

Senator Buckwold: Are there many occasions on which the parole officer, when he is making his final judgment, will disregard the general implications of the classification staff report?

Mr. Street: He is not allowed to do that. We receive these reports also. The members of the Board, or it might be the entire Board, review these reports. Our officers receive supplementary reports, but they also receive these reports. We will see them, whether he agrees with them or not.

Mr. Carabine: He might disagree with the reports.

Senator Gouin: The witness has referred to pre-sentence reports and has indicated that some provinces were not sending in these reports. Is that what has been said? I was not sure whether all of the provinces . . .

Mr. Carabine: Senator Gouin, I believe it was the Chairman who was speaking; and he referred to the pre-sent-

ence reports and indicated that the number of pre-sentence reports that were made at the court level was not equal among the provinces. They are made available to us later.

Senator Gouin: What about Quebec? Do you have any idea of the number . . .

Mr. Carabine: There is a probation service in Quebec which is growing and we do receive reports from them.

Senator Gouin: Regarding the behaviour of the inmate, what form does the report take outside of dealing with trade, and so on? They may be misbehaving, and I would like to know what points are covered concerning his character?

The Deputy Chairman: Are you referring to the pre-sentence report or the classification officer's report?

Senator Gouin: The classification officer's report.

Mr. Carabine: As I have said, it deals not only with the physical aspects of an inmate's behaviour, in an endeavour to ascertain the essential attitudes of the individual. It is relatively easy to depict the extremes of an inmate, and the so-called wheels within the institution or the inner sanctum. They might very well go along with the rules within the institution while they are inciting others not to follow the rules. His working habits are not good compared with other individuals. Some inmates attempt to learn and understand their own personality. It is that general personality structure of an individual we are concerned with and how that alters, if it does alter.

Senator Gouin: Is there always a psychiatric report in the file?

Mr. Carabine: No, sir, there is not. The majority of inmates would not normally come under the purview of a psychiatrist. Psychiatrists are obviously available. We do have psychiatric reports when they are required.

The Deputy Chairman: When they are required by whom, by yourselves, or if they happen to be in the file, or both?

Mr. Carabine: In both instances. Inmates themselves will ask to see a psychiatrist. An inmate's behaviour, or the crime he has committed may be such that he would be seen by a psychiatrist. These reports are available to us whether they are done as part of the institutional treatment of an inmate or if they are later requested by us.

Senator Quart: Senator Gouin, being from the province of Quebec, stole some of my music! Mr. Street mentioned the decision of the entire Board. With over 30 penitentiaries scattered across the country housing approximately 7,000 inmates involving the travelling parole panel, is it possible to hold many Board meetings of the full membership for policy decisions with respect to important specific cases?

Mr. Street: Yes, senator. As a matter of practice and habit those members who are in town meet every Thursday. This has been the case, except yesterday. Every two months one week is set aside in which all nine members are here for a meeting.

In order to overcome the problem of members being absent from the Thursday meetings our secretary attends to take notes. Minutes of the proceedings are available to absent members on their return.

Senator Quart: Do any particular cases call for the decision of the full Board?

Mr. Street: Yes. All murder cases naturally have to be considered by the full Board. Should the Board recommend parole, those cases must be prepared and submitted to Cabinet. If it is a case of an habitual criminal or a dangerous sexual offender, the application is heard by a majority of the Board. Certain other types of offences, such as armed robbery, would not be dealt with by only two members but by a majority of the Board, or five members.

Senator Hastings: Is it fair to say that any crime of violence requires the whole Board?

Mr. Street: That is roughly it, yes. The cases I mentioned have to be heard by the full Board. No two members could grant parole to a person convicted of armed robbery, for instance. Should the two-man panel consider a case to be important enough or one which might become a cause célèbre, they would not grant the parole on the spot, but would refer it to headquarters for consideration by the remainder of the Board.

Senator Quart: I have been led to believe that the Parole Act specifies that a Board decision is not subject to appeal. Can decisions of the Board be appealed? You mentioned that you submit them to the Cabinet.

Mr. Street: That applies only to murder cases.

Senator Quart: Why is it so for murder?

Senator Hastings: Because it is the Queen's prerogative.

The Deputy Chairman: Because the law so provides.

Senator Quart: I know, but—Well, I must not question the law.

The Deputy Chairman: You are a little off the subject in this line of inquiry.

Mr. Street: I personally would welcome a channel of appeal from decisions of the Board. I am very conscious of the awesome powers we have over the liberty of individuals in deciding the question of their release. However, I cannot think of any manner in which we could establish such a system. The courts are very busy now, and I do not believe they would desire to become involved in questions of release. Since we are conscious of this awesome responsibility, we have means within the Board by which cases to which some doubt attaches can be reviewed by the full Board, although the application may have been refused by two members.

The Deputy Chairman: Honourable senators, allow me to make a statement. We are attempting at the moment to arrive at a general picture of what happens from the time a man enters prison until his release completely from all restraints. Many questions will undoubtedly arise which can be asked at another time. May I again suggest that you make notes and keep them? We will provide other opportunities for discussing these questions, but we are losing continuity.

Senator Williams, may I first of all welcome you to the committee. Do you have a question?

Senator Williams: My question is broad, and may not qualify. I would like to know the percentage of those who apply for parole from the Métis and Indian population of the penal institutions?

Mr. Street: The percentage of the native population who apply?

Senator Williams: That is right.

The Deputy Chairman: That is the percentage of the total number of applications for parole; it would have to be that.

Senator Williams: Perhaps I should rephrase my question. Is there a fair number of Métis and Indian applicants for parole, in view of the very large population of Métis and Indians?

Mr. Street: Yes, there is senator. Unfortunately, we do not compile statistics according to ethnic background. A considerable number of Indians, Métis and other members of the native population, however apply for parole. We go to some pains to consider them. Our officers in the field are in touch with their councils, tribes and representatives on the reservations in making arrangements for their parole, supervision and welfare.

In addition, two years ago we hired eight parole assistants of Indian origin. Two, unfortunately, have since left our employ and two are on educational leave. Four work in our offices in the west.

Senator Williams: Four seems to be a very small number when possibly 25 per cent of the inmates are Métis and Indians. I have nothing to qualify the percentage of the population.

Mr. Street: This was specially done but Indians and Métis are welcome to apply at any time. However, most of our officers hold the degree of Master in Social Welfare and we have not found too many mature persons so qualified. This was a special project for which we reduced our qualifications. These parole assistants were hired even though they did not have the university education and degrees in social work which are usually required. We do have a high percentage, I know, of Indians, Métis and other people getting parole. Since we do not keep statistics on them I am unable to give you exact figures. However, I will do what I can to get you the information.

Senator Williams: Thank you.

Senator Goldenberg: May I come back to the point that was being discussed when I left the committee to answer a telephone call? Perhaps Mr. Street could elaborate on such co-ordination as there may be of institutional and parole plans for an inmate. If Mr. Street has already answered that question, I will not pursue it.

Mr. Street: Collaboration between our people . . .?

Senator Goldenberg: What co-ordination is there between institutional and parole plans for an inmate? Is there co-ordination?

Mr. Street: Yes, there certainly is, senator.

Senator Goldenberg: Is it satisfactory co-ordination?

Mr. Street: Yes, I think so. Perhaps Mr. Carabine could comment on that. But, as he indicated to you, there is a classification board which decides on parole. Sometimes our people sit on those boards to decide the program, and when a case is being reviewed our officer interviews them, and then interviews the classification board and they discuss the program.

Mr. Carabine: There was a memorandum directed to both services, from the heads of each service, with respect to a rather different topic, that of day parole and temporary absence. I would like to read a paragraph of this memo which was sent to both the penitentiary and parole services. This was something that was agreed to in principle, but like all developing programs it is somewhat uneven. The basic job was case preparation for parole supervision. Other than that our staff are encouraged to go into new ventures.

> The inmate's total sentence offers a total program opportunity with two facets, institutional and community. The parole service representative should be involved in the total planning of individual programs, beginning with classification. Their representatives may attend treatment and training boards if they so wish and offer any advice they may have.

That was written well over a year ago. As I say, the basic job is there, and it depends on other circumstances if officers have time to get into these things. Day parole and temporary absence, and early involvement with the inmate by way of classification boards is a new venture, but several of our staff are new directly involved with the institutional personnel—that is, the classification and others in the penitentiary service—with respect to selection for day parole. Also a few of our officers are actually on the classification board.

I cannot answer the question with respect to classification officers. However, I may point out obliquely that the executive director of the parole service formerly was a classification officer, that our board member, Karl Stevenson, who is at the back of the room, formerly was a classification officer, as I myself was. Perhaps that indirectly answers something.

The other point that I should like to make is with respect to the question of probation. We are now developing—and Senator Hastings might be interested in knowing that it is going well in Calgary and Edmonton—a concept on tentative experimental steps to do, in the absence of a pre-sentence report, a post-sentence report, both of which are, in effect, a community assessment to find out the background, the families, and so on. We are gradually working our way into this. This gives us the type of information that would normally appear in a pre-sentence report.

Senator Hastings: I am always glad to hear that Edmonton and Calgary are in the forefront of penal reform and enlightened treatment of inmates. You have completed the file, and you now turn it over to the board.

Mr. Carabine: Prior to the panel leaving for the hearings the material is normally available to them for study. They

then go to institutions in Ontario and Quebec on a monthly basis, and in the east and west, every two months, for the purpose of having a hearing. There is a panel of two, and in attendance are the penitentiary classification officer who knows the inmate as well as the parole service officer who interviewed the individual.

Senator Hastings: The hearing is held in the penitentiary and the man is interviewed. I notice you say, with respect to classification, a penitentiary official; you use the term "classification officer". Is there any assurance that the man's individual classification officer is present?

Mr. Carabine: That is the person who is there.

Senator Hastings: You have various classification officers in the penitentiary. Are they all there?

Mr. Carabine: No, they are not all there. The classification officer who has dealt with this man is there at the hearing.

Mr. Street: That is what you would call his individual officer. He is the one who is familiar with the case, and he is there.

Mr. Carabine: As is the parole officer who interviewed him.

Senator Hastings: Let us now go through the decisions. Would you explain "Parole is Gradual"?

Mr. Street: It means that before we consider putting him on parole we want to give him a bit of gradual release. He may have been in prison for a long time and it is desirable to have him slowly and gradually get used to freedom on parole. So he is taken out for a few hours a day until he gets used to it. If he has been in prison for 10 years, it is almost heartless to turn him out without any preparation. He does not even know how to buy a cup of coffee. In such sentences we provide a gradual release program before he is released on full parole.

Senator Hastings: Who provides that program?

Mr. Street: We do, with the co-operation of the penitentiary people.

Senator Hastings: What about "Parole for Deportation"?

Mr. Street: It means that a man has to be deported; so he is released on parole and goes to the United States or somewhere in Europe. He is turned over to Immigration.

Senator Hastings: What about "Parole in Principle"?

Mr. Street: "Parole in Principle" is somewhat misunderstood. When we started these parole hearings we were flooded with applications. Our staff may have been behind and we had to get the cases done in time. Rather than cause too many delays, the members would interview them at the institution and the community investigation report might not have been finished. They would therefore say "parole in principle", the idea being that if everything is all right in the beginning, and nothing is too negative in the community, or he represents that he is going to get a job or go to school, in such cases they grant him "parole in principle". If he can get a job or go to school, it will take effect as soon as the job or school comes along. It is in order to avoid any further unnecessary delay. It does not happen as much now as formerly.

Senator Hastings: What about "Minimum Parole"?

Mr. Street: I suppose one might call it a special project which was designed some years ago when there were not as many people being granted parole as there are now. We felt that if a man was to be released in a month or two, it would be highly desirable to have him released on parole if he would accept it. As a result of that we offered, without too much screening or selection, the minimum parole to certain types of inmates. Those inmates who were considered to be potentially dangerous and also sex offenders were excluded. In effect, we offered to give them one month for every year of sentence they had, if they chose to take the minimum parole. What it amounted to on a two-year sentence was two months out of prison for eight months supervision.

Senator Hastings: I think the committee would like to know the conditions that you always follow with respect to granting parole.

Mr. Street: The conditions are set forth in our brochure.

The Deputy Chairman: Would you read them into the record?

Mr. Street: I will be glad to go over them again. The conditions on a parole certificate are that the inmate will: report to his parole supervisor as required; report to the police—usually once a month, although in some cases this is not possible; support his family, if he has one, and fulfil his responsibilities. If he is employed, he is not allowed to leave his job without permission, nor is he allowed to leave the area without permission. He is also to follow the instructions of his parole supervisor.

Mr. Genest, the Chief of Parole Supervision, perhaps can give you more details in that respect.

Senator Hastings: We will come to that later.

What about "Parole Cancelled"?

The Deputy Chairman: That will come up later.

Senator Hastings: I suppose "Parole Denied" is straightforward.

Mr. Street: It simply means he did not get parole.

Senator Hastings: Do you set a future date for another hearing in cases where parole is denied?

Mr. Street: If he is serving a long sentence he is seen every two years. In the case of an inmate serving an indeterminate sentence, we are obliged to review his case every year.

Senator Hastings: Can you explain "Parole Deferred"?

Mr. Street: "Parole Deferred" means something less than a two-year deferral. In other words, if an inmate is denied parole he would be seen in perhaps two months or a year—something less than two years. Parole might be deferred to a later date in the hope that the Board would see some kind of improvement.

Senator Hastings: And could you explain "Parole Reserved"?

Mr. Street: This occurs when the Board is waiting for reports. In other words, they do not want to tell the inmate that he is not going to be paroled, because the report might be favourable to the inmate. The board could be waiting for a psychiatric report or a psychologist's report, or some information which they need in order to make their decision.

The Deputy Chairman: That seems to complete the hearing stage. Is everyone satisfied with the information?

Senator Thompson: Mr. Chairman, I wonder if Mr. Street could describe what exactly takes place at a hearing?

Is the classification officer present at the hearing, and does the inmate know what the classification officer's report contains? In other words, is he allowed to see the report?

Mr. Street: I believe he is.

Mr. Stevenson is here and perhaps he will correct me if I say anything with which he disagrees. He handles more of these hearings than I do.

Generally speaking, senator, I believe the inmate knows, in a general way, what is in the report. In other words, he knows whether it is favourable or unfavourable. I think it is the duty of those dealing with the inmate to give him some idea of how he is getting along or of what is contained in the report, without necessarily giving him too many details which would compromise the person giving such information. In that sense I think the inmate has a fairly accurate idea of what is contained in the report. He may not actually see the full report, but he has some idea of what it contains.

Mr. Stevenson, do you agree with that statement, or is that going too far?

Mr. B. K. Stevenson (Member, National Parole Board): I agree with your statement.

Mr. Street: Some of the information contained in the report has to be considered on a confidential basis. If the classification officer revealed negative information it could endanger another inmate's life or the life of a guard.

Senator Thompson: Yes, I appreciate that.

Assuming the parole officer is also present and he makes it known that, in his judgment, the inmate should not be released until he is further rehabilitated, but the Board, in its wisdom, decides that the inmate should be released, would that inmate have difficulty working with the parole officer? Does that happen at all?

Mr. Street: I suppose it could happen because the Board certainly is not bound by the recommendation of a parole officer. I would say that the number of cases where the Board disagrees with the assessment of the officers concerned is less than 10 per cent.

Senator Thompson: Is there a feeling, Mr. Street, on the part of the inmates that they do not get a fair hearing because they do not see all of the reports?

Mr. Street: Occasionally an inmate does write to me saying that he did not get a fair hearing. This does not happen very often, but when it does I refer it to the members of the Board concerned.

Generally speaking, I think the inmates are pleased to appear before the Board, and I believe they do get a fair hearing. You know as well as I do that you cannot please everyone.

Senator Gouin: I should like to know whether there is a psychologist's report contained in the file of an inmate?

Mr. Carabine: In some cases, yes, but not in all cases, except with respect to intelligence and perhaps with respect to personality. Those are tests as opposed to individual interviews.

In cases where an inmate has asked to see a psychologist or if he has been consulting a psychologist or a psychiatrist, then these reports would be in his file.

Senator Gouin: Is there a psychologist attached to the Board?

Mr. Street: Not other than Mr. Carabine.

That is right, is it not, Mr. Miller?

Mr. F. P. Miller (Executive Director, National Parole Board): There are some members on our staff who are trained in psychology, but we do not hire people specificaly as psychologists.

The Deputy Chairman: Do I understand that the psychologist's report is limited to the inmate's intelligence?

Mr. Carabine: His intelligence and his personality.

The Deputy Chairman: Yes.

Mr. Carabine: That is with respect to routine availability, but in certain selected cases, and there are a number, additional reports may be required. Every inmate does not have a psychological or psychiatric report as a blanket routine thing.

The Deputy Chairman: If a man is convicted of a sexual offence, would you automatically have a psychiatrist or a psychologist examine him and make a report, or do you deal with that type of individual without a report?

Mr. Carabine: I would say there have been sex offenders dealt with without a psychologist's report, but I think this would be a rare event. In the vast majority of cases concerning sex offenders we would either have a psychologist's report or a psychiatrist's report. We sometimes have as many as three and even more reports in the case of individuals who have been determined to be dangerous sex offenders.

Senator Goldenberg: Mr. Street, do the members of the Board ever run into the problem of having to distinguish between the inmate who is a con artist and a good talker and those who lack those characteristics?

Mr. Street: Yes, I am sure they do. Of course, we can be conned too, because I am not suggesting we do not make mistakes in judgment. If the man is going to do that, he will have to con many people. I would say that generally

speaking they are fairly easy to recognize. Some of them are extremely clever, as you probably know from your earlier interest in these affairs. Yes, that happens, but he would have to fool many people to get by.

Senator Fergusson: Are there any social workers on your staff, and do they make reports at the time of the hearings?

Mr. Street: We have about 250, all with master's degrees. We have the highest qualified branch in the government service.

Senator Fergusson: Do they make reports?

Mr. Miller: Social workers, psychologists, criminologists and sociologists are hired by us as parole service officers. They are not specifically psychologists, social workers and criminologists. It is a broad field. They do a report for us, with their various trainings and backgrounds.

The Deputy Chairman: Perhaps we could have a file with us for our information, giving the type of qualifications you establish for a person who makes application for employment as a parole officer, without going into it too broadly. Is it agreeable to the committee that we have that information?

Hon. Senators: Agreed.

The Deputy Chairman: Of course, we can get the Parole Board witnesses back at any time if we want to ask more questions.

Senator Thompson: You mentioned psychiatric reports, but I gather employment opportunities are something you are keen on trying to get. I can see that in some cases it is very tough to be constantly working to get enough opportunities in the community for ex-offenders. Do your people meet with trade union officials in order to try to get their support?

Mr. Miller: I could not answer that in detail. I have read reports and comments and talked to officers who have done this. It is part of the community contact, as would be service clubs, after-care agencies, manpower and so on. It is a collective thing. To answer your question specifically, they do not have instructions in that sense, but they automatically do it; and would certainly also be in touch with major employers in the community. There is that constant contact.

Senator Thompson: Are government departments contacted for job opportunities?

Mr. Street: You mean to get a job in the government service?

Senator Thompson: Yes.

Mr. Street: Yes, we have tried, and we have some of our people working in the government service. We investigate every source available. While it is sometimes difficult for people coming out of prison to get a job, in the study we did only last June for this year, which is not the best year for employment in Canada, as you know, of the about 3,000 parolees, which is set out in the brief, 78 per cent were working.

Senator Buckwold: This may be a somewhat difficult question for you to deal with. In coming to a decision, as the Parole Board, what is the relationship of the seriousness of the crime committed, or the severity of the sentence, to the social rehabilitation possibility of the man and his social acceptance in the community?

Mr. Street: If it is a serious crime, in the sense that violence is involved, we are naturally a little more careful than we would be if it were just a simple theft, fraud offence, passing worthless cheques or something like that. Naturally, we are very careful because of the consequences that could follow if the man did it again. We are not concerned with the length of the sentence or the propriety of the conviction; that is none of our business. We are obliged to review at the eligibility date, and our job is to decide whether he can safely be released on parole. Certainly we have to consider the seriousness of the offence, especially if violence is involved, and the community acceptance of him—in other words, is he ready to be paroled, and is the community ready to accept him?

Senator Buckwold: In other words, a model prisoner, with good rehabilitation possibilities who has committed a serious offence, might have a better chance of release than a difficult prisoner who has committed a lesser offence?

Mr. Street: If he was a model prisoner with, do you say, good community acceptance?

Senator Buckwold: Yes, he has a better chance of rehabilitation.

Mr. Street: I would say he would be better off. Even though the crime were serious, if all the reports and the assessments made of him indicated that he was not likely to do it again, and if he had a lot of support on the outside, I would say his chances of getting parole would be fairly good. We are paroling two out of three of those who ask for it now, which is one of the reasons we are criticized. Does that answer your question, senator?

Senator Buckwold: I am a little concerned about this. I am speaking now from the community point of view.

Mr. Street: We have to think about the question of community acceptance. As you know, there was a case mentioned yesterday which we thought was ideal for parole, and we received a certain amount of criticism because the offence was considered to be serious.

Senator Buckwold: Perhaps I could ask you what you mean by "community acceptance".

The Deputy Chairman: Yes, perhaps we should have that term defined, as it is being used so much.

Mr. Street: I guess there are two different things. I was referring to a certain amount of criticism from the public in this particular case. Generally speaking, by "community acceptance" I mean: Does he have a place to live? Does he have a family, do the family welcome him back, and will they support him and help him? Does he have a wife and, if so, does she want him back and will she help him? Does he have a job to go to? Does he have friends, people willing to help him? It was community acceptance, in that sense, that I assumed you were referring to, and that is very important. But there is the other feature, of course.

Senator Buckwold: I was referring to community acceptance by the greater community.

Mr. Street: That is the other part of it that I referred to. Sometimes you run into what we call a cause célèbre.

Senator Buckwold: The kind of thing that worries the community at large on occasions.

Mr. Street: Yes, that is a problem.

The Deputy Chairman: With permission, may I ask a question. "Community acceptance" is so broad a phrase that it is subject to all kinds of interpretation. I am thinking now of a case where a person might have been convicted of a crime in, say, a small community, and the community was really upset about it. To send him back to that community would mean that he just would not get a chance. Do you have any procedure whereby in such a situation you decide that maybe the fellow should go to an entirely new community to get started?

Mr. Street: Yes. That is one of the types of things we find out in a community investigation report, especially if it is a small town. We find what sort of acceptance there will be, and whether everybody will be up in arms about this man going back there. We have to think about that, and sometimes we recommend that he change his parole centre and we set him up somewhere else where he will not run into that community criticism. Yes, that situation arises.

The Deputy Chairman: It could be a family prejudice.

Mr. Street: It could be, yes.

The Deputy Chairman: Now we have got the fellow paroled.

Senator Hastings: Before we leave parole, I should like to pursue another question.

The Deputy Chairman: We are having trouble getting this fellow out!

Senator Hastings: Probably the worst decision you can give is a reserve decision. I will not quote statistics, but if you look at them you will find that the province of Quebec has an unusually large number of these decisions. This is about the worst decision to give a man. He has built himself up over the years to meet this Board, he gets this decision and goes back to wait. It is an agonizing period for him. He does not know whether he is in or out. The men have a term for it, "hanging on the gate".

Mr. Street: Yes.

Senator Hastings: They go through a terrible psychological experience. This precipitated my inquiry to you, sir. I just took 40 who were reserved at Leclair Institute and you probably have my letter in front of you. Out of the 40, 26 did not have the community report.

Mr. Street: We are dependent on people outside our organization to get these reports for us. I do not know how many of those were done by us and how many by other people, but we have to wait until we get them.

Senator Hastings: I appreciate that.

The Deputy Chairman: But you had four months?

Senator Hastings: This is only a month in advance, I think. Even some of those cases did get paroled in time, did they not?

Mr. Street: Yes, some of them did get paroled in time, but some are still waiting for a decision because we had to ask persons outside our organization to get this information for us and, as they are busy, they did not get it done.

Senator Hastings: Do you have adequate staff in the province of Quebec?

The Deputy Chairman: You mean his own staff?

Senator Hastings: Yes, his own staff.

Mr. Carabine: I think it is fair to say that we do.

Mr. Street: Mr. Miller, how would you answer that?

Mr. Miller: I think we have adequate staff there, as compared with the country as a whole. We have been in an expanding period and in certain areas a backlog has built up, for a variety of reasons, more than in other areas. It is a fact that in the Laval office they had a turnover of staff rather rapidly, for a number of reasons, and the new staff had to fit in. To get the work done has not been as easy as we would like it to be. We are in the process of adding staff all across the country.

Senator Hastings: Again, from the inmate's point of view, this is about one of the worst decisions you can give a man, except an outright denial. It is a terribly agonizing period. We set the dates and we know, on a murder conviction, nine years ahead of time that this man will be appearing on a certain date; and you know, Mr. Street, he is going to be faced with reservations and reservations. The worst feature of it all is that you reserve it three months and then you can reserve it in Ottawa for three and for three and for three, and he knows nothing about those reservations that you are making here in Ottawa. He is sitting in the penitentiary. There was a case in Manitoba of a man who sat 18 months.

Mr. Street: A murder case?

Senator Hastings: Yes.

Mr. Street: It takes a long time for it to go through, with all the processes it has to go through; but I guarantee that all those delays were not caused by us.

Senator Hastings: I am not accusing you. I know it is because you could not get your psychological or psychiatric reports; but I say that you know nine years ahead of time, on a murder conviction. Then when the man comes up it seems that there is an automatic reservation until you get further reports.

The Deputy Chairman: May I make a suggestion, Senator Hastings, which I think might be useful? You are dealing with two things. One is a murder conviction, and the decision of the Board has to be reserved because it has to go to the Cabinet. Can you break it down to the type of reservations that are required because of the statutory provision that the Board's decision is subject to approval

or disapproval; and to the other type, those cases where the Board members themselves make a reservation, for whatever reason? I think you have two separate types.

Senator Hastings: Certainly, you can have a reservation because of the report to Cabinet, but most of them are reserved for further psychological or psychiatric reports. I am speaking of murder cases now where the murderer is convicted. These are dragging on into quite a period of time. Also, you have the ordinary reservations because of community reports. You know a year ahead of time that this man is coming up on that date.

Mr. Street: Having a report a year ahead is not much good to us. We want all reports within six months, especially psychiatric or psychological reports. The members are not going to be happy with psychiatrists' reports two years old, or a community report two years old or even one year old. That is why we try to have everything within five months. I am not suggesting that we have not been responsible for some delays, but I am saying—not just suggesting—that most delays are caused by people outside our organization over whom we have no control. We have to refer to psychologists and psychiatrists for reports, and we have to wait until they get around to giving their reports to us. The members are not willing or able to make decisions until they receive the reports.

The same thing applies to community investigation reports. We cannot parole an inmate until we know where he is going and until we know something about him. If we refer it to an outside agency, we have to wait until we get it. We do the best we can, but because they are busy, and for various other reasons, we do not always get the reports in time.

Most of the cases you asked me about were in that category. I think you referred to 26 cases. Well, those were referred to outside agencies.

Senator Hastings: I do not know to whom they were referred. I realize you did not have the community report and were forced to reserve the decision. I appreciate that.

Mr. Street: That is one of the reasons why we thought we should do it ourselves.

Senator Hastings: I think you should, too. If you need additional staff, then you should have it.

Mr. Street: We have to do what we are told.

The Deputy Chairman: If you are going to have a hearing, before commencing the hearing could you not arrange to have all the information you are going to require? In other words, you could postpone the hearing rather than delay the result. I know you operate a little differently from that.

Mr. Street: We try to get the information before. That is why we start all the final processes five months ahead of the eligibility date. The hearing is one month ahead, so that we will know about and can allow for any last-minute delays. At least we have a month. In some of those cases the inmate did get out on his eligibility date, even though we had had to reserve it at the time. That is the way we try to do it. It is not fair to let the inmate go past his eligibility date. If he is suitable for parole, he is entitled to be released on parole on his eligibility date. We try to get all the reports ready and to gear everything for that date.

Senator Thompson: A moment ago, Mr. Street, you said that you wished you could do the community reports yourselves. Why cannot you?

Mr. Street: Well, if we have an officer in Montreal—and we have 14 there, I think—we say, "Do it!" We do not say, "Please, would you do it?" We say, "Do it!"

Senator Thompson: But why did you say you wish you could do it yourselves? Were you suggesting that you cannot; and, if so, why is that?

Mr. Street: Because we have instructions to refer 50 per cent of our cases to outside agencies.

The Deputy Chairman: Is this where your problem arises?

Mr. Street: Part of it. Then there is the other problem concerning psychiatrists and psychologists. We do not hire any of them.

Senator Laird: Mr. Street, are you saying that you are short of psychologists and psychiatrists?

Mr. Street: We do not have any on our staff, sir. I would say, yes, that there is a shortage throughout the country, generally speaking, although we are able to get them. As you know, psychiatrists can make more money in doing more pleasant work in private practice, industry, and so on, than in prison work. So, even though they are well paid, it is hard to get men interested in prison work. It is fair to say that there is a shortage, although the situation has greatly improved in the last few years. We are able to get them, but sometimes there are delays.

Senator Goldenberg: On this question of a shortage of staff, you were talking about mandatory supervision . . .

The Deputy Chairman: We have not reached that stage yet, senator.

Senator Goldenberg: Mr. Chairman, I am referring to the matter of the shortage of staff. I was going to say that that will put further stress on the staff resources.

Mr. Street: Yes, it will.

Senator Goldenberg: Have you been planning to meet the situation?

Mr. Street: We have been planning for a year and a half. This will mean another 70 persons coming out on parole who do not even want to be on parole, and we will have to contend with them amongst the other problems which we will face.

Senator Buckwold: Is there such a thing as a legal aid program for an individual parole applicant to help him in appearing before the Parole Board?

Mr. Street: In some provinces legal aid is available to them, but lawyers do not appear before the Board. However, they can write to us.

The Deputy Chairman: This raises a fairly important question, and I think we may want to go into it later, so I am going to ask Mr. Street right now if he will deal with this so that the committee will understand it. What is the hearing? What representation or assistance is available to

a person making an application, and why do they follow the procedure they do?

Mr. Street: Is this dealing with the hearings?

The Deputy Chairman: What I have in mind is this. Could you explain, so that the committee will understand, first of all, what the hearing is, starting out with the difference between an administrative and judicial procedure; and then going on to the actual process by which the hearing is conducted, what assistance the prisoner is given in providing for his application and what provision there is for his appearance and otherwise? I think this is what you have in mind, Senator Buckwold. I think it will be of help to everybody if you tell us precisely how you handle this situation at the present time.

Mr. Street: So far as the actual hearing is concerned, the inmate appears in person and he is able to make whatever representations he wishes on his own behalf. So far as assistance offered to him is concerned, he has been consulted and interviewed by a parole officer who would be able to give him whatever advice and assistance he wants, and by the classification people in the institution who would tell him what is involved in the hearing, and of course he knows from other inmates what hearings are like. So that is the way the hearing goes, and he may make what other representations he wishes. Then the members ask him questions about his parole program, his background and various other things, to clear up certain problems and points in the interview. So far as legal assistance is concerned, in some provinces legal aid is available, or they may engage their own lawyers at their own expense who may write to us and make representations on their behalf. They may help him plan his parole program.

So far as the actual decision of the Board or the panel is concerned, I do not think there is any use telling the inmate whether it is an administrative or judicial decision. To him it is the most important decision of his whole life, and it is a decision which affects his liberty and whether he gets out on parole or not. So it would be just mumbo jumbo to him to explain that it is an administrative decision rather than a judicial one. No matter what it is called, it is a very important decision to him. But even though I am very conscious of our very awesome responsibilities and powers in regard to this man's life and liberty, I do not think it involves legal matters. Whether he is released on parole or not is a matter of whether it appears that he is safe to be released. Can he be released? Can he be controlled in the community? Is he a suitable risk, and so on? None of these is a legal matter. We do not allow or encourage lawyers to attend a hearing. They may very easily talk to us or write to us at any time and make their representations to us on the inmate's behalf.

The Deputy Chairman: But they are not allowed to be at the hearing?

Mr. Street: No.

Senator Goldenberg: Some inmates are at a great disadvantage in having to present their own cases, are they not?

Mr. Street: I suppose, if you mean they are inclined to be shy or introverted or perhaps nervous.

Senator Goldenberg: Or they cannot express themselves properly.

Mr. Street: Yes, and on the other side of that, you have an inmate who is a real con and speaks very well. In such a case as you are referring to, our members are at some pains to make the inmate feel at ease, to draw him out and ask him questions. There is always the possibility that one person will express himself better than another. Some lawyers are better than others. However, I would say in the case of a person who is nervous or shy, we try to overcome that handicap.

I remember one evening in Joyceville we were sitting very late and we wanted to return this man so he could have his supper. He said that he wanted to wait. He said, "I do not want any supper. I want to know if I am going to be paroled." He would have been a nervous wreck if we had taken him back. But when he came in we put him at ease and made him feel more comfortable, especially after we granted his parole. There is no reason to be nervous, especially after we grant a parole.

Senator Goldenberg: What happens to a person who is, to a degree, mentally retarded, as I am sure some of them must be?

Mr. Street: The same thing happens, we try to make him feel at ease. They study the file before the hearing to ascertain what kind of person they are dealing with. There are some pains taken to make him feel at ease so he will not be nervous. Roughly; only one-third do not get parole; at least, that is the way it has been in the last year. We try to be careful that we do not miss a good person.

Senator Goldenberg: I suppose if an inmate does not speak English or French you provide an interpreter.

Mr. Street: Our Board members would interview him in French.

Senator Goldenberg: But if he does not speak English or French—

Mr. Street: I do not recall that situation ever occuring.

Mr. Stevenson: We would find an interpreter.

Senator Hastings: We have an Eskimo in Drumheller whom we will be interviewing shortly.

Mr. Street: One of our members can speak the Indian language.

The Deputy Chairman: Let us stick for a moment with Drumheller in Alberta. How do your Board members, having arrived in Alberta for a hearing at ten o'clock in the morning, make all the decisions which they have to make in evaluating a person to determine whether he is slick and has to be watched or is slow and has to be helped along?

Mr. Street: They have already done some of this. Mr. Stevenson, if you wish to, you can comment on this. However, they do not start at 10 o'clock. They begin at nine o'clock, sometimes at eight o'clock, and they sit through until nine or ten in the evening. But they have read the files beforehand and they have a very accurate idea about with whom they are dealing.

The Deputy Chairman: The files are prepared by various people on the staff?

Mr. Street: Yes, and the reports are there so they know ahead of time.

The Deputy Chairman: Now, they have the man in front of them, they have read the information which has been compiled by various people, and they make an instant decision as to what type of an individual he is.

Mr. Street: I would think it would not take very long to ascertain what kind of a person you are dealing with. Perhaps you would like to comment on this, Mr. Stevenson.

Mr. Stevenson: There are usually four persons in the room, two members of the Board, a classification officer and one parole officer. We discuss the case first, asking the classification officer to give us a summary of the institutional report. We then ask the parole officer to summarize his report. Although we have these reports in full detail we like to be brought up to date. The inmate then enters and we discuss his case with him. The interview will last perhaps 15 minutes, half an hour, maybe one hour. The inmate then leaves and we discuss the case further, arrive at a decision, ask the man to return and give him that decision.

Mr. Street: I might say that Mr. Stevenson was our regional representative in Vancouver before his appointment to the Board. He was also a classification officer in the British Columbia penitentiary for some years prior to that.

The Deputy Chairman: In other words, Mr. Stevenson has had experience first as a classification officer, then as a parole officer and now as a member of the Board.

Senator Hastings: You used the term "a classification officer" again. Is it the man's individual classification officer?

Mr. Stevenson: That is right. Sometimes the classification officer states that he does not know the applicant very well. I know from my own experience that with a case load of 150 to 200 inmates he may have seen an individual only once or twice since his admission. He may, as I did when I was a classification officer, have seen the man on admittance to the institution and again at the time of his application for parole. This is perhaps seven or eight months after his admission. That is the type of individual attention that is possible.

The Deputy Chairman: For a classification officer?

Mr. Stevenson: Yes, in most cases.

Senator Hastings: You said sometimes and now you say in most cases. Which is it?

Mr. Stevenson: In most cases.

Senator Hastings: For that reason the classification officer hardly knows the man he represents?

Mr. Stevenson: That is right. He has the background information and so on, but very few are involved in an intensive counselling process.

Senator Hastings: Is this because of lack of staff?

Mr. Stevenson: Yes.

Senator Hastings: So the man is really very much alone.

Senator Williams: Mr. Stevenson, in the area of Vancouver and new Westminster there is an institution in which I understand there are a fair number of our people. In your experience with those who apply for parole, did you find that their educational standards were very, very low, putting them at a disadvantage in expressing themselves to people of very high standards?

I have heard this morning that those acting on the part of the establishment, if I may use that word, hold master's degrees. In view of this it is difficult for the Indian or Métis inmate to receive a full or understandable picture. In view of that, how do you reach them?

Mr. Stevenson: I agree that it is very difficult with any member of a minority group who comes before us to persuade him to speak freely. We do our level best. Sometimes we know they are nervous and ask observers who might be in the room to leave so that there are just three of us together. We try to phrase our questions as simply as possible. We try to get over to him that we are interested in helping him through parole. That is the main thing.

Senator Williams: If he is fortunate and gets across to you or other people in your category, and he has been a transient possibly for a number of years—he could have come from any part of Canada and ended up in Vancouver or New Westminister—if he is qualified for parole, where does he go? Then comes the question of community acceptance. Is he shipped back to his reservation, whether it be in Manitoba or in the Yukon? He may have been a foreigner to his own people for perhaps the past decade. What happens?

Mr. Stevenson: We have to arrive at some decision. If, from the plan that he presents to us, it is considered not to be in his best interest for him to return to the very environment that brought him into prison, we might come up with another one of these terrible "reserve decisions", and try to get someone to work out a new plan with him rather than say no at the time. We may think that he needs a chance and that he can do well on parole, if the environment is correct. So a "reserve decision" is the only fair way at that point, and to have somebody work with him to develop a new plan.

Senator Williams: This terrible "reserve decision" leaves him hanging in suspense until possibly the next year?

Mr. Stevenson: Yes.

Senator Hastings: Do you not agree that in western Canada, where our Indian prison inmate population runs from 38 to 46 per cent, these boys are at a great disadvantage, as they are throughout life?

Mr. Stevenson: I agree, and I am very happy to go out on panels to the west with Mr. Maccagno who is able to speak some Cree, because the minute he says a few words of Cree to an Indian inmate it helps relax the whole atmosphere.

Senator Williams: There is very little Cree spoken in British Columbia, except in the northeastern portion of the province.

Senator Goldenberg: I happen to know British Columbia very well, and the Premier of British Columbia is always complaining that the rest of Canada comes to settle there. Does not the problem of community acceptance create a very serious problem in British Columbia? As you know many people come there from the rest of Canada as transients and this creates problems for people who have been there for some time. The problem of community acceptance is there, and people are placed at a great disadvantage.

Mr. Stevenson: That is right. All ex-inmates have a handicap because they have a criminal record.

Senator Goldenberg: But they have a particular handicap. An inmate from Quebec in a Quebec penitentiary would probably have his family there, but what happens to these other people? Do you reserve your decision?

Mr. Stevenson: If no satisfactory plan can be worked out, then we have to arrive at a denial or a deferral, if more than two years is left on the sentence. We go through hell in coming to decisions of this type, because we often feel that the fellow could benefit from parole and yet there are no resources to help him. I dislike making such decisions.

Senator Buckwold: Is there any validity to what you sometimes read in the newspapers about prisoners wanting to achieve what university students seem to have achieved, that is to become part of the decision-making process of the institutions?

Would it be any improvement in the parole system if, in fact, responsible inmates passed some judgment on their peers in so far as parole is concerned? Do you feel they could be objective?

Mr. Stevenson: I think the inmates know each other very well; they know the phoneys better than we do, but whether they would put themselves in the position of judging another inmate, I do not know.

They try to do this in group counselling and it works in some institutions while failing in others. I believe Matsqui penitentiary is using this method to some extent, but it is difficult to break down the values, and so forth, of the inmate subculture.

Senator Buckwold: You do not feel they could be objective?

Mr. Stevenson: It would be quite difficult.

Senator Thompson: I believe you stated you started hearings at 8 o'clock and sometimes 7.30 in the morning and you go through until 9 o'clock at night. What is the largest number of applicants you have heard in a day?

Mr. Stevenson: I believe 30 applicants is the largest. We average about 15 to 20 a day.

Senator Thompson: That would mean that some of them would spend very little time before you.

Mr. Stevenson: Yes. I do not know what the average is. One of our members, Mr. Maccagno, keeps a record of the length of time an inmate was present before the board, and the length of time the board takes to come to a decision and so forth. He has all of this information covering the last two years. Quite often, senator, we do not finish at 5 o'clock; we sometimes work until 7, 8, or 9 o'clock.

Senator Thompson: But you have had as many as 30 applicants before you in a day, although it is unusual. Now, does that mean that you require more members on the board, or do you need more hearings, or what?

The Deputy Chairman: You may express an opinion, Mr. Stevenson.

Do you find you are overloaded?

Would you care to rephrase the question, Senator Thompson?

Senator Thompson: Well, I will not press it. I have the feeling of it.

The Deputy Chairman: And you have a feeling of the answer, I think, too.

Senator Thompson: Yes.

The Deputy Chairman: Senator Fergusson?

Senator Fergusson: I realize there are a great many more men than there are women in our institutions, Mr. Street, several thousand men as compared to about 87 women, but all reference to parole has been to "the inmate" and to "him" and to the "man". There has been no reference whatsoever to the women inmates.

The Deputy Chairman: The male includes the female.

Senator Fergusson: I do not accept that, Mr. Chairman. That may be the interpretation in some of our statutes, but that is not my interpretation when I am making a speech. Could you tell us how many women inmates have been granted parole in the last year, and how many applied and were refused?

Mr. Street: I will try to get that information for you, Senator Fergusson, if it is available.

The Deputy Chairman: Do you have another question while we are waiting for that answer?

Senator Quart: I will ask a question in the interim.

Mr. Stevenson, you mentioned something about observers. Do you allow observers to be present when you are interviewing an applicant for parole, or are there just the two of you with the prisoner? Do you allow observers in as well as just the two of you with the prisoner?

Mr. Stevenson: Yes.

Senator Quart: What type of observers?

Mr. Stevenson: There may be the psychologist from the institution. In some institutions there are guidance officers and classification officers. Occasionally we are asked by the John Howard Society or the Salvation Army if they

can sit in. They may have been interviewing the man for some time, they know him. They can contribute something to our discussion, so we allow them to come in.

Senator Quart: They actually assist the application for parole?

Mr. Stevenson: Yes, right.

Senator Quart: Do the chaplains sometimes take part?

Mr. Stevenson: Yes, we have had chaplains in too. In fact, I think it is in Springhill that they take a particular interest; they ask to come in and sit through it, and the inmate is very happy to see him there.

Senator Quart: I am sure he is.

Senator Thompson: Do you travel across Canada?

Mr. Stevenson: Yes, we do, with about 10 to 12 trips a year, lasting about two weeks each, with an average of 150 cases each time. I do not hesitate to say it is a heavy schedule. This is why I am away from home close to two weeks each month, and for a man with a family it is very difficult.

Senator Goldenberg: I want to revert to the situation we talked about earlier, which has troubled me for a long time. You have told us, Mr. Stevenson, that if two men apply for parole, you may find both are equally qualified in personality, change and so on, but one has what you call community acceptance and the other has not. The one who is qualified and has community acceptance is granted parole. The man who is unfortunate enough not to have community acceptance is denied parole; he has to complete his term. Does he not emerge a much more dangerous person? I am using the word "dangerous" but . . .

The Deputy Chairman: Difficult.

Senator Goldenberg: Yes, a more difficult person than would otherwise be the case?

Mr. Stevenson: I agree it would have a negative effect on him. Can we use the term "community resources" rather than "community acceptance"?

Senator Goldenberg: Yes, community resources.

Mr. Stevenson: He has no family resources, friends and so on. He feels less and less a part of society, and I am sure that when he comes out he will not make nearly as good an effort as if he had been released on parole.

Senator Goldenberg: So that by sending him back to complete his term you are really making him a worse citizen.

Mr. Stevenson: Right. But what else can we do? Would you release him to no resources with a fairly good likelihood that he is going to violate and come back, and then all we do is add more time to his sentence?

Senator Goldenberg: What happens is that he goes back, finishes his term, and then when released, being a more difficult person, he may commit a more violent offence and return.

Mr. Stevenson: Very often we try to leave the door open. We say, "Write to somebody. Try to find somebody who will give you a hand. See the John Howard Society, see the Salvation Army; see if they will give you some help in making a post-release plan".

Senator Goldenberg: Do you refer a case like that to the John Howard Society, the Salvation Army, or any other organization?

Mr. Stevenson: The classification officer is there, the parole officer is there; they would both take cognizance of that.

Senator Thompson: Just to clarify the expression "community resources", I assume that is lack of a job, lack of family support.

Mr. Stevenson: Lack of a place to stay. There are now these halfway houses which, fortunately, are coming into existence. These provide for men who cannot go back to their families, and in fact it would be the worst thing for them to do to go back. So a halfway house is a great place, and more and more of them are coming into existence.

Senator Goldenberg: There is an organization called, I think, the X-Kalay Foundation in Vancouver. Does that help to solve the problem I am talking about?

Mr. Stevenson: Sometimes.

Senator Laird: And the St. Leonard's organization.

Mr. Stevenson: Yes, there are many of them across the country which have grown up recently.

Senator Thompson: Taking the individual who I feel is most unfairly treated by our society, the one I have been talking about, would you refer him to an organization—assuming this was in Vancouver—an organization like the X-Kalay one?

Mr. Stevenson: Yes, I think so. If we felt that what they had to offer was what he needed.

Senator Buckwold: The question I should like to ask may have been asked before. This is my first attempt at this committee meeting. I am trying to get the role of the provincial jails as against the federal penitentiaries and the Parole Board.

The Deputy Chairman: I wonder if we could leave that, senator, because that is really another subject. There will be an opportunity again.

Senator Buckwold: Thank you.

The Deputy Chairman: We have the answer to Senator Fergusson's question now.

Mr. Street: Senator Fergusson, it appears that the last year for which complete detailed statistics are available was 1969, and they indicate that we granted parole to 130 lady prisoners in that year and that we refused parole to 36 in that year. So it would appear that the Board members were very big hearted with the fair sex!

Senator Fergusson: Thank you.

Senator Goldenberg: Is "lady prisoners" the women's lib term?

The Deputy Chairman: It is a courteous gentleman's term.

Senator Fergusson: Does this cover both federal and provincial cases?

Mr. Street: Yes, it does.

Senator Fergusson: I was just thinking of the federal cases really, when I was asking the question, but I am glad to have the information.

Senator Hastings: Further to Senator Buckwold's question to Mr. Street, to your knowledge, do you employ any former inmates, or Métis, or native Canadians on your staff, in the parole service?

Mr. Street: We have four Indians or Métis. I do not think we have an ex-inmate.

Mr. Miller: We do not have any ex-inmates on our staff now. We have had ex-inmates and they are ones that we have attempted to take who are actually qualified but who feel they would rather do something else. We have ex-inmates on our staff who are able to act as good parole officers. There are ex-inmates employed by several of the organizations that assist us. We have had ex-inmates involved in supervision in that way as a full-time staff on bodies like the John Howard Society. Also, we have had ex-inmates as volunteers and we have had a seminar of volunteers who assist our parole officers in the supervision. We had an excellent and sensible presentation of what is involved in parole supervision, done by an alcoholic ex-inmate. He had in his care another alcoholic.

Senator Hastings: What is your experience with the ex-inmates?

Mr. Miller: People of this type are very definitely helpful.

Senator Hastings: You say you had four Métis?

Mr. Street: Yes, two of them are on educational leave; two resigned. Those two who are on educational leave are still there, and we will get these two back.

Senator Hastings: Where are they employed?

Mr. Street: Perhaps Mr. Leroux can answer that.

Mr. J. H. Leroux, Assistant Executive Director, Parole Service Administration, National Parole Board: There are two employed on the staff in the Vancouver office; two on the staff of the Brandon office; two in Winnipeg; and one on educational leave from the Regina office.

Senator Hastings: What are they employed as?

Mr. Street: They are employed as parole assistants. They are really parole officers, but they do not have all the qualifications for parole officers, so they are given a special grade so that we can hire them. Their rank is called "parole assistant"

Senator Hastings: Do you have any limit as to the number of parole assistants you can hire?

Mr. Street: Other than a budgetary limit, no. I do not think so. As a matter of interest to Senator Fergusson, we have 19 lady parole officers as well.

Senator Fergusson: Mr. Street, not that I want to have the answer now, but can you tell me how many of those paroles were granted to women from the Prison for Women at Kingston, and how many of those who received their parole broke their parole and had to be returned to prison?

The Deputy Chairman: Mr. Street will get that information for you, senator.

Honourable senators, it is now ten minutes after twelve. Perhaps this would be a convenient time to adjourn.

Mr. Street has given me some figures on the contacts they have with the voluntary organizations. I believe this would form a useful part of the record.

Senator Fergusson: Seeing that I asked the question in the first place, I would move that it be part of the record.

Hon. Senators: Agreed.

(*See Appendix "C"*)

The Deputy Chairman: We have just got the inmate before the Parole Board. We have not even got him paroled yet. Obviously, we are going to have to do some more work on this matter. I think all of us are resigned to the fact that we will have to hold another meeting later on.

The committee adjourned.

APPENDIX "A"

CANADA'S PAROLE SYSTEM

A PRESENTATION TO THE SUB-COMMITTEE OF THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

by

T. G. Street, Q.C.,

Chairman,

National Parole Board

December 1971

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MEMBERS OF THE PAROLE BOARD

CHAIRMAN—T. G. Street, Q.C.

VICE-CHAIRMAN—A. Therrien

MEMBERS—C. Bouchard; J. P. Gilbert; Miss M. L. Lynch, Q.C.: M. Maccagno; G. R. McWilliam; B. K. Stevenson; G. Tremblay.

EXECUTIVE DIRECTOR—F. P. Miller

SECRETARY TO THE BOARD—G. Vincent

CANADA'S PAROLE SYSTEM

Honourable Senators:

I am very pleased to be here today to explain to you the duties and obligations of the National Parole Board and how these duties and obligations are carried out. I welcome this opportunity because despite our efforts to explain parole to everyone concerned, there is always a great deal of misunderstanding about it. During the course of your examination, senior members of the staff of the Board will be made available to you should you wish to explore, in depth or in any detail, the operations of the Board.

I—LEGAL BASIS OF THE NATIONAL PAROLE SYSTEM

The cornerstone of our operations is the Parole Act which was proclaimed in force on February 15, 1959. The Act established a National Parole Board. The Board is now made up of nine permanent members including the Chairman. The Chairman is the Chief Executive Officer of the Board and has supervision over and direction of the work and the staff of the Board. The Headquarters of the Board is in Ottawa, however, panels of the Board travel to the federal institutions and interview inmates who have applied for parole or who have had their parole revoked.

The Act provides that the Board must review and determine whether parole should be granted in the case of every inmate who is committed to a penitentiary, unless the inmate advises the Board in writing that he does not wish to be granted parole. Further, every application received requesting parole from inmates imprisoned in a provincial institution must be considered. There is also the duty of reviewing, once in every year, the case of every inmate who is serving a term of imprisonment of preventative detention. Under the Act the Board must review the case of every inmate whose parole has been suspended for over 14 days and either revoke the parole or continue it.

While the Board's prime function is determining whether or not parole should be granted, the Board is also called upon, under the Act, to make decisions relating to the revocation or suspension of any sentence of whipping or any Order made under the Criminal Code prohibiting any person from operating a motor vehicle. Finally, any inquiry desired by the Solicitor General of Canada, in connection with a request for clemency, is made by the Board. These requests relate to the grant of pardons based on innocence, the remission of fines, penalties, forfeitures or estreated bail.

Under the Criminal Records Act, a duty is placed on the Board to cause proper inquiries to be made in connection with any application for the grant of a pardon under that Act and to make recommendations as to whether or not a pardon should be granted.

The National Parole Board has, with two exceptions, exclusive jurisdiction and absolute discretion to grant, refuse to grant or revoke parole in the case of any person who is under a sentence of imprisonment imposed pursuant to an Act of the Parliament of Canada. The exceptions are in the Provinces of British Columbia and Ontario where the courts may impose, in addition to a fixed term of imprisonment, an indeterminate period. The Provincial Parole Board in those provinces may parole an inmate during the period he is serving his indeterminate sentence. The National Parole Board has jurisdiction over the definite part of such sentences.

While the Board has absolute discretion to grant parole, free from any outside influence, the Act sets out guidelines and limitations. The Board must be satisfied before granting parole that the inmate has derived the maximum benefit from prison, that reform and rehabilitation of the inmate will be aided by parole and that the release of the inmate on parole does not constitute an undue risk to society.

Under the Act the Governor in Council has made regulations prescribing the portion of the term of imprisonment that an inmate must serve before parole may be granted. Generally speaking, this period is one-third of the term of imprisonment imposed, or four years, whichever is the

lesser. Where, however, a person has been convicted of murder, the minimum period, since 1967, that an inmate must serve in prison is 10 years and in addition the release on parole must be approved by the Governor in Council.

II—RELATION OF PAROLE TO SENTENCE PASSED BY THE COURT

The Board is not concerned with the propriety of the conviction or the length of the sentence.

From time to time, the opinion has been expressed that the operation of the parole system constitutes, in some manner, an abrogation or interference with the rights and duties of judges in imposing sentences. Fortunately, most judges recognize that the Parole Act is an integral part of our system for the administration of criminal justice and are pleased to co-operate with the Parole Board.

In passing sentence, judges are aware of the possibility of release on parole in accordance with provisions of the Parole Act. Many judges taking cognizance of this fact have adopted the practice of making known to the Parole Board their views on the desirability of parole as a tool in rehabilitation in particular cases. Such recommendations are most heartily welcomed by the Parole Board whether they support or oppose parole.

Recommendations from judges are given the most serious consideration when the Board reviews applications for parole. Any assistance that the judge can give to the Board which will help it in arriving at its decision is greatly appreciated. We would encourage judges to continue this practice whenever they feel that there are circumstances which should be brought to the attention of the Parole Board.

Parole is a means by which an inmate who gives definite indication of his intention to reform, can be released from prison so that he can serve the balance of his sentence at large in society. under supervision and surveillance, subject to restrictions and conditions designed for the protection of the public and his own welfare.

III—BOARD POLICY IN PAROLE ADMINISTRATION

The dual purpose of parole is the rehabilitation of the offender and the protection of society. It is a means of assisting him to become a useful, law-abiding citizen, while at the same time ensuring that he does not misbehave or return to crime.

The possibility of parole provides a strong incentive to an inmate to gain maximum benefit from the prison facilities and to change his attitude towards crime. It also encourages him to maintain contact with the outside world and to plan realistically for his future. It tends to discourage association with the hard-core criminals and the anti-administration groups in prison, and gives him something to hope and strive for.

There are over 7,000 men in our federal prisons serving sentences of 2 years or more. Over 80% of these men have been in prison before, and a good many have been there many times.

There are, in addition, some 15,000 persons incarcerated in provincial jails and correctional institutions serving sentences of up to 2 years. In many cases, because of lack of facilities and trained staff or because of the short duration of the sentence, many of these institutions lack training programs or have developed very limited opportunities for useful activities. Inmates generally are obliged to waste their time in idleness. They gain no useful experience but are instead subjected to harmful effects from associating with other criminal offenders.

The purpose of a realistic correctional program is to return criminal offenders to society as law-abiding citizens who are willing to accept responsibilities as members of the community. This cannot be accomplished by locking them up away from society and keeping them in prison where they have no responsibilities.

The Parole Board recognizes that there are criminals who have selected crime as a way of life or who are dangerous and pose a serious threat to public safety if they are permitted to be at large. Such persons must be controlled and this can be done adequately only by a prison sentence. Some suffer from mental illness and should be sentenced for treatment in psychiatric institutions. Since two-thirds or more of the people in prison are not dangerous or vicious or violent, most of them could be controlled and treated in the community and parole is one of the means by which this can be accomplished.

Treatment and training within the institution is a vital part of the reformation and rehabilitation process. Parole is a continuation of this program on the outside. The function of the Parole Board is to select those inmates who give some indication that they intend to reform and assist them in doing so, by the grant of a parole. We are looking for a distinct change in attitude and if we do not think that there is at least a reasonable chance they will reform, they are not considered.

Granting parole is not a question of being unduly sympathetic to criminals and their problems but simply a realistic understanding and appreciation of the problems and an attempt to effect a sensible solution in each case. Parole is not a matter of pampering persons who have been sentenced to prison but rather a means for helping those who want to help themselves and of giving them an opportunity to reform if, in the opinion of the Board, the attitude of the inmate and his response to training programs within the institution provide a reasonable expectation that he is sincere in his intention to reform and merits the opportunity to return to the community before the expiry of his sentence.

IV—PROCEDURES PRECEDING BOARD DECISION

The decision of the Board to grant parole is not taken lightly. The Board recognizes the gravity of this decision and the serious consequences which may follow if a person released on parole turns once again to criminal activity. A great deal of careful preparation is made to obtain information and opinions which will assist the Board in arriving at its decision.

Case preparation encompasses all activity prior to the inmate's release on parole or mandatory supervision. It includes the gathering of reports from several sources, interviews, analysis of all pertinent data available and a summary and recommendation for consideration by the Board.

Case preparation procedures vary for cases of inmates serving penitentiary sentences and those serving sentences in other prisons. This presentation will therefore deal first with the procedures in penitentiary cases, following which the differences between the two will be stated.

Penitentiary Cases

A case file is opened in the district office and at headquarters upon receipt of the penitentiary admission document. The identifying information on this form enables us to initiate our requests for reports that do not come to us automatically.

The R.C.M. Police Fingerprint Section record is forwarded to us automatically by that force in each case. This document gives a history of the individual's criminal record.

Certain police forces supply us automatically with reports outlining the circumstances of the offence and other details surrounding the commission of the offence. In all other cases, we request reports from the investigating force. The Board places great stress on having an official version of the offence. The necessity for police reports becomes clear when it is realized that the inmate (like all humans) generally wishes to place himself in the best possible light and is therefore likely to repress certain of the facts surrounding the commission of the offence.

It is a well known fact that police forces will, from time to time, express their displeasure with the activities of the Parole Board. It should be made clear, however, that this fact in no way detracts from the further fact that the reports of individual police officers written with respect to individual offenders are remarkable in their objectivity.

Certain types of cases involve additional enquiries. For example, in cases involving drugs, we request a report from the Division of Narcotic Control, Department of National Health and Welfare and enquiries are made of the Department of Manpower and Immigration with respect to the citizenship status of individuals who may be deportable. Pre-sentence reports are available to us in those cases in which they have been conducted by the provincial probation services.

The inmate is advised in writing of his parole eligibility date and if interested in parole, he is invited to forward his application five months in advance of that date (nine months in advance in life sentences).

Receipt of the inmate's application initiates additional reports by the institutional staff. (At this point, however, we already have on file a social history report from the institution which was completed shortly after admission.) The report at the time of the inmate's application is, in large measure, drawn up by institutional classification officers, but it incorporates reports or comments from staff members who are in frequent contact with the inmate. Depending on the nature of the case, there may be reports from either a psychiatrist, a psychologist, or both. Essentially, the institutional reports tell us of his attitudes, what the inmate has accomplished in the institution, what he has achieved during his sentence by way of training, treatment, etc.

Following receipt of this report, the representative of the Parole Board interviews the inmate. During this interview, the inmate's release plans are discussed in depth, contacts will frequently be made with institutional personnel for additional information and clarification, and in certain cases, a case conference may be held with institutional personnel.

Once the assessment of the individual is completed, the district representative will direct a request for a community assessment. Each district representative is responsible for community assessments within his own district boundaries. Consequently, the file, with appropriate referral material (copies of the various interview reports indicated above), is directed to the office of destination, as required. This office will either complete the investigation or refer the case to the appropriate provincial or private after-care agency in their district.

The purpose of the community assessment is to make in-depth enquiries in the community to determine that aspect of the feasibility of releasing the inmate on parole. The investigation determines the attitude of the family and the community in general toward the applicant. It confirms the inmate's stated release plans in terms of offers of employment, where he intends to live and the willingness of the family and community to assist the applicant with his rehabilitation plans. While the emphasis is on the immediate family constellation, corollary interviews may be held with other relatives, potential employers, police, etc.

Essentially, there are two assessments made. The first of these is the assessment of the man in the institution and the second is the assessment of the adequacy of the community resources to receive him. Changes in the community situation often necessitate a further interview by the parole officer and occasionally, this results in a completely new release plan being formulated. This information is normally available in Ottawa to the Panel Members of the Board who will eventually interview the inmate in the institution.

The panel hearings take place either one or two months in advance of the inmate's eligibility. At the time of the Panel hearing, the institutional officer and the parole officer who interviewed the inmate are present and are able, at that time, to present the Board with up-to-date information about the inmate's situation and plans.

Prior to cases being presented to the Board for review at headquarters, there is a review by the headquarters staff to ensure the presence and adequacy of all material required for the Board review. A Special Categories Section carries out an intensive review with respect to a selected category of cases. These cases include Dangerous Sexual Offenders, Habitual Criminals, Doukhobors, Life cases and any other case designated as "special".

Because of the nature of the cases, the procedures in processing them in the district offices are more elaborate. Before recommending for parole, there are normally case conferences involving the institutional psychiatrist, psychologist, classification officer, a representative of the National Parole Service and other institution officials, i.e., the prison chaplain and training officers who are in daily

contact with the inmate and who are aware of his daily progress in the institution.

Should the case conference decide that further psychiatric opinions are necessary, this is done by bringing together a panel of "outside" psychiatrists for a more comprehensive and independent evaluation. Should it be decided that further treatment is indicated or that a change to a different environment seems necessary, these arrangements are made. The change of environment may be to a hospital or clinic where specialized programs are carried on or the inmate could be moved to a different type of security institution where his rehabilitation would be enhanced.

If progress in the institution appears favourable, an intensive community enquiry is carried out to determine the readiness of the community to receive him.

Following upon positive reports from the institution and from the community investigation, a comprehensive report is prepared by a parole officer. He will summarize all reports on file, discussing the nature of the offence, the findings of the psychiatrists and penitentiary officials, the treatment carried out and the inmate's adjustment to the institution. He will discuss the inmate's present attitudes in terms of the offence and future plans in the event of parole. All of the strengths and weaknesses of the case are discussed and a recommendation is made to the Board. The Board may or may not reach an immediate decision. They may require further clarification of some issue or an elaboration of a particular report. When all issues of the case are covered to the satisfaction of the Board, it is then in a postion to make a definitive decision.

Prison Cases

The procedures that are carried out in penitentiary cases are carried out in prison cases with the following variations:

1. A file is opened upon receipt of an application from the inmate or by someone on his behalf. Together with the inmate's application, the institution forwards a document similar to the admission document which contains the information necessary for us to begin our basic enquiries.

2. No automatic features exist and, therefore, all our reports are requested.

3. The Board Panels do not visit provincial institutions and, therefore, the Board decision is made at headquarters in Ottawa.

V—SUPERVISION OF PERSONS ON PAROLE

A major concern of the Board is the protection of society. We are confident that a system of parole, whereby persons are released under a degree of supervision and control with clearly stated conditions which they must recognize and observe, offers a better protection than unconditional release at the termination of sentence. In all the contacts which the officers of the Board have with the prisoners in the institutions, they encourage them to think in terms of reform and self-improvement and to plan realistic, attainable programs for their future, whenever they are released. If they are granted parole, the officers of the Board are available not only to enforce the observance of stipulated conditions and to maintain supervision but also to provide guidance and counsel to the parolee and to his family. Supervision of the parolee therefore becomes a further step in the process aimed at treatment and rehabilitation of the offender.

At November 30, 1971 there were 5,479 persons on parole in Canada. Officers of the National Parole Service supervised 3,162 and the balance, 2,317, were supervised by aftercare agencies, provincial welfare or correctional services and private citizens who volunteered their services.

When individuals are released on parole, it is our responsibility to help them in every way possible to become law-abiding and productive citizens. The majority of parolees are supervised on a one to one basis; this means that usually each person is seen individually by a supervisor who utilizes the case-work technique. In recent years, however, some other techniques of supervision have been developed, such as the ones utilizing group dynamics. Some specialized group-therapy programs have also been organized on an experimental basis in a few of our offices. Up to now, the results have been quite promising. Other special techniques, e.g., Alcoholics Anonymous, are being utilized. In the course of supervision, we will frequently utilize the services of many professionals and community resources if there are special needs.

Experience shows that the first six months on parole is the most difficult and trying period. This is the time when a good number of parolees encounter their more serious problems and crises in re-adapting to a satisfactory way of life. Because of this, our supervision is more intensive and our contacts are much closer during the first months on parole. We do not want, however, to create dependence. Our ultimate aim is to see these persons accept their own responsibilities.

There are three main aspects in the supervision of parolees which, it is believed, will influence the successful outcome. They are:

1. Service and Assistance
2. Treatment and Support
3. Control and Surveillance

Service and Assistance

The aspect of service and assistance is the one where the material needs of the parolees are evaluated and adequate action taken. Very often they have problems and difficulty in finding employment because of their criminal record. They will be refused employment because they cannot obtain security bonding or employers do not want to hire persons with criminal records. They need assistance from different sources. The supervisor gives practical help in these instances and in so doing he will be able to establish a good relationship. Whenever this has been accomplished, the chances of a successful outcome of the case become greater.

Treatment and Support

This is the most important aspect of supervision whereby professional techniques are utilized, and an analysis of

the personality problems is made. Assistance is given to overcome difficulties of adaption, methods and means of solving crisis situations are shown. Support is given and ways suggested to assist parolees to accept frustration and cope with personal problems without resorting to anti-social action.

Control or Surveillance

The parolee knows that he has been released conditionally, that he has to follow rules and regulations. He is periodically reminded of what is expected of him and the consequences that will likely follow should he not live up to the conditions of his certificate of parole. In the majority of cases, the parolees are required to report regularly to the local police department. In some cases, where it is not deemed necessary or might even be deterimental, this condition is not imposed. When supervising parolees, it is, of course, not possible to follow them twenty-four hours a day. They must learn to be on their own eventually since, in the great majority of cases, parole lasts only a few months and, sooner or later, these persons will not be supervised and will have to make their own decisions and resist the temptations that they may have later on of committing other crimes.

If possible, parolees are visited at work, provided their employers are aware of the fact that they are on parole. Contacts are kept with the families or with other persons interested in them.

If, after trying everything possible to help a parolee, he does not respond, refuses to co-operate or will not observe the conditions of parole, the district representative has the authority to suspend the certificate of parole and issue warrants of apprehension and committal to have the parolee returned to prison. District representatives have the authority to lift such suspensions of parole and order release of the suspended parolee within fourteen days. Otherwise, the case must be reviewed by the Board and either the suspension is lifted by the Board and the parolee is given another chance, after having been warned, or the parole is revoked. In 1970, 312 paroles were revoked because it was found those persons were not following the conditions of their paroles and it was feared that they would commit further crimes.

Finally, if a parolee is found guilty of an indictable offence while on parole, this results in an automatic forfeiture of the parole and this person is returned to custody to serve the remanet of his sentence, i.e., the portion of his sentence which remained at the time he was released on parole plus any new sentence. In 1970 we had approximately 922 forfeitures.

When parolees are supervised by other agencies, the Parole Service retains the same important responsibilities and authority in these cases. Reports relating to the actions and progress of parolees are forwarded to our offices by their supervisors. These reports are evaluated and analyzed. If there are problems, these are discussed with the supervisors and appropriate decisions are taken. Corrective action may include official warnings or disciplinary interviews by the district representative or even suspension of the parole. The district representative also retains the authority to grant or withhold permission for the parolee to travel to other districts, enter into contracts, or make other important changes in his way of life.

VI—PAROLE EXPERIENCE IN CANADA

The Parole Board feels that it may take justifiable pride in its accomplishments to date. In the first 151 months of our operation, we granted parole to 37,710 inmates and during that time we have had to return to prison about 5,000, of which some 3,000 committed indictable offences and forfeited their parole, and 2,000 had parole revoked because they failed the conditions of their parole or committed some minor offence. This means that on the average, for the first 12 years and 9 months of our operation, 87% of persons on parole completed their parole satisfactorily without reverting to crime.

In 1963-64 the Board granted only about 1,800 paroles. At that time the average failure rate was about 10% and we were paroling only 29% of those who applied. Since that time we have been able to recruit more staff and, since the failure rate was so low, we deliberately increased the use of parole. In 1970 we paroled 5,800, or 67% of those who applied. Naturally since there was such a substantial increase in parole, the failure rate also increased, so that at the present time it is running at about 25%.

This record compares very favourably with results in a number of jurisdictions in the United States. Research records of the National Council on Crime and Delinquency, published in December 1970, report on a review of 8 different parole boards. A study which included 1,766 parolees recorded no forfeitures or revocations in the case of 1,146, for an average failure rate of 35%. In a study which included 24 parole boards, it was established that failure rates were as high as 58%.

In 1970 the United States federal Parole Board, which is responsible for adult parole in U.S. federal prisons, granted parole to 45% of those who applied. The recorded failure rate for persons on parole during 1970 was 28.5%. In the same year the National Parole Board in Canada granted parole to 67% of those who applied and recorded a failure rate of only 17%, including revocations and forfeitures.

We recognize that it is extremely difficult to make precise comparisons because all of the factors used as a basis for statistical studies are not always identical. From studies which have been conducted and discussions with representatives of parole boards in Britain and the United States, we are confident that the record of Canada's parole system compares favourably with that of systems in those countries.

Economic Considerations

We believe that parole is not only an effective means of helping and rehabilitating prisoners and making them useful productive citizens, but it also achieves a very considerable saving of expense to the taxpayer.

It costs anywhere from $7,000 to $10,000 to keep a man in prison for one year, and this does not take into account the cost of maintaining his family on welfare, which could be another $2,000 or $3,000 a year. If he is on parole, and

employed, he can support his family, and is thus contributing to the economy of the country as a taxpayer rather than a tax burden.

In a study which we did last June of 2,663 persons on parole, we found that 2,078 or 78% were working. Their average income was $412.00 for the month and their gross income was nearly $857,000.00. The 2,621 men and 42 women in this survey supported 2,279 dependents. Altogether, there were over 5,257 persons on parole on June 30. Assuming that an equal proportion of the other 2,500 or so where working, we can reasonably project total yearly earnings of persons on parole in Canada at approximately $12,000,000.00.

This is money which is going into the economy of the country which would not be going into the economy otherwise, if these people were kept in prison. At the same time, we are saving the cost of their incarceration.

Publicity and Public Relations

In any parole system there are bound to be failures. Unfortunately, parole failures receive much more publicity than do the 75% or so who succeed and are rehabilitated. If there were very few failures, it would probably mean that the Parole board is too rigid in the application of criteria and overly selective. The result would be that many persons who have a reasonable expectation to reform would remain in prison. We would simply be missing the opportunity of helping those who need it and who are going to come out of prison sooner or later, whether we like it or not.

We realize that the public is properly concerned when someone on parole commits another crime. There have also been cases where this has had tragic results. It should be pointed out, however, that accounts of crimes committed by persons parole have not infrequently been in error. In some cases, these reports refer to persons released from prison at the termination of a sentence or who are at large through legislation other than the Parole Act.

We are using all the means at our disposal to inform the public by use of the media, through meetings of our officers with the public, and by the publication of reports to give factual data on the results of the activities of the Parole Board. We do not, of course, jeopardize the possible rehabilitation of parolees through public disclosure either of their identity or of the circumstances related to a case. Parolees are at liberty to discuss these facts themselves and increasingly numbers of them do come forward in response to general invitations to discuss the problems of rehabilitation and corrections at congresses and meetings of criminologists.

The Parole Board feels that it has nothing to conceal in its objectives or activities. Our officers are encouraged to seek opportunities to give information to the public in order to convey a better understanding and enlist support of our efforts.

VII—RESOURCES AND MEANS AVAILABLE TO THE BOARD

The Board is supported by a parole staff composed of social workers, criminologists, psychologists and other professionally trained officers. They assist the Board in carrying out its responsibilities by maintaining liaison with other departments and agencies in the correctional field and in other areas of mutual interest and concern.

The headquarters of the Parole Board is at Ottawa. The staff of the Board, at the headquarters, plans and implements the program of the Board and provides managerial and support services to the organization enabling it to carry out its tasks and objectives.

The Board has established thirty-four offices which are located at centres calculated to provide the widest possible service to the total population. The following is a listing of the location of district offices by region:

Atlantic Provinces

St. John's, Nfld.
Halifax, N.S.
Truro, N.S.
Sydney, N.S.
Moncton, N.B.
Saint John, N.B.

Quebec

Montreal
St. Jérôme
Laval
Quebec
Chicoutimi
Rimouski
Granby

Ontario

Ottawa
Kingston
Peterborough
Toronto
Guelph
Hamilton
London
Windsor
Sudbury
Thunder Bay

British Columbia & Yukon Territory

Vancouver, B.C.
Victoria, B.C.
Prince George, B.C.
Abbotsford, B.C.

Prairie Provinces & North West Territories

Winnipeg, Man.
Brandon, Man.
Regina, Sask.
Saskatoon, Sask.
Prince Albert, Sask.
Edmonton, Alta.
Calgary, Alta.

Parole officers visit penal institutions, conduct interviews with inmates, arrange community investigations and enquiries to establish probable success of parole. They arrange for supervision of paroled inmates, interview employers and representatives of community organizations to promote acceptance of paroled inmates. They prepare reports and recommendations to the Board on applicants for parole and report on progress of paroled inmates.

The Parole Board obtains a great deal of assistance as was indicated earlier from provincial departments of corrections and welfare in several provinces, from private after-care agencies and from individual citizens who volunteer their services. The Board also obtains support and assistance from organizations operating half-way houses and other residential facilities.

The assistance provided by these organizations and the private after-care agencies was recognized by providing them with financial grants which partially covered their operating costs. The Department of the Solicitor General

recognized, in 1970, that the system of grants was inadequate and that a more equitable method of providing financial assistance to the agencies was required. As a result, Memoranda of Agreement were designed whereby a mutually acceptable fee for service basis has been substituted for the former system of grants. These Agreements are re-negotiated annually and appear to have provided us with a workable and acceptable system whereby we can utilize and extend services made available by private and provincial agencies. In the 1971-72 fiscal year, payments to agencies will total some $800,000.00. A listing of the agencies which have entered into Agreements with the Department to provide services to the National Parole Board is included as an appendix.

VIII—CO-ORDINATION OF PROGRAM WITH OTHER AGENCIES

The Parole Board not only works in close collaboration with provincial departments and agencies and with private after-care agencies but also with a wide variety of other federal and provincial departments and with agencies at the local level.

We maintain, at all times, a close liaison with police forces. District representatives of the Parole Board have been requested to arrange meetings with chiefs of police in order to further develop and improve our communications and co-operation with the law-enforcement agencies.

It has been noted above that we are assisted by provincial and private agencies who conduct community investigations, prepare assessments of the situation and supervise parolees. There is a continuing exchange of information between officers of the Parole Service and these agencies. This interchange includes not only routine reports but direct consultation and case conferences.

The co-ordination of activities aimed at developing treatment and training programs to assist the rehabilitation of inmates is being rapidly intensified. The Penitentiary Service has undertaken to prepare parts of the reports which form the submission to the Parole Board. In 1970, we entered into an agreement with the Penitentiary Service whereby parole officers at the Edmonton and Calgary offices in Alberta interview all persons sentenced by the courts in that province to 2 years or more. Using a set of criteria developed jointly by our two Services, the parole officer determines whether the convicted person is to be directed to the maximum security penitentiary at Prince Albert or the medium security institution at Drumheller. This early involvement by the parole officer gives our Service and the Penitentiary Service accurate detailed information which is helpful in planning a suitable training program in the institution and in long-range planning for possible release on parole. This program has proved so satisfactory that we are now proposing to extend the procedure to the Atlantic Provinces and to Saskatchewan and Manitoba as soon as arrangements, which are currently under discussion, can be completed.

District representatives maintain continuing and close relationships with welfare departments, municipal welfare services, organizations which operate half-way houses, Manpower centres, service clubs and a host of other agencies and organizations.

We recognize that successful rehabilitation of criminal offenders is a highly complex problem which involves many facets of community life. We are, therefore, attempting to interest and involve all the community agencies which can play a significant part in assisting in the re-integration of the offender.

IX—NEW PROGRAMS

Today, we live in what has been called the post-industrial or technetronic society, a society in which rapid change is almost taken for granted. But whatever it may be called, the nomenclature clearly indicates a change from traditional patterns. Traditional ways of action are being questioned, altered, or discarded, and rightly or wrongly, traditional values are at stake. While this change has brought benefits, such as a much needed liberalization of certain social values, it has also laid a number of problems at our doorstep. Not the lest of these is wht appears to be a widespread disregard for traditional concepts of law and order and recourse to violence as a means of attaining both legitimate and unlawful ends.

Crime is not a phenomenon peculiar to our time. Nor is all crime directly related to the pressures caused by change; for assault, robbery, and murder have always been a part of man's history. An individual who has a record of drinking and committing offences is certainly not news. But the number of people who are locked into that pattern indicates to us the reaction both to the traditional and to the emerging problems facing our society.

The origins of many offences can be traced to an unfortunate early life, in an inadequate social and economic environment. They may also be traced to the tendency towards a breakdown in the roles once played by the family, the school, the church and the neighbourhood. But drug abuses, political kidnappings, aircraft hi-jackings, fraud, and misleading practices cannot be entirely adcounted for through the explanation of broken homes, poverty, or mental illness. What are the problems, what are the solutions? We cannot fully answer either of these questions yet and I certainly do not intend to offer you a panacea for the cause and the increase in crime.

The Parole Board is conscious of the need to improve on present methods and techniques and to seek new ways of dealing more effectively with the interlocking problems of correction and rehabilitation of persons who commit criminal acts. A number of new projects have been implemented or are in the process of development. It is expected that these will contribute to the overall program and help us to make further progress and improve the results.

Mandatory Supervision

This is a new provision in the Parole Act which applies to persons who were sentenced to, or transferred to federal penitentiaries after August 1st, 1970. It provides that such persons on their release will be subject to supervision under authority of the parole Board for the combined total of the statutory and earned remission standing to their credit where this is sixty days or more. The person subject to mandatory supervision will be in the same position as a paroled inmate in respect of the suspension, revocation and forfeiture of parole.

This new provision of the Act is based on the view that if a person selected for parole requires counselling and supervision, those persons who are not so selected need such counselling and supervision even more. It is the intention of the Parole Board to provide to persons released under mandatory supervision the same level of support, counselling and assistance as is available to persons on parole.

This expansion of our program has not had an appreciable impact on the workload of the staff to the present beyond activities which our officers have undertaken in the institutions to explain the conditions and prepare inmates who anticipate release under these provisions early in the new year. Commencing in January 1972, it is estimated that some seventy persons will be released from the federal penitentiaries under mandatory supervision each month. Since we now parole approximately 3,000 from the penitentiaries each year, representing about 50% of the total population, the cumulative effect of mandatory supervision will be to increase the total number of persons under the authority of the Parole Board by about 3,000. This will represent a very substantial increase to the total workload of the Parole Service.

Temporary or Day Parole

One of the most promising developments in the last few years is an expanded use of what is known as temporary or day parole. This is simply an arrangement whereby a prisoner can be released from the prison in the morning, returning at night or for several days returning to the prison on weekends or by other special arrangements.

This type of parole is employed for two main purposes:

1. It can serve to allow continuity of employment or education, where disproportionately serious consequences would result, such as loss of long-term employment, or loss of a year of studies through inability to complete a term or write examinations.

2. Temporary parole is also used as a preconditioning for full parole and is frequently employed to test an inmate's ability to function in society and assist his re-integration by employment, attendance at retraining courses, etc.

Since persons on temporary or day parole are kept in very close control by the fact that they must report back to the prison at night or for weekends, parole failures in these circumstances are few and persons released in this way can easily be returned to prison if they are unwilling to abide by the conditions under which they are released. In 1970, the Board granted over 700 temporary and day paroles. This year, it is expected that the number will exceed 1,300.

Several provinces have established work release programs for employment and retraining of persons incarcerated in provincial institutions. They are able to do this under the provisions of the Prisons and Reformatories Act. These programs appear to be highly successful. There is a close collaboration between the provincial authorities and the Parole Board, since temporary release under a provincial program is frequently followed by parole.

Research and Pilot Projects

A research project has been jointly sponsored by the Penitentiary Service and the Parole Service to establish a diagnostic and trea'ment plan on an ability study basis which will closely integrate the activities of both our agencies in planning and carrying through the program aimed at effective planning, treatment and supervision of a selected group from the time of their sentencing to discharge from parole.

Officers of the Board are participating in a variety of community projects including development of residential facilities, training courses and programs in community colleges, retraining and employment projects, and participation in community councils of welfare and social service agencies.

In conclusion, I may say that all of our efforts and activities are based on the following premises:

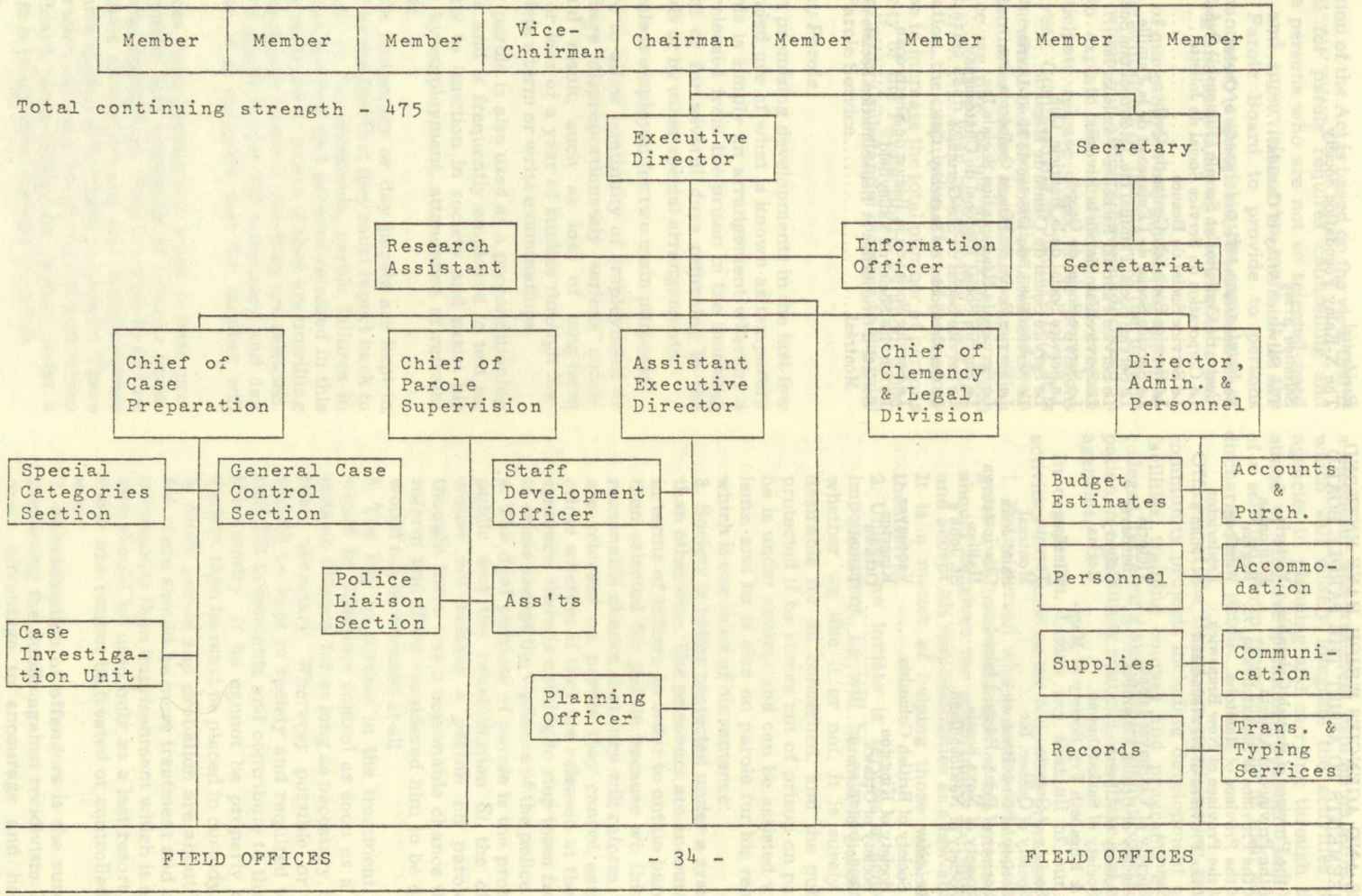
1. Every person who is sentenced to prison and who gives a definite indication of his intention to reform should be given the opportunity to return to society and accept his responsibilities as a law-abiding citizen. It is a matter of helping those who want to help themselves.
2. Unless an inmate is serving a sentence of life imprisonment, he will be released sooner or later whether we like it or not. It is surely much more desirable for all concerned, and the public is better protected if he comes out of prison on parole because he is under control and can be assisted with his problems, and he is also on parole for his remission time, which is one third of his sentence.
3. Society is better protected under a system of parole than otherwise. The prisoners are encouraged to think in terms of reform in order to obtain parole. They are then selected for parole because we think there is a reasonable chance that they will reform. Then, if they are released on parole they cannot easily return to crime whereas if they are released at the end of their sentence, there is nothing to stop them from returning to crime except the vigilance of the police.
4. The dual purpose of parole is the protection of the public and the rehabilitation of the offenders. We would not release a person on parole unless we thought there was a reasonable chance that he would reform and if we considered him to be dangerous, he would not be released at all.
5. The key to success in the treatment of criminals would be adequate control as soon as a person commits an offence, for as long as necessary, but no longer than necessary. Wherever possible or feasible, he should be kept in society and required to work, support his dependents and contribute to the economy of the country. If he cannot be properly controlled in society, then he must be placed in custody.
6. Since parole and probation are about 75% successful, there should be more treatment and control in the community than imprisonment which is often hamrful and should be used only as a last resort and only for those who cannot be treated or controlled in any other way.
7. Rehabilitation of offenders is the surest means of protecting the public against recidivism. It is to everyone's advantage to encourage and help with this process.

The Parole Board hopes that we shall continue to merit the support of the public in our efforts to achieve these results.

PROVINCES AND AGENCIES WHICH HAVE ENTERED INTO AGREEMENTS TO ASSIST THE PAROLE BOARD

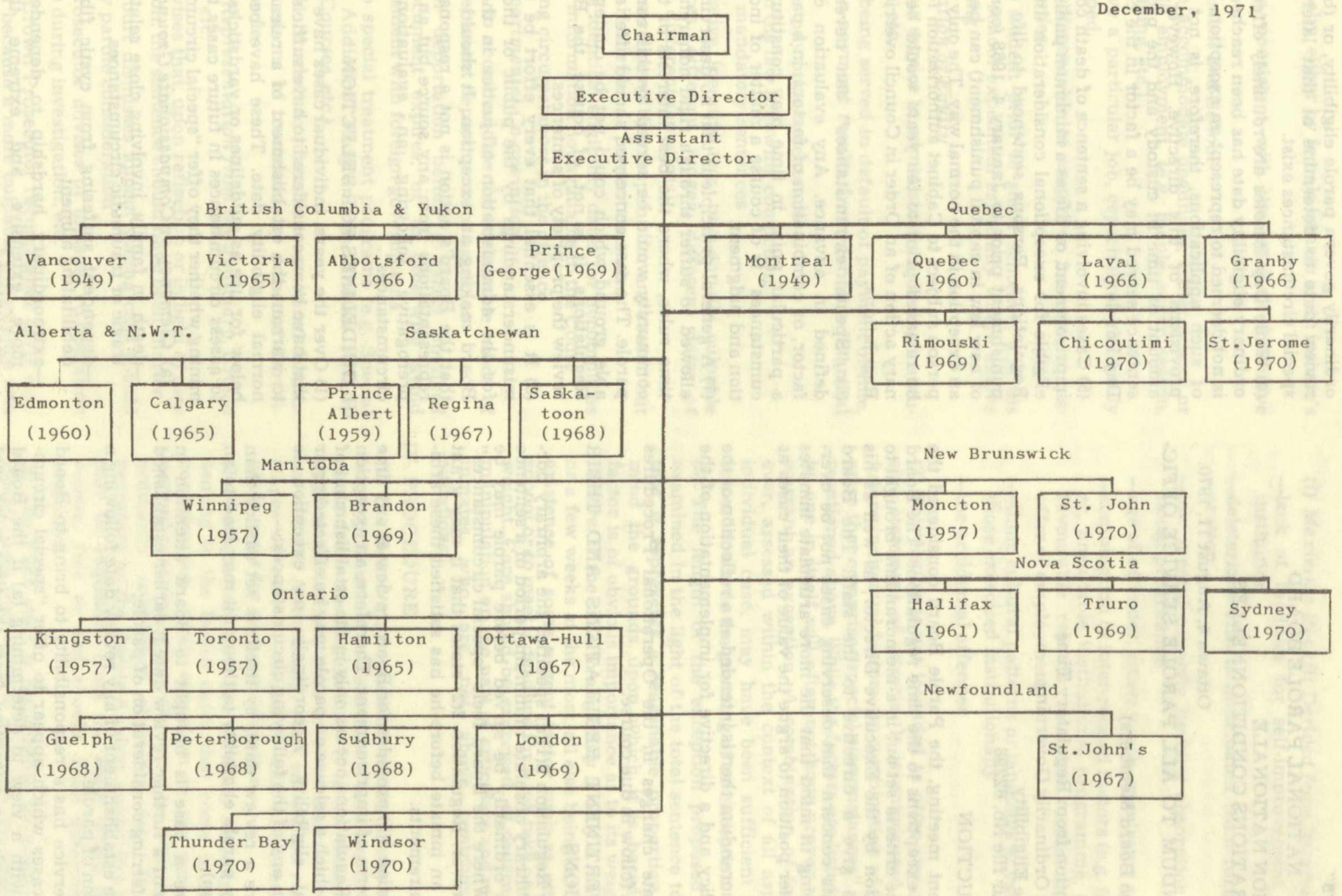
Provinces	
Government of the Province of British Columbia	Victoria
Government of the Province of Alberta	Edmonton
Government of the Province of Saskatchewan	Regina
Government of the Province of Manitoba	Winnipeg
Government of the Province of New Brunswick	Fredericton
Government of the Province of Newfoundland	St. John's
John Howard Societies	
John Howard Society of Vancouver Island	Victoria
John Howard Society of British Columbia	Vancouver
John Howard Society of Alberta	Calgary
John Howard Society of Saskatchewan	Regina
John Howard & Elizabeth Fry Society of Manitoba	Winnipeg
John Howard Society of Ontario	Toronto
John Howard Society of Quebec, Inc.	Montreal
John Howard Society of New Brunswick	Saint John
John Howard Society of Prince Edward Island	Charlottetown
John Howard Society of Nova Scotia	Halifax
John Howard Society of Newfoundland	St. John's
Elizabeth Fry Societies	
Elizabeth Fry Society of British Columbia	Vancouver
Elizabeth Fry Society of Kingston	Kingston
Elizabeth Fry Society of Ottawa	Ottawa
Elizabeth Fry Society of Toronto	Toronto
Residential	
The X-Kalay Foundation Society	Vancouver
Salvation Army	
The Salvation Army of Canada	Toronto
Social Services and Welfare Agencies of Quebec	
Centre de Consultation Sociale (Rimouski) Qué	Rimouski
La Corporation du Service Social de Joliette	Joliette
Le Service Social de Beauce	Montréal
Le Service Social du Centre du Québec	Nicolet
Le Service Social de l'Enfance et de la Famille	La Pocatière
Le Service Social Familial Inc. (Métropolitain Sud)	Longueuil
Le Service Familial Richelieu-Yamaska Inc.	St. Hyacinthe
Le Service Familial de la Rive-Sud	Lévis
Le Service Social de Gaspé	Gaspé
Le Service Social de la Mauricie, Qué.	Trois-Rivières
Le Service Social du Comté de Mégantic	Thetford Mines
Le Service Social du Diocèse de Mont-Laurier	Mont-Laurier
Le Service Social de l'Ouest Québécois, Inc.	Amos
Le Service de Réadaptation Sociale Inc.	Québec
Le Service Social Régional de Châteauguay	Châteauguay
Le Service Social de Ste-Germaine	Ste-Germaine
Le Service Social de Saguenay, Qué.	Hauterive (Saguenay)
Le Service Social de la Région de Sherbrooke	Sherbrooke
Le Service Social de Valleyfield	Valleyfield
Société d'Orientation et Réhabilitation Sociale de Montréal	Montréal

NATIONAL PAROLE BOARD - ORGANIZATION December 10, 1971



National Parole Service - Field Organization

December, 1971



APPENDIX "B"

NATIONAL PAROLE BOARD

COMMISSION NATIONALE
DES LIBÉRATIONS CONDITIONNELLES

Ottawa 4, August 11, 1970.

MEMORANDUM TO ALL PAROLE SERVICE OFFICERS
(with copy to Board Members)

Re:

Exception from Regulatory Time
Rules Ordinarily Governing
Parole Eligibility
—our file No. 62298

I. INTRODUCTION

At a recent meeting, the Parole Board considered the question of exceptions to the time regulations. The Board endorsed the criteria set out in a memorandum brought to their attention by the Executive Director, as well as his proposal to give a directive to the staff. The Board expressed its concern that deserving cases not be overlooked, having in mind that the more articulate inmates are in a better position to argue the value of their cases as exceptions.

This memorandum then is intended as a reflection of the Board's policy and a directive for implementation of the policy.

Appropriate changes in the Operational Procedures Manual will follow in due course.

II. THE PERTINENT REGULATIONS AND THEIR IMPLICATIONS

(1) Parole Regulation 2(1)(a) specifies the arbitrary portion or arbitrary absolute minimum period of a sentence that shall ordinarily be served before parole may be granted. Where the Board feels "special circumstances" exist, however, Regulation 2(2) states that it may grant parole to an inmate before he has satisfied these arbitrary requirements.

(2) Regulation 3(3) provides for Board review at any time during a term of imprisonment. Therefore, an exception from the Regulations occurs only in the establishment of a date at which a release on parole may be effected prior to normal eligibility. Accordingly, no exception is involved in any of the following circumstances:—

(a) where a review date, by itself, is set earlier than ordinary parole eligibility (although it may lead to an exception);

(b) where a case is brought to Board attention in advance of a further review date it earlier established upon deferring consideration of parole;

(c) in the establishment of any review date following a revocation of parole.

(3) The Service has a responsibility to bring to Board attention cases which appear to offer "special circumstances", with a view to determining (a) if the Board wishes to make an exception from the time rules that ordinarily govern parole eligibility, or (b) set an earlier review date to determine at that later time whether special circumstances exist.

(4) While Day Paroles are routinely effected before the ordinary eligibility date has been reached, this situation is not deemed to represent an exception. The processing of such applications, therefore, is not subject to the provisions of this directive. However, the absolute amount of time in custody and the proportion of the sentence served may be a factor in the consideration of Day Parole.

(5) Cases involving a sentence of death commuted to life imprisonment, or life as a minimum punishment, are not eligible for exceptional consideration under the Parole Regulations. Persons sentenced to life as a minimum punishment prior to January 4, 1968 (coming into force of new law in capital punishment) can be considered for an exception in the normal way. The only way in which a person subject to Cabinet authorization for parole could be released prior to ten years would be the extraordinary action of an Order in Council overriding the Parole Regulations.

(6) "Special circumstances" can never be precisely defined in advance. Any evaluation of what single factor, or combination of factors, in a particular case at a particular point in time may constitute "special circumstances" is of course a matter of individual discretion and judgment.

(7) A general principle is that no deserving case shall be allowed to suffer through rigid adherence to arbitrary time rules, where the best interests of the inmate and community would be served by this earlier release on parole. The case concerned should offer a unique justifiable ground which could not be contemplated by the Regulations. It is not, of course, the Board's duty to review the propriety of sentences.

(8) It is essential that every effort be made to avoid misunderstandings by the public or those responsible for the administration of justice in the event of the Board making an exception. It should be understood that the Board's action is not a response to subjective representations from any source but an exercise of its prerogative following an evaluation of "special circumstances".

III. GUIDELINES FOR SELECTION

(1) Over the years, individual cases have offered factors that have been considered to have sufficient significance to warrant the establishment of a release earlier than normal eligibility date. These have been categorized below for use as guidelines or yardsticks against which to assess circumstances in future cases to aid in determining whether they offer "special circumstances".

(a) *Clemency or Compassionate Grounds*

—death in family, involving close relationship and/or tragic or traumatic circumstances

—dependent suffering from cystic fibrosis or other debilitating ailment

—extraordinary hardship to dependent of inmate, more extensive and extreme than normally encountered

—birth of baby, either by female inmate or an inmate's wife

—Christmas, consistent with the spirit of executive clemency

(b) *Employment and School*

—release to accommodate deadlines, either school or seasonable employment, (e.g. maple sugar season, lobster fishing, etc.)

—to preserve a particular job, especially if physically handicapped

—inmate indispensable to employer for certain specialized duties

—inmate a student prior to short sentence, and his return to school expedited, especially where exams forthcoming

(c) *Preservation of Equity*

—meritorious service to administration, during institutional riot, etc.

—sentence being served in default of payment of fine, where non-payment results from genuine financial hardship

—time in custody prior to sentence

—changes in the law following conviction

—minimum mandatory sentences

—administrative inequity (e.g. two equally culpable accomplices, different judges, different dates of sentences, different sentences)

—accomplice released by exception for any reason but especially if relevant to present case also

—to provide identical eligibility dates for accomplices in light of information not available to the Court

—extenuating circumstances in the offence

(d) *Interdepartmental Co-operation*

—generally, to accommodate the reasonable needs of other government departments or agencies

—parole for deportation before a rarely obtained travel document expires, or to otherwise avoid embarrassment with foreign governments

—entry into special treatment programs (e.g. Special Narcotic Addiction Programmes, Indian Affairs Training Courses, etc.)

—transfer from adult to juvenile correctional institution, for reasons of treatment, by a special Certificate of Parole

(e) *Special Representation from the Judiciary, Crown Prosecutor, etc.*

—Judge advises that, upon reflection or in light of new information, the sentence should have been shorter

—Appeal Court dismisses appeal stating case should have early parole consideration

—Crown Prosecutor advises of unusual co-operation by inmate during investigation, etc.

—Judge or Crown Prosecutor recommends early consideration because a more culpable accomplice was acquitted on a legal technicality

(f) *Maximum Benefit Derived from Incarceration*

—lack of facilities for self-improvement within the institution

—deleterious effects anticipated from further incarceration

—low mental capacity limiting absorption of institutional programme

—age of offender, either youth or extreme age

—combination of inter-related factors (e.g. first offender, unsuitable institutional programme, universally favourable reports, receptive community, special offer of employment)

—ethnic cultural patterns or language at variance with those exercised institutionally

—the accidental offender

(2) This listing is not intended to offer any comprehensive statement of criteria. It is anticipated that in the future individual factors, or combination of factors, will arise that comprise "special circumstances" that are not mentioned above. While the factors are listed individually, one in itself will often not have proven sufficient to warrant an exception. *A combination of factors,* however, assessed within the context of all aspects of an individual case, may have been sufficient to "tip the scales" towards the granting of an exception.

(3) The length of the exception proposed should be examined in the light of the total sentence to determine that it represents a reasonable proportion, having in mind the grounds upon which it is based. The time factor is of obvious importance as to its weight on other factors. If the time to eligibility is only a matter of days or a few weeks at the most, all else being favourable, the existence of some urgent factor such as attendance at school or to meet a deadline for a job take on much more weight. Care should be exercised, of course, to prevent manipulation on the part of articulate and manipulative inmates who are not above contriving "urgent situations".

IV. PROCEDURE

(1) The Board may conduct a review at any time following imprisonment to determine if an exception should be made from the Regulations. It is not necessary for an application to have been received from, or on behalf of, an inmate. Accordingly, staff should be vigilant at all stages of case investigation and preparation to spot likely cases for such consideration.

(2) Headquarters staff are normally responsible for presenting to the Board cases that come to attention for consideration of an exception in the period *prior* to normal preparatory activity in a case with respect to the ordinarily established eligibility date. If considered necessary by the Parole Analyst, supportive information may be requested from the Field. *Field staff are, of course, free to and should draw deserving cases to attention.*

(3) The Field staff is responsible for presenting to the Board cases that come to attention for consideration of an exception *during* the period of normal preparatory

activity in a case with respect to the ordinarily established eligibility date.

(4) In some cases of penitentiary inmates, the consideration of a possible exception might require that the inmate appear before a division of the Board earlier than the normal schedule. In such cases action may be taken by the Field staff (or headquarters staff after consultation with the Field staff) to present a proposed action to advance the review date and appearance before the division of the Board.

(5) Summaries compiled for Board consideration of an exception should not be used as referral material to agencies for community enquiries.

(6) In any presentation in support of an exception, following a brief summary of the principal features of the case, staff shall state clearly:—

(a) that they are recommending an exception;

(b) the factors that motivate the recommendation;

(c) why these factors, in their opinion, constitute "special circumstances" that would warrant an exception.

(7) All representations for an exception that are received shall be referred for Board review. Where the staff do not feel they could recommend favourably, it shall be clearly stated:—

(a) that such representations have been received;

(b) the origin and content of the representations;

(c) why these factors, in their opinion, fail to constitute "special circumstances" that would warrant an exception.

(8) The Executive Director shall arrange to maintain a record of all such decisions and shall report from time to time, giving an analysis of the special circumstances which moved the Board to authorize an exception.

V. FORMAT OF SERVICE RECOMMENDATION

(1) If a Service recommendation involves an exception, this fact should be clearly indicated. In the absence of such an indication, it is assumed that ordinary time rules will apply.

(2) The appropriate format would be in accordance with the following selected examples, which cover a number of possible circumstances:—

(a) "I recommend Parole, by exception, to be effective September 15, 1970."

(b) "I recommend Parole for Deportation by exception, to be effective September 15, 1970."

(c) "As a Proposed Action, I recommend that the Parole Eligibility Review Date be amended to March 15, 1971."

(d) "As a Proposed Action, I recommend that the Board review this case on March 15, 1971 to determine if grounds exist for an exception, and that this review be kept in confidence."

(3) Where an application for an exception has been received, and the Service is unable to recommend that such be made, the recommendation is:—

"I recommend that the Board take no action to vary the Parole Eligibility Review Date ordinarily set in this case."

F. P. Miller,
Executive Director,
National Parole Service.

NATIONAL PAROLE BOARD

Agency Contracts—Payment Record 1971

Private Agencies	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
John Howard Society												
Newfoundland	360	570	580	520	590	610	530	520	780	810	900	
New Brunswick	870	1,230	560	860	990	1,000	1,100	980	840	890	840	
Nova Scotia	2,060	1,940	2,210	2,640	2,530	2,960	2,220	2,910	2,590	2,910	3,400	
P.E.I.	—	330	330	330	400	360	330	400	370	370	300	
Quebec	4,810	5,250	5,170	4,990	5,210	5,450	5,360	5,390	5,270	5,560	5,630	
Ontario	12,570	12,290	13,200	12,130	12,590	12,820	12,240	12,580	13,040	13,130	13,740	
Manitoba	2,390	2,300	2,800	2,780	2,930	2,780	3,330	3,000	4,120	3,110	3,450	
Saskatchewan	1,600	1,690	1,570	1,430	1,350	1,780	1,720	1,760	1,910	1,780	2,220	
Alberta	3,130	3,350	3,610	3,120	2,740	2,870	3,200	2,920	2,800	2,860	2,670	
British Columbia	330	1,390	1,330	1,750	1,640	1,910	1,800	1,880	2,040	2,730	2,450	
Vancouver Island	630	710	750	550	390	390	390	430	710	560	510	
J.H.S. OF CANADA	28,750	31,050	32,110	31,100	31,360	32,930	32,220	32,770	34,470	34,710	36,110	
Elizabeth Fry Society												
Ontario	340	300	300	300	300	300	340	300	370	430	450	
British Columbia	280	280	240	280	210	150	170	150	180	120	180	
EL. FRY—TOTAL	620	580	540	580	510	450	510	450	550	550	630	
Salvation Army												
Newfoundland	90	160	130	130	90	120	120	120	90	90	90	
Quebec	570	560	630	660	630	680	720	710	720	660	640	
Ontario	300	280	320	320	300	270	240	250	240	970	420	
Manitoba	2,530	2,420	2,730	2,280	2,520	2,100	2,110	2,020	2,250	1,860	1,700	
Saskatchewan	—	—	—	—	—	40	—	—	—	—	—	
Alberta	560	630	430	390	410	370	340	310	280	310	210	
British Columbia	90	120	160	120	120	270	150	180	180	180	240	
SALVATION ARMY—TOTAL	4,140	4,170	4,360	3,900	4,070	3,850	3,680	3,590	3,760	4,100	3,300	

NATIONAL PAROLE BOARD

Agency Contracts—Payment Record

Quebec Social Service Agencies	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Service Social de Quebec	9,600	9,860	9,920	9,280	9,280	9,700	9,840	9,470	10,600	10,680	111,30	
Service Familial de Quebec	30	70	60	60	30	30	30	30	30	—	—	
S.O.R.S. de (Quebec) Montreal	5,990	5,810	5,490	5,490	5,070	5,250	5,180	4,740	4,700	4,680	5,430	
La Corporation du Service d'Assistance de Joliette	740	660	710	910	660	520	720	600	710	660	670	
Service Communautaire de la Gatineau & des Laurentides, Mont Laurier	240	240	270	210	240	210	240	250	250	320	300	
Le Centre Socio-Familial Laurentian Inc	570	480	450	390	390	390	430	420	420	460	420	
TOTAL—Quebec	17,170	17,120	16,900	16,300	15,950	16,100	16,440	16,010	16,710	16,800	17,950	
Other Private Agencies												
Other Private Agencies												
Manitoba—Catholic Welfare Bureau	70	60	60	90	120	120	120	90	60	60	60	
Vancouver—X-Kalay	330	300	370	420	360	360	450	450	420	360	270	
B.C. Borstal Assoc	—	30	—	—	40	—	—	—	—	—	30	
TOTAL—Other	400	390	430	510	520	480	570	540	480	420	360	

NATIONAL PAROLE BOARD

Agency Dontracts—Payment Record 1971

PROVINCIAL AGENCIES	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
N.B. Probation Serv.....	3,475	3,612.50	3,800	2,287.50	2,700	2,562.50	2,800	2,525	3,250	2,862.50	2,975	
Manitoba Probation Serv	1,370	1,120.00	1,620	1,460.00	1,780	1,380.00	1,700	1,920	1,840	1,960	1,780	
Alberta Probation Serv.....	3,920	4,480.00	4,560	5,370.00	5,020	6,160.00	5,740	6,270	6,230	6,230	5,870	
B.C. Probation Serv.....	—	—	3,330	1,940.00	4,220	4,610.00	4,440	5,400	5,040	4,810	4,540	
N.W.T. Probation Serv.....	90	270.00	250	290.00	350	330.00	360	360	510	380	360	
Department of Social Serv. and Rehab. St. John's.....	—	—	—	—	200	1,460.00	1,550	1,470	1,340	1,220	1,200	
Department of Welfare, Saskatchewan.....	260	250.00	250	430.00	380	460.00	440	450	440	510	520	
Yukon Probation Serv.....	—	—	—	—	—	—	150	230	150	180	210	
TOTAL—PROVINCIAL AGENCIES.....	9,115	9,732.50	13,810	11,777.50	14,650	16,962.50	17,180	18,625	18,800	18,152.50	17,455	
GRAND TOTALS.....	60,195	63,042.50	68,150	64,167.50	67,060	70,772.50	70,600	71,985	74,770	74,732.50	75,805	

Last year of Grants $165,000.00.
1971–72 estimated Costs $800,000.00.

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

Available from Information Canada, Ottawa, Canada.

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

Available from Information Canada, Ottawa, Canada

Third Session—Twenty-eighth Parliament

1970-71

THE SENATE OF CANADA

STANDING SENATE COMMITTEE

ON

LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable J. HARPER PROWSE, *Chairman*

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Prepared

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

Available from Information Canada, Ottawa, Canada.