REGULATORY AND POLICY DEVELOPMENTS

PROPOSED RULES FOR REGULATING THE PRACTICE AND PROCEDURE OF THE COMPETITION TRIBUNAL

By: Randy Hughes, Fraser & Beatty, Toronto

In the November 8, 1986, issue of the Canada Gazette, the Government gave notice that the Competition Tribunal (the "Tribunal") proposed to make certain rules for regulating its practice and procedure pursuant to the *Competition Tribunal Act* subject to the approval of the Cabinet. Interested persons were asked to deliver written representations to the Tribunal in respect of the proposed rules before January 8, 1987.

The proposed rules are based, to a large extent, on the rules of the Federal Court of Canada. Indeed, the proposed rules provide that the practice or procedure set out in the Federal Court Rules shall be followed in circumstances not provided for by the rules of the Tribunal.

Applications Commenced By The Director

Proceedings before the Tribunal are to be commenced by filing with the Registrar a notice of application. Applications by the Director of Investigation and Research (the "Director") in respect of reviewable matters under the *Competition Act* (the "*Act*"), such as refusal to deal, exclusive dealing, tied selling, market restriction, abuse of dominant position and mergers, are initiated by a notice of application filed by the Director. The notice of application is to set out the sections of the *Act* pursuant to which the application is made, the name and address of each person against whom an order is sought, a concise statement of the grounds for the application, the material facts relevant to each ground and the particulars of the order sought. After filing the notice of application with the Registrar, the Director is required to serve a copy of it on each person named in the notice.

A person served with a copy of a notice of application who wishes to oppose the application is required to file a response with the Registrar within 30 days after service of the notice of application. The response is to contain a concise statement of the grounds on which the application is opposed, the material facts relevant to each of those grounds, a statement of any material facts not set out in the notice on which the responding party wishes to rely, an admission or denial of each ground and the material facts relevant to each ground set out by the Director in the notice of application and the name and address of an individual upon whom any documents in the proceedings may be served. After filing the response with the Registrar, a copy of it is to be served on the Director and every other person named in the notice of application. Within seven days after service on him of a copy of a response, the Director may file with the Registrar and serve a reply dealing with the matters raised in the response.

There may be serious consequences arising from a default in the filing of a response. First, a person served with a notice of application who does not file a response is not entitled to notice of any further proceedings before the Tribunal relating to matters set out in the notice. Second, the Tribunal, at the request of the Director, may make such order with respect to that person as it deems appropriate if it is satisfied that a copy of

the notice was served and it has heard such evidence as it may require.

Specialization Agreement Applications

An application by any person for the registration of a specialization agreement is also commenced by filing with the Registrar a notice of application to which is appended a copy of the agreement. The notice is to contain the name and address of each party to the agreement, indicate whether the agreement has been entered into or is about to be entered into and set out a concise statement of the grounds on which the applicant asks that the Tribunal order registration of the agreement, with reference to the factors set out in section 58 of the *Act*. The applicant is required to serve a copy of the notice of application on the Director after it is filed with the Registrar. Within 14 days after service on him of a copy of such a notice, the Director may file with the Registrar, and serve on the person who filed the notice, a notice of opposition containing a concise statement of the grounds on which the application is opposed. Again, there is a provision for a reply dealing with matters raised in the notice of opposition to be filed and served within seven days after service of the notice of opposition.

There are default consequences for the Director in respect of an application for the registration of a specialization agreement. If the Director does not file a notice of opposition within the prescribed period, the Tribunal may make such order as it deems appropriate, at the request of the applicant, if it is satisfied that a copy of the notice of application was served on the Director and it has heard such evidence as it may require.

Pre-Hearing Conference

In an attempt to narrow the issues to be considered at the hearing of an application and resolve certain procedural matters at an early stage, the proposed rules provide for a pre-hearing conference which may be directed by the Chairman of the Tribunal. There are certain matters which are required to be considered at such a pre-hearing conference, including: simplification of the issues, the desirability or necessity of amending the notice of application, the response or the reply for that purpose, the admission of certain facts and information, and the use of documents and transcripts obtained at a section 8 inquiry under the *Act*. Other matters which are to be considered at a pre-hearing conference are the desirability of examining particular persons for discovery or the discovery of certain documents, the procedure to be followed at the hearing of the application, the official language to be used at the hearing, the date, location and expected duration of the hearing, and any other matters which may simplify the evidence and the disposition of the application. As in certain civil court proceedings, the parties appearing at a pre-hearing conference are to file and serve a memorandum setting out the matters to be dealt with at the conference. Drawing from the Federal Court Rules, agreements relating to matters considered at the pre-hearing conference are to be recorded in minutes signed by the parties and countersigned by the judicial member presiding at the conference. Where agreement cannot be reached, the Tribunal may decide the matter. Such agreements and decisions are to govern the hearing of the application unless the Tribunal orders otherwise.

Interim Orders

Applications by the Director for interim orders with respect to proposed mergers, and generally with respect to reviewable matters under Part VII of the *Act,* are to be commenced by filing a notice of application with the Registrar together with one or more affidavits supporting the Director's belief that an order should be made and a memorandum containing a summary of the Director's arguments. These documents are to be served on each person served with the notice of application for a final order of the Tribunal.

Generally, the hearing of an application for an interim order is not to be earlier than 48 hours after service of the notice of application and

accompanying documents, unless otherwise ordered by the Tribunal. That general rule is subject to provisions permitting an *ex parte* application for an interim order in respect of a proposed merger where the notice period cannot reasonably be complied with or there are urgent circumstances.

A person named in a notice of application for an interim order, other than in *ex parte* proceedings, is permitted to file and serve on the Director one or more affidavits in reply to the notice. Generally, evidence before the Tribunal in respect of an application for an interim order is to be by affidavit, although the Tribunal may grant leave for oral evidence to be given and cross-examination on an affidavit.

Other Applications

Applications to the Tribunal for orders with respect to the modification or removal of a specialization agreement or to rescind or vary an order of the Tribunal shall also be made by filing with the Registrar a notice of application. The rules with respect to applications for interim orders will apply unless the judicial member presiding at the hearing orders otherwise.

Interventions

Pursuant to subsection 9(3) of the *Competition Tribunal Act,* any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person. Under the proposed rules, requests are to be made by filing with the Registrar a request to intervene setting out the proceeding in respect of which intervention is sought, and a concise statement of the matters in that proceeding affecting the person. After filing, the Registrar is to serve the request to intervene on all parties to the proceedings. Generally, it is contemplated that a request to intervene will be dealt with at the pre-hearing conference. Otherwise, the request is to be heard by the Tribunal at such time and place as is fixed by the Chairman. The Tribunal is to be empowered to grant or refuse the request, or grant the request on such terms and conditions as it thinks appropriate. In the event that a request for leave to intervene is granted, the Registrar is to give written notice to all parties to the proceedings and the person granted leave is to receive copies of all documents previously and subsequently filed in the proceedings.

The other form of intervention is by the Attorney General of a province in proceedings in respect of specialization agreements or mergers. The Attorneys General will become aware of such proceedings as the Registrar is required to send a copy of a notice of application relating to a specialization agreement or merger to the Attorney General of each province. An intervention by a provincial Attorney General is to be made by filing a notice of intervention. The rules relating to the contents of a request to intervene and service of the document on parties to the proceedings are to apply in respect of notices of intervention.

Interlocutory Matters

The proposed rules provide for motions to be brought before the Tribunal commenced by notice of motion with an accompanying memorandum of argument. Generally, evidence on a motion is to be by affidavit, although leave may be granted by the judicial member presiding at the hearing of the motion for oral evidence or cross-examination on an affidavit. It is also anticipated that motions will be dealt with at the pre-hearing conference where one has been directed. Otherwise, a motion in respect of an interlocutory matter is to be heard by the Tribunal at a time and place to be fixed by the Chairman.

General Matters

The general rule is that proceedings of the Tribunal will be open to the public and any person is entitled to access to documents filed or received in evidence. However, on motion by any party to the proceedings, the Tribunal may

order that the proceedings not be open to the public or that access to documents be denied. Subject to the particular rules requiring affidavit evidence, all evidence before the Tribunal is to be given orally.

There is every likelihood that expert evidence will be a predominant feature of proceedings before the Tribunal, particularly economic evidence with respect to applications involving abuse of dominant position, specialization agreements and mergers. The proposed rules provide that every party to proceedings before the Tribunal who intends to introduce evidence of an expert witness at a hearing shall file with the Registrar, and serve on the other parties to the proceedings, an affidavit of the expert setting out a full statement of the expert's evidence and shall make the expert witness available at the hearing. The expert's affidavit is to form part of, and "need not" be read into, the record. Arguably, this proposed rule does not prohibit a party from reading the expert's affidavit aloud, as is permitted in the Federal Court. Notably, however, upon filing the affidavit, the expert witness is not to be examined in chief but is only subject to cross-examination and re-examination. This may be contrasted with the Federal Court Rules which permit the expert to give oral evidence explaining or demonstrating the contents of the affidavit. In proceedings before the Tribunal, on the other hand, cross-examination is the first oral evidence of the expert to be heard by the Tribunal. This will place considerable pressure on the party calling the expert in re-examination to ensure that the impact of the expert's evidence is not lost. In circumstances where an expert witness is called exclusively for the purpose of rebutting the evidence of an expert witness introduced by an opposing party, an affidavit of the expert need not be filed and that expert may give his evidence in chief orally.

There are a series of rules proposed which deal with such matters as extending or shortening time periods prescribed by the rules, defects of form or technical irregularities, service of documents and writs of subpoena for the attendance of witnesses. These rules are similar to those of the Federal Court. With respect to the composition of the Tribunal, for the purposes of a pre-hearing conference or motions in respect of interlocutory matters, the Tribunal is to consist of one or more members as designated by the Chairman one of whom must be a judicial member. Notably, there are no provisions contained in the proposed rules dealing with the responsibility for costs of proceedings before the Tribunal.

WORK PROGRESSES ON COMPETITION ACT IMPLEMENTATION

The Bureau of Competition Policy is continuing its work on implementing the new *Competition Act*. A series of special workshops and seminars for Bureau staff has now been completed and revised internal procedures are now in place as required for administration/enforcement of the legislation.

Organizational Changes Being Considered

In December, Cal Goldman, Director of Investigation and Research, has indicated that he is examining the possibility of making some changes to the organizational structure of the Bureau aimed at improving its ability to handle cases under the new *Act*, particularly merger matters. At present, the Bureau is structured largely by industrial sector (eg. Resources Branch, Services Branch, Regulated Sector Branch, Manufacturing Branch), not according to the various provisions of the legislation. With the exception of the Marketing Practices Branch, each Branch looks after enforcement of all aspects of the competition law as it applies to the sector in question.

While plans are not yet finalized, it is known that the Bureau is working toward the establishment of a separate Mergers Branch that will handle prenotification cases and merger review for all sectors.

In addition, the Bureau is examining the establishment of a Financial Markets Unit within the Services Branch. The new Unit would better equip the Bureau to deal with this rapidly changing area and would also assume primary responsibility for the new role respecting Banking agreements and mergers.

Merger Pre-notification Regulations

The major piece of unfinished business for the Bureau is the merger pre-notification regulations. According to Cal Goldman, the regulations should be completed and prepublished in draft form early in January, 1987. Under the provisions of the *Competition Act*, they cannot come into effect until 60 days after the date of prepublication. Assuming no major changes in the regulations, proclamation of the pre-notification sections of the *Act* could occur as early as April, 1987.

COMPETITION LAW AND REGULATION: EXPLORING THE BOUNDRIES OF THE REGULATED CONDUCT DEFENCE

By: Eric A. Milligan
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With the new resurgence of interest in economic regulatory reform throughout Canada, in areas such as transport, telecommunications, broadcasting, securities, and financial institutions, the application of competition law to regulated industries is heating up as an area of interest for the Bureau of Competition Policy, and presumably, for the firms involved.

In its simplest terms, as regulatory control over matters such as entry, exit, pricing, mergers, and marketing activity is reduced, the applicability of competition law to the regulated industry should increase. The importance of effective competition law in these situations has been recognized for some time. In its 1981 Report on the Regulation Reference, for instance, the Economic Council of Canada called for application of a strengthened federal *Combines Act* as a necessary element in any program of economic deregulation.

This is an area of jurisprudence that is almost as old as the anti-combines law itself, with the earliest recorded case (*Gibbins v. Metcalfe* [1905] Man. R. 560 (Man. C.A.)) dating from 1905, sixteen years after enactment of the first *Criminal Code* provisions. It is an area of jurisprudence characterized by predictable outcomes (favouring exemption of regulated activities) based on largely inconsistent reasoning. The consistency with which the courts have refused to apply competition legislation in cases involving regulated industries has left the impression that these industries enjoy a broad exemption. However, this is clearly not the view of the Director of Investigation and Research.

In a major speech delivered to the Canadian Association of Members of Public Utility Tribunals (Saskatoon, September, 1986) Cal Goldman, Director of Investigation and Research, set out the ground-rules for the Bureau's approach in this area. The Director's first point was that there is no "regulated industries exemption". The jurisprudence has established a defence to be considered when adjudicating a charge under the *Competition Act*. According to Mr. Goldman, the defence is activity or conduct-specific and should not be taken as a defence to all types of behavior in an industry, but only those activities that are subject to regulation.

After reviewing the *Farm Products Marketing Reference* [1957] S.C.R. 198. (S.C.C.) and *R. v. Canadian Breweries* [1960] O.R. 601 (Ont. H.C.) cases, the Director laid out an analysis of the *Jabour* decision and its implications for future application of the *Competition Act* in regulated industries. He rejected the contention that the *Jabour* decision has extended the scope of the regulated conduct defence, as previously established in *Canadian Breweries* decision.

Mr. Goldman stated that the Bureau views *Jabour* as a unique case, largely based on the

particular facts of the case, such as the unusual nature of legal services, the fiduciary position of solicitors, the status of members of the bar as officers of the courts, and the responsibility to protect the general public placed on the Benchers by the provincial legislature. Mr. Goldman saw the case as also having been influenced by the fact that it involved the actions of persons holding office under a provincially authorized regulatory body and discharging their responsibilities to the community pursuant to their constitutive statute. He distinguished this from cases involving conduct arising from a voluntary agreement among members of a regulated industry.

The Director's review of the jurisprudence led him to make the following points which, he cautioned, are of fundmental importance for a proper understanding of this issue. First, not every activity in an industry nor every dimension of competition is normally regulated. The mere fact that some government regulation exists in a given sector does not mean that the *Competition Act* has no application. Second, whether or not such a defence may be applicable depends on a careful examination of the nature of regulation in the particular case under review. The discussion of the IOF case elsewhere in this issue of the *Record*, (see Enforcement Activities) seems to support this view.

Mr. Goldman disclosed that the Competition Bureau is currently examining three distinct approaches for challenging the assertion of a regulated conduct defence. These relate to demonstrating that (1) regulation has been hindered by the behavior of those subject to regulation; or (2) the regulator has not exercised its authority; or (3) the enabling regulatory legislation may be subject to the provisions of the *Competition Act*.

The Director traced the first ground for challenging the regulated conduct defence to language in the *Canadian Breweries* decision which suggested that a violation of the legislation would occur if the "combine has operated, or is likely to operate, so as to hinder or prevent the provincial body from effectively exercising the powers given to it to protect the public interest." He noted that this is the easiest of the three areas of possible challenge, particularly in cases where there is "non-disclosure in any complete sense of the scheme in question to the regulator, with the result that the regulator does not regulate with full appreciation of the material facts".

The interconnection of deregulation and competition law was obviously influencing the Bureau's work on the second ground for challenge: (abdication or forebearance by the regulator). Mr. Goldman made reference to recent consideration of so-called "passive regulation" by some tribunals--in which, for example, the regulator does not require the filing of tariffs, and does not review or approve them but rather withdraws from active supervision and acts on complaint only. Mr. Goldman stated:

> Under examination here is whether this type of regulatory behavior constitutes an effective exercise of authority within the meaning of the jurisprudence. In particular, where there is anti-competitive conduct engaged in by firms under a regime of passive regulation, can it be said that the regulator actively supervises the conduct or that the conduct is clearly articulated and affirmatively expressed in regulatory policy?

Perhaps the most significant signal about the Bureau's current thinking in this area came in the course of the Director's remarks concerning the third area of challenge (primacy of the *Competition Act)*. According to Mr. Goldman:

> A very interesting question is raised by the enactment in the *Competition Act* of significant new provisions as civil matters reviewable by the Competition Tribunal, rather than as criminal law matters. In view of the fact the jurisprudence on the regulated conduct defence is fundamentally based on the prosecution of criminal offences, the question arises as to whether it can be automatically assumed that the doctrine continues to apply in the same fashion to matters reviewable under civil or administrative law.
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> This latter question should be considered not only in light of the new civil provisions in the *Act*, but also in light of the series of recent rulings to the effect that the *Combines Investigation Act* is valid under the federal trade and commerce power, provided for in s. 91(2) of the *Constitution Act, 1867*.

Mr. Goldman noted that the underpinning of past decisions such as *Breweries* appears to be that Parliament should not be taken to have intended to characterize as criminal, conduct

authorized by regulators empowered to protect the public interest. He then went on to make the following distinction:

> ...if the provisions in the *Competition Act* are seen as an exercise of Parliament's power over trade and commerce, it might not prove as difficult to conclude that Parliament might have intended, in legislating for the "general regulation of trade affecting the whole dominion, to prohibit some aspects of conduct which a regulator might otherwise permit.
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> .....
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> Another way of looking at it is to pose the question: if the logic of recent judgments finding the *Combines Investigation Act* constitutionally valid under the trade and commerce power is that only a national regulatory scheme can effectively and constitutionally regulate competition, does that mean that some regulatory legislation might be held to be inapplicable to the extent that it conflicts with the principles of the *Competition Act*?

Mr. Goldman closed his remarks by noting that the *Competition Act* and regulatory legislation exist side-by-side, each filling a specific and complementary need. He called for greater dialogue between the Bureau and regulatory authorities to avoid the risk that, particularly in a time of change, certain types of behavior that would not be in the public interest might not be subject to any public control - neither regulation nor the competition laws.

FEDERAL ANNUAL REGULATORY PLAN PUBLISHED

The federal government has taken another step in implementing its new Regulatory System requirements. On December 15, Barbara McDougall, Minister of State for Privatization and Regulatory Affairs, tabled the first Annual Regulatory Plan before Parliament. Publication of the Plan makes the first time a federal government has prepared a comprehensive plan of its regulatory intentions for the up-coming year.

The 600 page document contains more than 800 regulatory initiatives proposed for 1987 by 20 federal departments and 5 regulatory agencies. It replaces the November compilation of the federal Regulatory Agendas, providing better impact information and broader coverage of federal regulatory activities.

Copies of the Annual Regulatory Plan can be ordered from the Canadian Government Publishing Centre, Ottawa, K1A 0S9 (Catalogue No. BT57-2-1987E) at at cost of $27.95 (Canada) or $33.55 (outside Canada).

TRANSPORT DEREGULATION BILLS RE-INTRODUCED

By: Eric A. Milligan
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On November 4, as promised, the federal Minister of Transport, John Crosbie re-introduced legislation that will substantially reduce economic regulation of the transport sector. The new *National Transportation Act* was tabled as Bill C-18, while the *Motor Vehicle Transport Act, 1986* became Bill C-19. Both bills are largely unchanged from their predecessors [C-126 and C-127] tabled last June.

A Few "Technical " Changes Made

In the *National Transportation Act,* the regulation-making powers with respect to the definition of "Canadian" for air licensing purposes [s. 67] and variation of the threshold limit for notice of acquisitions [s. 253(1)] were shifted from the National Tranportation Agency to the Governor in Council. The definition of appealable air fares has been clarified and there is now a requirement to include such fares in the tariff for each service. All tariffs must be displayed or published and carriers may charge only the published/displayed tariff.

Some slight revisions were made to the mediation, final offer arbitration, and public interest investigation provisions of the legislation. Among the revisions are those that will allow parties to final offer arbitration to agree to limit or change the criteria to be considered by the arbitrator in making his decision or to limit the amount of information to be provided [s. 51].

Several minor changes were also made to the rail provisions. A 500 mile minimum was added to the 50% rule in the competitive line rate conditions [(s. 135(4)] and competitive line rates will be allowed for container traffic to, as well as from, a port [s. 135(3)]. Section 144 of the *Act* was adjusted to ensure that confidential contracts would not be voided by any breach of that section. Finally, a new section [s.158] was added to allow for the transfer of rail lines in appropriate cases to a short line railway without the need to first make an abandonment application.

Opposing Interests Launch Major Offensive to Stop Bills

Moving the transport deregulation legislation through Parliament is clearly a top priority for Mr. Crosbie. The legislation is one of the most important and far-reaching economic reform initiatives that will be taken by the current government.

There is believed to be general support in the business community (particularly among shipper interests) for the government's move toward less economic regulation and greater competition in the transport sector. However, there has not been much outward evidence of this support to date.

Interests opposed to the reforms, on the other hand, have launched a major public relations and lobbying offensive aimed at killing-off the legislation. On December 1, the Canadian Labour Congress announced a campaign involving distribution of a quarter million anti-deregulation leaflets in workplaces and shopping malls, etc., a series of large ads in newspapers, lobbying of MPs, local and provincial politicians, public forums, and media interviews. Calling the government's reforms, "wrong for Canada", the CLC warned that transport deregulation would have a negative effect on employment, fares, service, safety, regional development and corporate concentration.

If supporters of the legislation remain quiet and inactive while those opposed mount a vigorous lobbying campaign aimed at undercutting public and parliamentary support for the reforms, getting the bills passed may prove more difficult than expected. Experience with competition law reform over the past decade makes it very clear that something more than party discipline by the majority is often required to move contentious legislation through Parliament.

Air Carriers Anticipate Deregulation

Judging by the actions of firms in the air industry, at least, greater competition in the transport sector is expected. Air carriers appear to be re-positioning themselves in anticipation of a deregulated market. In late November, 1986 Air Canada announced acquisition of Air BC. Air Canada's stable of regional "feeder" carriers now includes:

- Air BC
- Air Ontario
- Austin Air
- Air Nova

Less than a week later, Pacific Western Airlines Corp. announced its purchase of Canadian Pacific Air Lines for $300 million. The PWA network includes the following regional carriers feeding into CPAL's national and international service:

- Time Air
- Pacific Western Airlines
- Nordair
- Eastern Provincial Airways
- Norcanair
- Air Atlantic
- Québecair

Industry observers appear to be divided on the impact of the recent changes in the air transport market structure. Some see the moves as a natural (and inevitable) re-alignment that will result in more efficient, competitive services with minimal risk of anti-competitive practices by the two major players. Others are concerned that the benefits expected as a result of deregulation will

not materialize under a duopolistic market and that anticompetitive behavior will be more difficult to control in the absence of economic regulatory control over the industry. So far, the Canadian Transport Commission has not indicated whether it will be holding hearings into the proposed acquisition under the existing *National Transportation Act* and the Director of Investigation and Research has not announced any proceedings under the *Competition Act.*

Second Reading Debate Started

In the final hours before the House of Commons rose for its 1986 Christmas Recess, Mr. Crosbie began Second Reading Debate on the two transport reform bills. In his speech, he stressed the economic development and job-creation benefits that the Federal Government expects will occur throughout the economy with a more competitive, more efficient transport sector. The Minister took pains to reassure Members of the House of Commons that safety in all transport modes remains the first priority and that it will not be compromised through economic deregulation. Mr. Crosbie called on MPs to move quickly with the review of the legislation and indicated that "good, workable suggestions for improvement will, as always, be considered seriously by the government".

When the House of Commons resumes sittings in mid-January, the Second Reading Debate will be resumed. Opposition party critics will probably be the lead-off speakers, and several days are certain to be required to complete the full debate. The legislation would then be referred to a parliamentary committee for detailed study. Given the length and detail of the legislation, and the number of private sector interests that are likely to submit briefs and appear in public hearings, a protracted committee stage in the House is a reasonable expectation.

CRTC EASES REGULATION OF CABLE TELEVISION RATES

By: Andrée Wylie, Smith, Lyons,
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In August, following a series of public hearings which elicited wider ranging submissions, the CRTC issued revised Cable Television Regulations. The stated aims of the review were the institution of "a more supervisory approach to regulation", the elimination of obsolete provisions in ten-year old regulations, a decrease in regulatory lag for cable licensees and a reduction of the regulatory and paper burden for both the Commission and licensees.

On the day that the enactment of the new regulations was announced, the CRTC invited cable television licensees to submit applications for the addition, deletion or amendment of the conditions of their licence necessary for them to benefit from the new streamlined regulatory regime put in place. The first decisions allowing cable licensees to avail themselves of certain provisions of the new regulations were issued this month. It is readily apparent that the principal thrust of the new regulatory scheme is to reduce the level of Commission oversight over and of public participation in the regulation of the basic access rates charged by cable licensees. Yet, the cable industry remains an industry operated on the basis of territorial monopoly in that only one licence is granted by the CRTC to carry on a cable undertaking in any geographical area.

Not surprisingly, the cable industry hailed the advent of a less restrictive approach to adjusting monthly access rates as a step in the right direction. It will benefit subscribers, argues the Canadian Cable Television Association, by easing the regulatory burden borne by the cable industry, by allowing the industry to respond in a more timely fashion to rapidly changing conditions and by stimulating increased investment in the expansion and upgrading of cable facilities. Licensees will be encouraged, the CCTA maintains, to rebuild and improve old

plant and equipment, to increase channel capacity and to improve the technical capabilities of their system. Delivery of services to subscribers will thereby be facilitated and quality of service will be improved.

The Consumers' Association of Canada, on the other hand, has been the most outspoken opponent of the new approach to the regulation of cable rates. It represents, the CAC argues, an abdication by the CRTC of its responsibility to continue to scrutinize, through an appropriate public process, the extent to which monopolistic rates are fair and reasonable and truly reflect costs.

The Commission had, until now, regulated the maximum monthly access rates that a cable licensee may charge by setting out such maximum rate in each licence. The levying of a fee for basic access in excess of the amount so authorized without prior Commission approval was prohibited. Each application for authority to increase the monthly rate was processed as an amendment of licence. Consistent with the requirements of the *Broadcasting Act,* public notice of all such applications was given in the *Canada Gazette* and in one or more newspapers of general circulation within the area served. Each application was made available to the public. Interested parties were given a reasonable opportunity to intervene and, in some cases, a public hearing was held. Public notice of the ensuing decision was also given in the *Canada Gazette* and in the appropriate newspapers.

Since 1974, the Commission had examined applications for cable rate increases against published criteria which included, over and above obvious economic considerations, such factors as the quality of service provided by the licensee, proposed additions to or improvements in service, the efficiency of the management of the cable system and the variance of the fees proposed from those generally in effect in the region concerned.

The regulatory scheme established in August eliminates completely the regulation of cable rates for "core" or Part III licensees. Part III licensees are defined in the regulations as cable licensees receiving over-the-air two or fewer Canadian television signals and not authorized to distribute any non-Canadian television signal prior to the licensing of CANCOM, the company authorized by the CRTC in 1981 to distribute television services via satellite to "underserved" areas. Part III licensees do not necessarily serve more remote areas of Canada. They may be found in close proximity to large urban centers, for example, less than twenty-five miles from Ottawa.

For other licensees, whether they provide service to a few hundred subscribers or to as many as one-third of the cable subscribers in Canada, rate increases can henceforth be effected without public notice and, in some cases, without a formal application and supporting documentation being made available for public inspection. It must be emphasized, however, that the regulations require that each subscriber be given written notice individually of any proposal to increase monthly rates.

There are four separate processes set out in the regulations for increasing cable rates. The first allows a licensee to increase his monthly access rates, without application, once a year, by up to 80% of the annual percentage increase in the Consumer Price Index published by Statistics Canada. The second allows a licensee to increase his monthly rates at any time by the amount necessary to recover any new or increased charge related to the transmission of programming services paid to a third party where the charge was approved separately by the CRTC or by a provincial regulatory body. Such "pass-through" charges include payment for microwave services and for pole and conduit use. They also include charges for the provision of services paid to other licensees whose rates are regulated by the CRTC. Approval, in both cases, is automatic forty days after the giving of notice of the proposal to subscribers. It will be granted without apparent regard to economic need or quality of service or to the fact that increases in the level of charges paid to a third party by cable licensees in any given year are already taken into account in the increase in the price index on the basis of which cable rates can be adjusted yearly.

Two further processes for increasing monthly cable rates are provided for. A licensee may increase his rates by an amount which reflects 10% of the amount distributed over his subscriber base of any capital investment in his headend or distribution system, to the extent that the costs relate to the reception, processing or distribution of the services which subscribers receive for the monthly access fee. A licensee may also apply to increase his monthly rates by an amount in excess of the increase in the CPI for any other reason.

In these last two cases, the application for an increase and documentation filed in support must be made available for public inspection and subscribers must be invited to comment to the Commission. Within ninety days of written notice to subscribers, the Commission may disallow the implementation of all or any part of the increase applied for. It may also suspend, within that period, the implementation of all or any part of the increase pending the receipt of additional information or the holding of a public hearing.

The Commission and the cable industry have argued that the new notification requirements are an improvement over the formal public notification process, that the regulator has maintained an adequate level of supervision through the disallowance mechanism, that interested parties still have the opportunity to intervene in appropriate circumstances and that, with the advent of videocassette recorders, computer videogames and satellite delivery, cable television is subject to an increasing degree of competition and therefore no longer requires the same degree of regulation. In their view, the overall streamlining and reduction of regulatory requirements is in the public interest in that the more timely implementation of rate increases will decrease regulatory costs and encourage licensees to improve service to the public.

Parties such as the CAC maintain that the provision of cable services remains a monopoly and, as such, continues to require close regulatory scrutiny. In their submission, pre-recorded videocassettes may be a substitute for discretionary services such as pay television (whose rates are not regulated) but many Canadians, including most urban dwellers, have no alternative but to subscribe to cable in order to receive an adequate level of basic broadcasting services. The procedure proposed will, they fear, institutionalize inflation. The process of notification of individual subscribers, they argue, will be difficult to supervise and may prove less effective than public notification and disclosure to such non-subscribers as consumer groups, municipalities and governments. Any cable rate increase proposed, they submit, must continue to be examined in light of the quality of the service provided. No rate increase should be allowed without regard to whether the rates charged are fair and reasonable in each specific set of circumstances.

After participating in the public process which led to the new regulations, the CAC continued to oppose automatic approval of any cable rate increase. It intervened in a number of applications by licensees to bring themselves within the new regulatory regime. Interestingly, one of the CAC's interventions was filed in the application of a licensee who, in late June 1986, was denied a rate increase on the ground that the current rate is "sufficient to continue to enable the licensee to maintain an adequate level of profitability, to carry out the proposed operating and capital expenditures on schedule and to continue to provide a good quality of service to subscribers".

This same licensee may, once he is operating pursuant to the new regulations, proceed immediately to implement an increase in his basic monthly rates which, a few months ago, the CRTC found was not justified. If the increase is related to the CPI and is calculated correctly, the CRTC will not have the power to intervene.

BELL CANADA IS ORDERED TO REFUND OVER TWO HUNDRED MILLION DOLLARS TO ITS SUBSCRIBERS

In August, the CRTC relaxed its regulatory scrutiny over cable television rates, in part by

permitting cable television licensees to increase their basic rates annually by 80% of the increase in the Consumer Price Index, without reference to economic need or to any other justification such as quality of service or prudent management. Less than two months later, the Commission issued Telecom Decision 86-17, following a public review of Bell Canada's economic performance for the last two years with a view to ruling finally on the level of the rates allowed for 1985 and 1986 on an interim basis and to establishing Bell's revenue requirement for 1987.

In Decision 86-17, the Commission ordered Bell to return to its subscribers, on a pro-rated basis, through a one-time credit on its billings for basic local services, an amount of $206 million found to be excess revenues earned over 1985 and 1986.

A rate of return on common equity was last established for Bell Canada by the CRTC in 1981. Since then, federally regulated industries have lived through the unusual fluctuations experienced in the Canadian economy recently and have seen increases in their rates limited to 6% and 5% by government decree in 1982 and 1983. Bell also underwent, since 1981, a major corporate reorganization. Its effect on the ability of the CRTC to discharge its regulatory mandate has raised concerns and is the subject of a Bill currently before Parliament.

In September 1984, Bell was granted an interim increase of 2% on certain services, effective January 1, 1985, on the basis of a rate of return of 13.7%. The interim increases were to be reviewed for final approval, on the basis of 1985 and 1986 test years, in the context of an application for a general rate increase to be effective January 1, 1986. The hearing of the application was scheduled for the Fall of 1985.

In March 1985, Bell requested final approval of the rate increases granted on an interim basis. It also asked the Commission to postpone the general rate increase proceeding scheduled for the Fall of 1985 to the Spring of 1986, on the ground that the company no longer needed the general increase applied for.

The Commission did not find it appropriate to give final approval to the 2% interim rate increases without further public process and decided to review them in the 1986 general rate increase proceeding to be held in the Spring of 1986. In light of Bell's apparent improved financial performance, the Commission ordered it to file forecasts of revenues and expenses for 1985 on a monthly basis. In August, the Commission suspended the 2% interim increases effective 1 September 1985 and advised Bell that the Commission would make a final determination on Bell's revenue requirement for 1985 following the general rate increase hearing. At that time, the company's cost of equity for the years 1985, 1986 and 1987 and its revenue requirement for these years would be reviewed. An appropriate range for Bell's rate of return for the years 1986 and 1987 would also be established.

In Decision 86-17, the Commission found that, with the interim rates in effect for part of 1985, the deduction of $63 million in revenues was necessary to provide a rate of return of 13.7%, the level found to be permissible when the interim rates were set. The Commission also found that a revenue reduction of $143 million was required for Bell to achieve an acceptable rate of return of 13.2% on a regulated basis in 1986. In order to bring Bell's rates of return on common equity in line with the levels established, the Commission ordered Bell to reimburse to residential and business subscribers, by January 1, 1987, on a pro-rated basis, a total of $206 million. Each subscriber would receive a credit in an amount equivalent to two months' regular charges for basic local services.

The level of revenue required to earn a permissible return of 12.7% on a regulated basis for 1987 would be achieved through rate reductions totalling $234 million in long distance charges effective January 1, 1987, resulting in an average 20% decrease in such charges.

Bell challenged the Commission's decisions on two fronts. It requested the Commission to review and vary that part of Decision 86-17 requiring a reduction in long distance rates by

revising the reduction from an average of 20% to an average of 17.7% to reflect a higher permissible range for the 1987 rate of return and an increase of $25.8 million in the company's revenue requirement. The application was filed on the ground that there were inaccuracies in the way the CRTC calculated projected revenues and expenses for 1987.

Bell also filed an application in the Federal Court of Appeal challenging the CRTC's jurisdiction to order what has been characterized as a retroactive adjustment in the company's achieved, rather than allowable, rate of return. Bell also asked the Court for a stay so that rebates need not be remitted to subscribers until the appeal has been finally determined on the merits.

The Federal Court of Appeal has granted Bell leave to appeal the Commission's decision and has also ordered that credits to Bell's customers be put on hold pending a decision on the appeal.

Given that Bell's appeal may not be heard by the Federal Court of Appeal until Spring and that either party may then seek a reversal of the decision by the Supreme Court of Canada, subscribers may not benefit from the Commission's adjustment of Bell's profits in their favour for well over a year.

ESTEY COMMISSION SPREADS THE BLAME FOR BANK FAILURES

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In late October, Mr. Justice Estey produced his long-awaited report evaluating the failures of the Canadian Commercial Bank and the Northland Bank. To the dismay of the media and opposition politicians, he found that there was no single culprit in these events, and that there had been no major systemic failure. Rather, he placed responsibility on a range of actors within the system; on the management and internal auditors of the banks, the external auditors, the Inspector General of Banks, and to some degree on federal Ministers.

The main conclusion was that the failures were a result of a whole series of "errors of omission", as opposed to "errors of commission". He did not find evidence of self-dealing abuses as had been asserted by some. Rather, he found evidence of poor judgment on the part of all those mentioned, and inadequate control mechanisms in the supervisory process. His recommendations reflect these conclusions and attempt to repair and adjust the system rather than replace it.

The report provided a careful analysis of the system of bank monitoring and supervision, and debunked a number of the myths which have been relied upon to justify often misguided proposals for "reforming" the financial services regulatory structure. Mr. Estey found the existing system essentially sound. He also concluded that there is not a need for greatly expanded regulatory and supervisory powers. Rather, there is a need for more effective use of the powers which now exist.

As important as what the Commissioner found is what he did not find. Specifically, he found that the CCB - Northland problems were not endemic to the banking system. Rather, he concluded that the large banks in the system:

> are clearly not exposed to the same serious risks which developed in (these institutions). From all that

> has been studied here, the Canadian banking system is sound, well led, and is recognized outside this country as standing in the front ranks of world banking.

Given the reasoned approach taken, it is perhaps unfortunate that the Commission took such a narrow view of its mandate. The Report indicates that:

> Broader questions relating to the Canadian banking system and its associated regulatory environment, the ownership of Canadian financial institutions, the segregation of banking from other financial activities, the establishment of bank holding companies, and associated changes to financial institutions in Canada, are beyond this Commission's mandate.

As a result of these limitations, the federal government was provided with no concrete guidance in formulating policy in these important areas. However, the Report does provide a conceptual approach to thinking about these issues and puts forward a number of significant recommendations relating to the supervision of banks which hopefully will be generalized to the regulation of other financial institutions when the government announces its plans for reform of the supervisory and inspection systems in the coming weeks.

The following will examine the more important recommendations made in the Report, relating these to recommendations and proposals made in the federal Green Paper on Regulation of Financial Institutions (April 1985), the Blenkarn Committee report (House Standing Committee on Finance and Economic Affairs) and the Senate Banking Committee report, as well as to the legislation now before Parliament (Bills C-8 and C-9).

Combined Supervisory Structure Proposed

A key finding of the Commission was that the existing tri-partite supervisory structure, which depends on management, the internal-external auditors and the Office of the Inspector General of Banks (OIGB), is essentially sound and should not be modified. The Commission recommends that this structure remain, but that it be supplemented by an increase in the direct supervision of bank loan portfolios, especially where a bank is emitting trouble signals.

However, the Commission found fault with the existing separation of powers and responsibilities between the OIGB, the Canada Deposit Insurance Corporation (CDIC) and the Bank of Canada. It recommends that the OIGB and the CDIC be combined into a single Canada Deposit Insurance Commission (new CDIC) which would both supervise and provide deposit insurance to banks. This new CDIC would be composed of three individuals, one each with extensive experience in the fields of banking, accounting and insurance. This is similar to the structure in the U.S. where the Federal Deposit Insurance Corporation (FDIC) performs both the supervision and insurance functions. The Commissioner did not feel that the role of the Bank of Canada should be expanded beyond its present one of supplying liquidity to the banking system.

The Commissioner noted that this new combined structure could be expanded to the supervision of all federal deposit taking institutions, as well as to provincial institutions where requested by a province. This goes beyond what was contemplated in the Green Paper, which was a combination of the OIGB and the Superintendent of Insurance separate from the existing CDIC, and comes closer to the national supervisory structure envisioned by the Blenkarn Committee. The recommended changes would make the CDIC largely independent of the government in respect of administrative functions. However, policy elements relating to the establishment or termination of a bank would remain with the Minister of Finance.

The Commissioner further recommended that the new CDIC expand the number of existing personnel experienced in, and qualified to conduct inspections of banks. It also recommended that the current practice of financing the office of the regulator through assessments on banks continue. In a similar

vein, the current system of financing the deposit insurance system through member assessments should be continued. However, the government should consider revising the deposit insurance assessment procedure in ways which could better reflect the inherent risks of the various types of insured institutions.

In line with recommendations made by the Blenkarn and Senate Committees, the Commissioner recommended that an Advisory Committee be established, comprised of bankers, bank auditors, internal bank inspectors and accountants, lawyers and representatives of the community at large to develop uniform guidelines for bank accounting, internal controls, and auditing, in the design of early warning systems and other information returns, and in the improvement of published financial information regarding the financial services industry.

None of the recommendation of the Commissioner in this area should be of concern to financial institutions. The recommended system would be more efficient and effective and would enhance public confidence. There are solid reasons to prefer a combined insurance and supervisory structure. The major stumbling block to acceptance of this notion would be the entrenched interests of the existing regulators and the CDIC. The latest indication is that these latter interests have carried the day, and that the federal government will propose a new structure which combines the OIGB and the Superintendent of Insurance, but which leaves the CDIC as a separate agency.

Greater Regulation of Internal Bank Management Rejected

Several recommendations have been made over the past several years in respect of a requirement that the boards of directors of financial institutions establish internal committees to review self-dealing and conflicts of interest. Such recommended committees would be comprised of independent directors. The Commissioner found no merit in such a requirement, opting instead to leave such review to the full board. However, he proposed that where a financial institution decides on its own to establish such a committee, then its terms of reference should be filed with the regulator.

The Commissioner also considered the proposal put forward by the OIGB that the CEO of a financial institution be precluded from also assuming the role of Chairman of the Board. Again he found no merit in this proposal.

The Commissioner also rejected the notion put forward in the Green Paper and the Report of the Blenkarn Committee that additional qualifications should be required in order to be a member of the board of directors of a financial institution. He concluded that the existing requirements are entirely adequate. However, he recommended that employee members of bank boards should comprise no more than 15% of the total board, down from a current maximum of 50%.

The Green Paper and the Report of the Blenkarn Committee recommended that there be increased standards of care for the directors of financial institutions. The Commissioner concluded that there was no need to change the existing standards as expressed in the *Bank Act*. He also concluded that there was no justification for the recommendation that directors be subject to criminal sanctions for gross negligence or wilfull disregard of the statutory standards governing the conduct of directors. However, he did recommend that directors' responsibilities be extended beyond the corporation to include the shareholders and depositors, and that these parties be granted a right of civil action against directors for improper behaviour.

The Commissioner went to great lengths in his discussion of the role and responsibilities of the audit committee of boards of directors. He stated that these committees should be under a duty to ensure that a banks internal audit and inspection systems are adequate and functioning properly. The audit committee should be required to meet with the bank's internal auditors at least yearly and at any time upon request, and to report on such meetings to the board. The committee should also be required to meet

annually with the regulator, and the regulator should have the right to meet with the committee at other times and attend meetings of the board of directors with adequate notice.

The Green Paper suggested that, in a decision to grant or renew a license to operate a financial institution, the regulatory authority should consider the sufficiency of skills, knowledge and experience, and the past performance of senior members of management. The Commissioner supported this recommendation and added that this should include assurances that qualified personnel, especially in the field of bank credit management, have been retained on a permanent basis.

The Commissioner also recommended that internal audit and inspection systems be established in each bank for the examination and evaluation of the loan portfolio, lending practices, credit limits and control systems of the bank, including the management information system. The head of these services would report directly to the CEO, the external auditors and the audit committee as circumstances require, and would be available to the regulator at all times.

Again, financial institutions should not find a great deal to be concerned about in this area, with the exception of the recommendation that directors become subject to civil action by stockholders and depositors. This could be a more onerous matter than the introduction of criminal sanctions.

Overall, the Commissioner took the view that management should be allowed to run the affairs of financial institutions subject only to effective prudential regulation. He rejected most earlier recommendations which would replace management judgment with regulation. Recommending civil sanctions, as opposed to criminal, leaves responsibility for action in the hands of individuals rather than the state. While some may be concerned with the class action concept, it is to be preferred over the alternative.

Tough Line Taken on Bank Auditors

The Commissioner recommended that the current dual auditor system applicable to banks be retained. He rejected the notions put forward in the Green Paper and the Report of the Blenkarn Committee that one of the auditors be appointed by, or be responsible to, the regulator, and that auditors be approved by the regulator. He did recommend that auditors be required to have at least five years experience in bank auditing before being eligible to serve as a bank auditor, that the *Bank Act* be amended to require banks to maintain a panel of such persons from which auditors are selected and that the regulator be notified, and interview, any auditor removed from the list, or who resigns or retires.

In the view of the Commissioner, the *Bank Act* should also be amended to require the external auditors to report to the regulator once a year as to the adequacy of the banks internal controls and inspections, the extent of the auditors review of the bank's loan portfolio, any change in the bank's accounting policy, other matters specifically required by the *Bank Act*, and generally as to any matters which materially affect the bank's financial position.

An important finding of the Commissioner was that:

> there is no validity in the argument that under the *Bank Act*, the regulator has insufficient power to ascertain particular aspects of the bank's business, including loan provisioning assumptions, security valuation practices, and the degree of fiscal conservatism characteristics of the management.

In light of this finding, the Commissioner concluded that no changes are required to the powers now available to the OIGB in these areas.

The Commissioner was especially hard on the auditing profession and has stimulated much needed discussion as to how bank auditing practices and procedures can be improved. Indeed, the Alberta Institute of Chartered Accountants is currently in the process of determining whether or not to lay charges against the auditors responsible for auditing the CCB and Northland Bank. The recommendations of the

Commissioner are welcome in this area, and should produce necessary changes which will contribute to an increase in public confidence in Canada's financial institutions.

Once again it should be noted that the Commissioner opted to recommend changes which will strengthen the private sector surveillance of business operations as opposed to the substitution of public sector regulation.

Regulatory Powers and Supervision

Bill C-103 (new Bill C-9), introduced in the previous session of Parliament, contemplated granting the Minister three new powers; to issue cease and desist orders, to re-value the assets of financial institutions and to grant approval for the transfer of shares in financial institutions. The Commissioner did not comment on the latter power. However, he did concern himself with cease and desist orders and the re-valuation of bank assets. Specifically, he supported the cease and desist power with appropriate appeal rights, but rejected the re-valuation of assets power.

The Commissioner recommended that the regulator establish an "early warning system" to ensure that banks approaching difficulty are identified quickly. This system could be operated within existing data requirements and could be designed to monitor: nonperforming and unsatisfactory loans, interest rate spreads, accrued interest, capitalization of interest and fee income, loan portfolio growth and diversification, off-balance sheet risks, loan loss experience, workouts, earnings, liquidity and personnel changes.

Furthermore, the supervisory resources of the OIGB should be allocated in a way that reflects: the financial condition of the bank, its maturity, size, asset quality and the diversification of its loan portfolio as revealed by the early warning system. These factors should determine the frequency of on-sight inspections by the regulator.

The Green Paper and the Parliamentary Committees dealt at length with the issue of how to control self-dealing abuses. The Green Paper proposed banning all such transactions, while the Parliamentary recommendations called for selective bans. The Commissioner found:

> no clear demonstration in the record that any financial evil befell the CCB, Northland Bank, or anyone involved in the banks by reason of borrowing by directors or officers.

However, the Commissioner did conclude that loans to outside directors of financial institutions should be banned, and that loans to companies affiliated with the bank or its directors should be limited to a percentage: e.g., 15%, of the unimpaired capital stock and surplus of the institution. This could be viewed as a "partial ban" on self-dealing.

The Commissioner rejected the recommendations in the Green Paper which would require diversification of loan portfolios on the basis of geography, industry and so on. He believed that such factors can be adequately monitored by way of the data provided through the early warning system.

The recommendations in this area are consistent with those in previous sections. The Commissioner opted for private sector remedies to problems as opposed to increased public sector regulation. This is clearly apparent from the rejection of the notions that the Minister of Finance should have the power to re-value the assets of a bank, and that there should be a total ban on self-dealing. Wherever possible, the Commissioner has opted to let the private sector correct its own problems. This is to be applauded.

The recommendation calling for the establishment of an "early warning system" is sound. An efficient system in this area would increase public confidence in financial institutions.

Bank Assistance Programs

The Commissioner recommended that all assistance programs be developed and administered, subject to the approval of the

Minister of Finance, by the new Canada Deposit Insurance Commission. This would reduce the difficulties associated with mixing business and political judgments. Mr. Estey also strongly recommended that the government develop a means for determining which institutions will qualify for rescue and which will be allowed to fail. He is of the view that so long as institutions remain in private hands, the discipline of the market should be allowed to operate, subject of course to over-riding issues of system stability.

There is clearly a need for imposing some discipline on the current *ad hoc* system of granting assistance to financial institutions. The United States classifies banks into two groups those that are essential and which will be rescued if they get into difficulty, and those which are to be allowed to fail. Furthermore, the system in the U.S. allows the FDIC to move in quickly and seize control of troubled institutions. In most cases, the FDIC provides depositors with a return of their insured deposits within 48 hours of the time of seizure. This type of system promotes certainty and public confidence in addition to being efficient.

In Canada, it takes months to wind-up the affairs of a failed financial institution, and nearly that long before depositors are compensated. Furthermore, the decision to close an institution takes far too long. Much of the problem resides in the fact that our system is excessively dependent on the politicians for decisions. The recommendations of the Commissioner would reduce political involvement, although not eliminate ultimate political responsibility. This is a step in the right direction. Political involvement in administrative decisions usually spells trouble. It causes delays and invariably results in excessive losses to the taxpayer as has been shown in nearly all recent cases.

Deposit Insurance Coverage

The Commissioner took the position that deposit insurance is vital to the maintenance of confidence in the financial system. However, he recommended that the CDIC examine the possibility of altering the existing system such that different classes of institutions would be pooled together for purposes of determining premium rates. In this way, the premiums charged each class would more closely reflect the risk presented to the system. At the same time, notions of reduced insurance coverage and co-insurance by depositors were rejected.

There is no doubt that deposit insurance is vital to the stability of deposit taking institutions. It is also true that our current system needs reform. The Commissioner has not given much guidance in this area. However, he was correct to reject the notions of co-insurance and/or reduced coverage. In fact, coverage should be increased. But at the same time, there should be increased capital requirements imposed on institutions, perhaps in the form of a minimum amount of subordinated debt. The system of identifying and winding-up troubled institutions should be greatly improved to prevent excessive losses to the insurance fund. These issues will presumably be considered by the government at a later date.

An Overall Assessment

The Report of the Estey Commission is a thorough and well reasoned document covering a limited, but important range of considerations. In the areas dealt with, the recommendations are sound. The Report takes a much less interventionist line than that found in preceding reports on these matters, and provides logical reasons why many of the recommendations made in the federal Green Paper, and in the reports of the Parliamentary Committees should be rejected.

The beauty of the Estey Commission Report is that it was not prepared by either bureaucrats, who have a vested interest in expanding their power base, or politicians, who have an interest in scoring political points through sensationalism. Perhaps the federal government will take the approach of the Commissioner to heart and extrapolate his conclusions to the reform of other aspects of financial services regulation which he felt were beyond his mandate; such as ownership rules and the

retention of out-dated business power constraints based on the "four pillars" concept, when it brings down its proposals for reform in the coming weeks.

Mr. Justice Estey has shown that it was not the system that was inadequate, but those who were administering the system. His recommendations act to improve upon the system rather than replace it. His approach is clearly biased in favour of private sector solutions, and reflects the philosophy: "if it ain't broke, don"t fix it".

The major issue now is: Will the government be willing to do only what is necessary, or will it feel compelled by political considerations to go much further under the guise of erring on the side of "prudence"?

Will the Report be seen as establishing the minimum change necessary to restore the system to health? The answer will be abundantly clear when the government's proposals are released.

A full discussion of these new proposals will be undertaken in the next issue of the *Record.* By that time both the Phase I proposals dealing with the supervisory and inspection systems and the Phase II proposals dealing with the ownership and business powers of financial institutions should have been released. The coming months are sure to be interesting.

COMING UP IN THE NEXT ISSUE OF THE RECORD:

- √ **Abuse of Dominant Position Provisions -- Analysis and Comment**
- √ **Review of Federal Proposals for Regulation of Financial Institutions**
- √ **The Proposed Merger Pre-notification Regulations**
- √ **Further Developments in *Competition Act* Enforcement**
- √ **OECD Recommendations on Restrictive Business Practices Affecting International Trade and on Competition and Trade Policy Conflict**