OUTSIDE THE COURTS

FEDERAL PROPOSALS FOR MORE BANKING COMPETITION DRAW VARIED REACTIONS

The proposals in the Green Paper The Regulation of Canadian Financial Institutions which was published by Minister of State for Finance Barbara McDougall on April 15 has been welcomed by trust and insurance interests, condemned by the banks and treated as a step in the right direction by completion policy authorities.

The principal changes proposed for discussion are:

- Non-bank financial institutions including trust and insurance companies could own a new type of bank (Schedule C bank) under the umbrella of a financial holding company. Such banks would have the same powers as the existing Schedule A chartered banks and, unlike the latter, could be wholly owned by the holding company rather than being subject to the restriction that no person could own more than ten percent of the stock. Securities dealers are largely under provincial control, and their status under the proposals would require negotiation.

- Adoption of new tougher rules to ensure consumer protection and the soundness of financial institutions. The government favours a ban on self-dealing that would, with limited exceptions, prohibit non-arm's length transactions between a financial institution and its controlling interests. A new public body would be created to investigate complaints and represent consumer interests where conflict of interest situations may lead to abuse, such as where a financial institution chooses a course of action which is in its own interest but in conflict with that of a client. A "Chinese wall" would be set up within a trust companay to maintain a clear separation between fiduciary investment decisions made on behalf of trusts and the company's other operations so that confidential information would not be passed between the different divisions of the company.

- The proposals do not apply to the existing chartered banks and none are planned until the decennial review of the Bank Act in 1990.

The Green Paper is Ottawa's response to the mounting pressures against the four-pillar separation of financial institutions, i.e., the banks, insurance companies, trust companies and investment dealers (see also

Canadian Competition Policy Record, March, 1985 regarding the Ontario Securities Commission's recommendations to ease ownership restrictions on the securities industry). The pressures have come from the financial institutions themselves, each class straining to encroach on the territories of the other, and from Canada's urgent need to catch up with the rapid evolution of financial institutions abroad. Factors militating against removal of the four-pillar separation have included concern about the need for special measures to prevent failures of bank and other savings institutions resulting from self-dealing (non-arm's length) transactions and for means of protecting the public against injuries from conflicts of interest within financial institutions. The ten percent equity ownership limitation on Schedule A banks referred to above has probably helped to reduce those problems within that sector although it may also have tended to discourage entry.

Several large Canadian-owned financial conglomerates whose holdings include trust and insurance companies have been mentioned in the press as likely to move into banking if the proposals are implemented. They include Trilon Financial Corp., controlled by Edward and Peter Bronfman, and Power Financial Corp., controlled by Paul Desmarais.

Spokesmen for the chartered banks have reacted negatively, and were particularly incensed by the lack of any proposals for concomitant changes in the Bank Act. Mr. Grant Reuber, President of the Bank of Montreal, also made the following points:

- The proposals would imply a shift in power over financial institutions from the Provinces to Ottawa and might require a long period of negotiations.

- Extending the power of financial conglomerates could reduce rather than increase competition.

- The proposals would mean a heavy and costly overburden of regulations which might still not be effective.

Some of these criticisms have been made by others as well, including James Baillie, a former chairman of the Ontario Securities Commission. He criticized the concept of a fundamental review which left out the "principal players". On the other hand, the Globe and Mail of April 22 published an editorial strongly in support of the proposals.

Assessing the net effects of the proposals on competition is not easy, but combines Director Lawson Hunter discussed the issues at length during a conference on the Changing Regulatory Environment for Canadian Financial Institutions in Toronto on May 23. As in the past, he favoured as much free entry as possible into financial markets, including entry by foreign-controlled firms. He also favoured as few restrictions as possible on the operations of financial firms including conglomerates. He expressed the view that the

proposed ban on self-dealing might be unduly restrictive of competition and hence might create unnecessary inefficiencies. He stated:

> "In this regard, the issue of self-dealing appears to be the most critical. I have argued above that the option put forth for discussion in the green paper that would rely on a ban on self-dealing may be unduly restrictive of competition and hence may create unnecessary inefficiencies. The most important of these would be the inability of related or affiliated financial institutions to put together financial packages for users of capital that include significant amounts of both new equity and debt. These problems could be overcome through a self-regulating mechanism which could broaden the fiduciary responsibilities of the Boards of Directors, increase the standard of care imposed on them, and strengthen the regulatory process in order to ensure that where self-dealing does occur, the deals approximate arm's length transactions."

Mr. Hunter was critical of the kinds of statistics which are frequently cited by those who express concern that discontinuance of the four-pillar separation would lead to undue dominance of financial markets by the banks and large financial conglomerates. Figures showing that the banks account for over 61 percent of the Canadian financial industry's total assets can only be sensibly discussed, he said, in terms of relevant markets. Even existing product market data such as commercial lending, consumer loans and residential mortgages are inadequate. He cited as examples the many different kinds of business financing, which constitute a spectrum of submarkets. He also cited the Caisse Desjardins in Quebec and the cooperatives on the prairies, both of which have extensive branch networks offering lending facilities to small businesses and individuals.

Even more, however, is required to determine actual or potential abuse due to market dominance. He said:

> "One of the essential issues that would seem to be at the heart of the concerns about concentration and removing the inter pillar barriers to entry is the judgement about whether one particular corporate configuration engaged in multi-product and multi-market activities will have such large economies of scale or scope that it will be able to drive all other competitors from the market. To draw that judgement requires among other things a knowledge of economies of scale and scope in the production, distribution and marketing of financial services. Policy analysts must also have a sophisticated and subtle knowledge of how competition takes place in the various sub-markets so that the comparative strengths and weaknesses not only of the various institutional types, but also of the particular corporations involved can be judged. The extent and nature of the legal and economic barriers to entry that determine the contestability of the various market segments will also be

critical."

He opened his discussion of regulatory barriers to entry by stating:

> "I would like to turn now to one of the small number of critical concepts in any competitive analysis. The most fundamental is the contestability of a market. This requires an analysis of the presence and impact of regulatory or other barriers to entry which may make it possible for anti-competitive practices to exist over time. Where barriers to entry and exit are low and markets are highly contestable by existing firms or new entrants, then abuse of market power is extremely unlikely to develop."

After noting some of the restrictions on non-bank financial institutions, including the provisions that trust and mortgage loan companies may not make commercial and consumer loans in excess of seven percent of their capital and guaranteed funds, he said:

> "The above examples are illustrative of the regulatory restrictions which I believe have served to limit significantly the participation by the non-banks in a number of important financial service market segments. Moreover, in a more general way, these restrictions have affected the absolute size and growth of these institutions' asset bases by denying them full flexibility to keep pace with the everchanging nature of financial markets; to take advantage of investment opportunities as they arise; and to enable them to better position themselves to compete for the savings and investment dollars of Canadians. Furthermore, detailed restrictions on the business powers of financial institutions not only limit their ability to diversify their investment portfolios and thus reduce the risk of loss, but also hamper the critical task of matching asset and liability maturities."

He was also critical of foreign ownership restrictions, stating:

> "The foreign ownership restrictions that apply to most financial institutions certainly represent a major barrier to increased competition and entry in our financial services markets. To my knowledge, these restrictions do not appear to be justified by sound economic analysis. Indeed, the nature and type of restrictions vary widely across the financial sector. As we heard from yesterday morning's speakers, financial markets are becoming increasingly internationalized in nature and scope. If we want Canadian industry to be able to access funds at the best rate possible, we cannot insulate ourselves from the world's financial markets. I think it will become increasingly evident that barriers which impede capital

movement into Canada can only be maintained at an economic cost to Canadian users and suppliers of capital."

Mr. Hunter then addressed the question of how best to arrange for financial conglomerates to operate with a minimum of restrictions while still protecting the public against the dangers of self-dealing and conflicts of interest. He contended that while some of the financial conglomerates are big,they do not occupy as large a position in the economy as some have suggested. Taking seven of the larger ones (First City. Crownx, E-L Financial, Investors Group. Laurentian, Traders Group and Trilon), he estimated that their total ownership control excluding assets managed by them under E, T and A arrangements was about ten percent of total Canadian corporate assets and about seven percent of financial sector assets. His figures did not take account of ownership links which exist between some of the financial conglomerates and a number of what he called economy-wide conglomerates, such as the links between Investors Group and Power Corporation and those between Trilon and Brascan.

Noting that the concern about allowing financial conglomerates into banking revolved around self-dealing and conflicts of interest, Mr. Hunter addressed the questions how these potential problems could be met in the least restrictive way. He expressed reservations about the Green Paper's proposal for a ban on self-dealing or non-arm's length transactions, stating:

> "I think we all recognize that while there would be advantages to a general ban on NALT's, there would also be drawbacks. Many self-dealing situations can in fact contribute to the efficiency of our financial markets and the economy. The ability to internally allocate funds between the various diversified corporate arms within a conglomerate can be desirable in that assets can be readily shifted to their most productive use, and risk can be better managed. Other common examples include modern merchant and investment banking which often see the investor placing both equity and debt in a firm. A ban on self-dealing within a financial conglomerate would make these activities impossible.
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> "Concerns have also been raised that if the trend toward financial conglomeration by groups with significant non-financial sector interests continues, the financial institutions that are part of such groups would have the business activities and investment choices available to them and the trust, pension or mutual funds they manage, made even more limited under a general ban on non-arm's length transactions. It should also be noted that to the extent the small number of large integrated financial and non-financial conglomerates is perceived to be a concern, a ban on self-dealing may tend to force them into tighter financial relationships with each other. Lastly, there is no guarantee that an uncompromising ban on self-dealing would be effective in deterring unscrupulous or

fraudulent individuals from involving third parties in transactions in ways that would ensure that the techanical features of the ban were maintained while the effect is otherwise."

Mr. Hunter suggested the following alternative approach to the problem:

> "For these reasons, I think that consideration should be given to whether laws, regulations and procedures could be developed which would address the basic issue of the nature and quality of the decisions that underlie self-dealing transactions. Such a mechanism should focus the minds and energies of the business community on avoiding abuses of self-dealing. This could involve a detailed system of NALTs review by a Committee of Directors who are independent of the transaction. Appropriate legislative amendment could be enacted to establish that the members of the Committee, when active in that capacity, owe a duty of care not only to the financial institution, but also to its depositors, policy holders and certificate holders. Legal sanctions would be required in respect of the Committee members' duty of care to the public to ensure that the persons charged with the responsibility for reviewing these transactions hold this responsibility in earnest. An express duty more onerous that that found in the modern corporate statutes like the CBCA would need to be prescribed. Also, additional intra-corporate and regulatory monitoring wuld be required and special provisions implemented for redress, enforcement and penalties. In this context, the green paper's proposal for discussion concerning the possible establishment of a Financial Conflicts of Interest Office could be used to assist individuals that may have been abused in a self-dealing transaction so that they are not faced with an unequal contest in their efforts to seek redress.
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> "With such a system, arm's length transactions could be approximated,the third parties and regulators would be provided with a high degree of assurance that the deals were being done at fair market value when consideration is given to all factors associated with the individual transactions. If the appropriate legislation is enacted, a reasonable and proper balance could be struck between the objectives of solvency and economic efficiency. While regulatory convenience would seem to favour a self-dealing prohibition, it is my view that the benefits of competition and economic efficiency suggest that careful review is warranted of the option that would rely on implementing procedures to screen non-arm's length transactions, and allow those which are just and reasonable to proceed."

With regard to the conflict of interest problem, Mr. Hunter expressed general support for the "Chinese walls" approach in the Green Paper but favoured extending the concept so as to allow smaller trust and insurance

company's to engage in a broader range of activities without being required to create a financial holding company or a Schedule C bank. He said:

> "One of the rationales for restricting of the line of business of firms in the financial industry is the belief that separation of financial functions is necessary and justified to regulate for solvency, and for the control of conflicts of interest abuses. Clearly, a number of conflicts may arise if financial institutions carry on different activities. The most cited example is the conflicts which can occur when fiduciary and commercial lending activities are allowed to co-mingle. In such situations, a basic conflict will arise when the institution, in the course of its commercial lending activities, obtains material insider information about a commercial customer. The institution owes a duty to its commercial customer, at common law, and to the public under relevant securities legislation, not to disclose such confidential information. On the other hand, the institution owes fiduciary obligations to its trust customers and may possibly be in breach of its obligations if it does not use the information which it possesses for their benefit. The institution may thus incur a liability if it discloses the information to its trust customers, but it may also be liable if it does not disclose it. Further, if a financial institution has lent money to a commercial customer, it has its own interests at stake. If the institution also carries on trust activities, it may find itself in a position where it may be in the interest of the institution to make trust fund investments in the commercial customer in order to protect its outstanding loans.
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> "It is worth noting that the potential for abuse of conflict of interest currently exists within the 7% basket clause. To the extent that the trust industry has been able to deal with the problem, ad hoc solutions obviously exist. Indeed, the obvious conflict of interest that securities underwriters face when giving investment advice to a client is an example of how rules, regulations and procedures can be used to manage and limit potential abuses of conflicts of interest.
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> "As was noted in the government's green paper, the problems raised by conflicts of interest do not tend to be of a nature to threaten the solvency of the institution involved. Notwithstanding this fact, the document reflects the concern that confidence in the system may be diminished by appearances of unfairness or improper use of confidential client information. To address this issue, it has been proposed that Chinese Walls could be created to separate the fiduciary from all other financial operations within an institution and its affiliated institutions under a financial holding company umbrella.
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> "A Chinese Wall is essentialy a collection of rules, procedures

and, possibly, physical arrangements designed to prevent communication of information from one division of an institution to another. The most comprehensive legislative and administrative recognition of Chinese Walls has occurred in the United States. The American experience with the wall has clearly indicated that it is very effective in protecting the public interest without imposing excessive burdens on the operations of financial institutions. Further, there is ample evidence that this procedure has worked well in a number of different applications. The SEC has endorsed Chinese Wall procedures, supplemented by a restricted list, as an effective technique in preventing the flow of inside information. The New York Stock Exchange has also issued a policy statement requiring the erection of an informal Chinese Wall by member firms which have directors sitting on corporate boards. The Code of Ethics and the Standards of Professional Conduct of the Financial Analysts Federation and the Institute of Chartered Financial Anaysts recognizes the value of Chinese Wall procedures in ensuring compliance with laws and regulations relating to the use of material, non-public information and in ensuring that an analyst's personal transactions do not take priority or conflict with those made for clients. There is evidence that Chinese Walls work equally well within the banking sector, from both industry and government accounts.

"In light of this procedure's impressive track record, I think it has potential for a wide range of applications in Canada. In conjunction with appropriate solvency regulations, it could be employed to allow each type of institution to engage in a broader variety of financial activities within the same corporate entity. This could be a particularly important option for smaller trust and insurance companies for whom the creation of a financial holding company or a Schedule C bank could be quite a burden. Heavier reliance on the Chinese Wall could enhance competition among financial institutions, could result in broader access to services for consumers, and could promote greater efficiency within our financial services industry."

EASTMAN COMMISSION WOULD RETAIN COMPULSORY DRUG PATENT LICENSING WHILE INCREASING ROYALTIES AND RESEARCH INCENTIVES

The report of the Commission of Inquiry on the Pharmaceutical Industry, which was tabled in the House of Commons on May 22, recommends retention of compulsory drug patent licensing coupled with measures to increase the compensation paid to licensors and to encourage research and development in Canada. Its recommendations, numbered according to the chapters in which they appear, are:

"8.1 that new drugs should be awarded a period of exclusivity from generic competition of four years after receiving their Notice of Compliance authorizing marketing.

8.2 that a Pharmaceutical Royalty Fund be established and be financed by payments made by firms holding compulsory licences, the payments to be determined by the value of the licensee's sales of compulsorily licensed products in Canada multiplied by the pharmaceutical industry's world-wide ratio of research and development to sales, as determined by the Commissioner of Patents, plus 4 percent (the 4 percent would reflect the value to compulsory licensees of current promotion expenditures of patent-holding firms); and

8.3 that the Pharmaceutical Royalty Fund be distributed periodically to the firms whose patents are compulsorily licensed, each firm's share to be determined by the sales in Canada of its patented products by compulsory licensees multiplied by the firm's ratio of research and development expenditures to total sales of ethical drugs in Canada plus 4 percent (to reflect promotion), all this as a proportion of the same variables for the entire group of firms with patents under compulsory licence in Canada.

8.4 that, conditional on preserving modified provisions for compulsory licensing in the Patent Act as recommended in this Report, limitations on product claims for pharmaceutical products in the Patent Act be removed.

8.5 that reverse onus for pharmaceutical patents be abolished."

9.1-9.8 (These recommendations deal with authorizations for marketing of drugs, a major effect of which would be to accelerate the approval process).

10.1 that all ethical drugs should be prominently labelled with their generic name, whatever other name may also appear on the label.

10.2 that provincial governments should remove restrictions on the advertising of drug prices, dispensing fees, or the sum of both;

10.3 that pharmacists should be expressly permitted to provide information on drug prices over the telephone; and

10.4 that prescription receipts state both the drug cost and the dispensing fee.

10.5 that provincial governments should ensure that public drug reimbursement programs require a significant contribution to each

purchase by the consumer arranged in such a way that price competition is induced, and should encourage private drug insurance plans also to have this feature."

12.1 that government departments review their procedures for granting financial support to research in the pharmaceutical industry with a view to improving the access of small research-intensive firms to such support by making such procedures simpler, faster, more stable, and more predictable."

The recommended four-year period of market exclusivity wuld be of some value to the licensors if the recommended acceleration of the approval processes were implemented. Under existing procedures, generics have not generally appeared on the market until more than four years after the appearance of the patent holder's drug.

Regarding Recommendation 8.2, the Commission reported that the world-wide proportion of r & d expenditures to sales was about ten percent. In consequence, the royalties to be paid by manufacturers of generics would rise from the present four percent of sales to 14 percent including the four percent charge for the promotional activities of the licensors.

The likely impact of Recommendation 8.3 is explained by numerical examples in the report, taking the present proportion of world-wide r & d of ten percent of sales, the present proportion in Canada of 4.5 percent, and present total sales of generics of $46 millions. A licensor with no Canadian r & d would receive royalties of 6.6 percent on generic sales of $5 millions. A licensor with r & d expenditures equivalent to the Canadian average of 4.5 percent would receive royalties of 14 percent. According to the report, the highest reported proportion of r & d to sales was 20 percent, and such a licensor would receive royalties of 39 percent on generic sales of $5 millions.

The Commission placed the annual cost to the consumer of the higher royalties at somewhere between $20 and $30 millions. That compares with estimates of annual savings in excess of $200 millions which have accrued to consumers as a result of lower prices because of compulsory licensing.

Consumer and Corporate Affairs Minister Michel Côte indicated that he plans consultations with interested groups and expects to introduce legislation relating to the Patent Act before the end of the current session of Parliament. Consumer interests, the press and the producers of generics have reacted favourably to the report. However, the licensors, through the Pharmaceutical Manufacturers Associations of Canada commented that the Commission "has at least recognized the need for fundamental changes to the current system" but that the recommendations "are not sufficient to encourage PMAC members to maintain and expand their high-tech research and

development programs".

GENERIC DRUGS ISSUE PRECIPITATES SIX-RESIDENT COMBINES INQUIRY

An application of March 21, 1985 by new Democratic Party Member of Parliament David Orlikow and five other residents in Canada has obliged the Director of Investigation and Research under the Combines Investigation Act to inquire into an alleged agreement among two drug manufacturing asasociations and the Minister of Consumer and Corporate Affairs. A press release by the New Democratic Party refers to "an arrangement between the Pharmaceutical Manufacturers Association of Canada, the Canadian Drug Manufacturers Association and Michel Côte, Minister of Consumer and Corporate Affairs, to issue no further licenses for generic drugs during a 120-day moratorium period now in effect as a violation of section 32 of the Combines Investigation Act". The former association includes the large foreign-owned drug manufacturers and the latter the producers of generics. S.8 of the Act requires the Director to launch an inquiry upon application under s.7 by any six persons resident in Canada who are of the opinion, inter alia, that an offence under Part V of the Act has been or is about to be committed. The Act provides the Director with a number of options after he has completed his inquiry. When he concludes that the Act has been violated, he usually refers his results to the Attorney General of Canada for consideration of possible legal action. When he concludes that no further inquiry is justified, he must so inform the Minister of Consumer and Corporate Affairs and the section 7 applicants, giving the ground therefor.

Documents which were attached to the application included a press release of March 15 by the Department of Consumer and Corporate Affairs announcing a series of consultations to review future direction of the Canadian pharmaceutical industry. It stated in part:

> "Federal Consumer and Corporate Affairs Minister, Michel Côte, announced this afternoon that representatives of the Pharmaceutical Manufacturers Association of Canada and the Canadian Drug Manufactuers Association agreed today to undertake a series of exchanges of views on the future of the pharmaceutical industry as a first step in the consultative process on this matter.
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> As a first step in this process of consultation, the Honourable Michel Côte and the Honourable Jake Epp, Minister of Health and Welfare, met recently with representatives from the Pharmaceutical Manufacturers Association of Canada and the Canadian Drug Manufacturers Association to determine the framework for this aspect of the consultation process. During this period, a temporary postponment of the issuance of new licenses under the Patent Act is in effect. This will give both sides ample opportunity to discuss with the government their views on the

direction in which the pharmaceutical industry should be growing. Mr. Côte also met recently with representatives of the Consumer's Association of Canada, asking them for their continued suggestions on this issue."

In a public statement accompanying the application, Mr. Orlikow stated in part:

> "Generic drugs by their nature are produced to compete with brand name drugs. An agreement to restrict their production that has been facilitated by the Minister is clearly grounds for investigation.
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> "We believe the 120-day moratorium is a clear restraint of trade. We want it ended so that the huge backlog of 153 applications for generic drug licences now before the Commissioner of Patents can be proceeded with immediately. There is a clear threat that these applications will be victims of any final deal between the two drug associations and the federal government.
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> "The Cote method has been to force the generic Canadian drug manufacturers Association to the bargaining table to protect the small 10 percent share they have of the Canadian prescription drug market. He will then call the forced agreement a "compromise" which satisfied everyone following some token after-the-fact "consultations" with interested parties such as the Consumers Association of Canada."

According to press reports, the moratorium on generic drug licences was rescinded on or before March 25, but meetings between representatives of the two drug associations continued.

INTRODUCTION OF COMBINES ACT REFORMS TO BE DELAYED

Consumer and Corporate Affairs Minister Michel Côte has decided not to introduce Combines Investigation Act reforms until the autumn. The reason, according to Giles Cherson in the Financial Post of June 15 is a breakdown in the concenus with business groups which was reached by the previous government.

The Minister has taken a number of initiatives over the past few months in his efforts to complete the drafting of an amending bill. He has circulated a discussion paper, held consultations with an advisory group from the private sector which he formed, and has presented speeches on the issues.

The consultation paper was distributed to some 400 parties along with a letter dated March 20 in which the Minister stated:

> "Notwithstanding certain shortcomings of Bill C-29, I believe that the problems with the legislation and the measures designed to resolve them have already been identified. I do not want to re-invent the wheel. Therefore, I have decided to focus my efforts on the major issues and rely on Parliamentary Committee to deal with matters of a more technical nature."

Bill C-29, which was introduced by the previous government on April 2, 1984, is dealt with in Canadian Competition Policy Record, June and September, 1984.

The Minister's consultation paper describes the following issues, noting possible alternative approaches and soliciting reactions:

> Adjudication: The question whether to rely on the courts or to set up an expert tribunal to deal with reviewable practices is clearly very much on the Minister's mind, and he favours a new tribunal. he emphasizes, however, that 'What is needed is a mechanism for assuring that only highly qualified experts are appointed to this tribunal'".

> Investigatory Powers: The decision by the Supreme Court of Canada in Southam that the search and seizure powers under s. 10 of the Act infringe the Charter of Rights and Freedoms and that the investigatory function of the Restrictive Trade Practices Commission impairs its ability to act as an impartial adjudicator will require major changes in the investigatory provisions of the Act. The paper points out that the nature of the changes required will depend in part upon the decisions respecting adjudication.

> Mergers: Aside from the issue of adjudication, questions are raised about the lessening of competition test, the efficiency defense and the treatment of joint ventures. The paper appears to agree with criticisms that the prenotification requirements in Bill C-29 were too complex.

> Monopoly: Questions include what anti-competitive practices should be specified, the nature of the efficiency test and to what extent the section should apply to joing dominance by more than one firm.

Conspiracy: The paper raises the following issues:

"1. How should the ambiguity regarding inferential agreements be dealt with by an amendment;

2. Should the proof of intent required under conspiracy law be clarified, and if so how;

3. Should the competition test of unduly lessening competition be amended or clarified;

4. How should the deterrent affect of fines under conspiracy law be increased;

5. How may the export exemption be broadened without opening a gateway for harmful effects on domestic competitors and competition?"

Banks: Whether bank mergers and inter-bank agreements should be brought under the Combines Investigation Act.

Crown Corporations: How best to bring the commercial activities of such corporations under the Combines Investigation Act.

On April 22, Mr. Côte announced the formation of a special advisory committee "to examine possible amendements", and be held meetings with them. The members were:

Thomas Kendell of Kendell & Crosbie, Newfoundland
Marcel Côte, President of Secor Inc., Montreal
Marc Regnier, Vice President, CIP Inc., Montreal
Diane Cohen, broadcaster and writer in economics, Montreal
William McKeown of Stephens, French, McKeown, Toronto and former
Deputy Director, Legal, with the Bureau of Competition Policy
Brian Finlay of Weir & Foulds, Toronto
Ron Atkey of Osler, Hoskin, Harcourt (Toronto)
Grant Murray, Vice President, IBM Canada Ltd., Markham, Ontario
Alan Cooke of Cooke, Shandling (Edmonton)
Eric J. Rice of Campbell, Froh, May & Rich of Richmond, B.C.

On April 26 a speech was delivered on behalf of the Minister at the MacDonald-Cartier Club in Calgary during which he discussed aspects of the proposed amendments "that are especially important, and that I am particularly concerned about". Regarding adjudication, he made it clear that, unless persuaded otherwise, he was "personally inclined to favour the export tribunal approach". He stated:

"Over 25 years ago, Mr. Justice Spence wrote '... a court is not

> trained to act as an arbitrator of economics'. Merger activity clearly requires sophisticated economic and business judgement. It also requires an adjudicative process which is fair, open and independent."

The Minister also alluded to conceerns which were expressed by business interests that the proposed definition of merger in Bill C-29 clearly included joint ventures and that there was no appropriate exemption for them. He stated:

> "...our amendements to the Combines Act will attempt to recognize the important benefits of joint ventures, while, at the same time, not allowing a gateway for genuinely harmful mergers."

On the subject of pre-merger notification, he assured his audience that "our proposals for prenototification will be significantly simpler in their formulation than previous proposals".

Briefs which were presented by the Consumers' Association of Canada and by the Canadian Chamber of Commerce in response to the consultation paper serve to underline the wide difference which still exist concerning competition policy reforms. The CAC strongly favours an expert tribunal, a stronger merger provision than that proposed in Bill C-29, the application of the monopoly provision to joint dominance by two or more firms, making price fixing a per se offence and provision for class action suits. The CCC, on the other hand, favours the courts rather than a specialized tribunal for adjudication, expresses doubt about the need for change in the existing merger law, opposes the application of a monopoly provision to joint dominance and favours retention of the conspiracy test of undue lessening of competition.