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BANKING IN CANADA

DANIEL J. BAUM*

The means by which banking is regulated in Canada is quite distinct from the methods which are employed in the United States. Moreover, the jurisdictional boundary between provincial regulation of securities and federal regulation of banking has created a regulatory penumbral zone. Additionally, the fact that the present regulation is largely the product of consultation between the banking industry and the government raises the question of the effectiveness of a regulatory scheme which is essentially consensual. The banking industry in Canada, as well as that of the United States, appears to be departing from its traditional role. The extent to which current regulation will be effective in these areas is perhaps the most important question confronted in this comprehensive treatment of Canadian banking.

PREFACE

Banks are the largest of the Canadian institutional investors, holding more than 10 times the combined assets of the mutual funds. This concentration is accentuated in that over 90 percent of the industry's assets are held by five of the nine Canadian banks.¹ Both the size of Canadian banks and their high degree of asset concentration result from the conscious implementation of a state-conceived public policy. It is in light of this policy that the banking law must be considered if one is to understand the relationship between Canadian law and banking behavior. Of equal importance is the developing role of banks in the equity market, a role which runs contrary to traditional notions viewing banks solely as

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¹ The nine chartered banks and their assets are as follows:

<i>Bank</i>	<i>Assets as of December 31, 1960</i>
Royal Bank of Canada	\$9.16 billion
Canadian Imperial Bank of Commerce	8.35 billion
Bank of Montreal	6.99 billion
Bank of Nova Scotia	5.20 billion
Toronto Dominion Bank	4.49 billion
La Banque Canadienne Nationale	1.49 billion
Banque Provinciale du Canada	760 million
Mercantile Bank of Canada	190 million
Bank of British Columbia	36 million

institutions which keep the depositor's money protected and liquid while seeking a return on investments greater than the interest which they are obliged to pay.

Historically, the law supported this traditional view of banking. In the *Quebec Vacant Property* case² Lord Porter defined the relationship of banker and customer as that of debtor and creditor, with the banker having an additional obligation of honoring the customer's draft. For obvious reasons, the debtor-creditor relationship has been fundamental to bank investment behavior: As creditor, the depositor can demand withdrawal of all his money and the bank, regardless of its investments, must meet that demand. Viewed against the bank's obligation to pay a fixed return, this bank-depositor relationship reveals no inherent flexibility.³ In addition, three factors traditionally have been used to measure the attractiveness of an investment—security, yield, and liquidity. In light of these factors, the banking industry poses a regulatory dilemma; even though security is an all-encompassing consideration and the traditional banker-depositor relationship emphasizes liquidity, the nature of the fixed obligation emphasizes the importance of yield.

HISTORY OF REGULATION

The first general banking statute in Canada was passed in 1871.⁴ There were already a considerable number of banks in Canada and their early incorporation, by renewable letters patent, had resulted in that industry's being distinguishable from the outset. The first Act was largely the result of consultations between the legislature and the bankers and was passed with little opposition.⁵ The original Act had the same form as the current legislation, the Bank Act of 1967,⁶ and was the comprehensive company charter of the banks. It has been suggested that the main reasons for the enactment of this general banking law were his-

² *Attorney-general of Canada v. Attorney-general of Quebec*, [1947] 1 D.L.R. 81, 87 (1946), citing *Foley v. Hill*, 9 Eng. Rep. 1002 (H.L. 1848).

³ By way of contrast, a mutual fund provides an example of a management with inherent flexibility in investment. Whereas the investor in a mutual fund is prepared for and in fact welcomes a fluctuating value in his investment, the depositor in a bank expects his capital to remain constant and looks to a fixed rate of interest on the deposited money. M. WATKINS, *REPORT ON STRUCTURE OF CANADIAN INDUSTRY* 389 (1968).

⁴ The Dominion Banking Act, 1871, 34 Vict., c. 5 (Can.). The banks had also received special attention in the British North America Act which provided that the legislative authority concerning banking, incorporation of banks, and the issuance of paper money would be vested exclusively in the Parliament of Canada. 30 Vict., c. 3, § 91(15) (Can. 1867).

⁵ See I. BAXTER, *THE LAW OF BANKING AND THE CANADIAN BANK ACT* 1-5 (2d ed. 1968); A. JAMIESON, *CHARTERED BANKING IN CANADA* 3-16 (1953).

⁶ CAN. STAT. c. 87 (1967).

torical, Canada's recent confederation and the experimental state of the banking industry prompting a desire for uniform operation of banking with fairly detailed legal controls.⁷ Although these conditions were not the sole justification for current regulation, and were not considered to be of primary significance by the Porter Commission,⁸ current bank regulation clearly reflects this historic example of a successful model of regulation. Control by means of a central act, however, is only one means of successful banking regulation; others, such as those employed in the United States and Great Britain, have been just as effective.⁹

In enacting the statute, the legislature included, as far as practicable, all of the laws relating to banking. Of special significance is the fact that banks are the only institution named in the Act, and they are subject exclusively to federal control. Modern Canadian banking regulation, therefore, is not the result of arbitrary legislation or the general enactment of settled principles. As first enacted, the legislation was the product of consultation between the banking industry and the government. From the bankers' desire for maximum growth potential for their institutions and the government's need for effective control over the country's monetary policy, a common interest had developed and this community of interest has continued to exist.

By 1871, banks were the major financial institution in Canada, and the Bank Act resulted not only in more effective government control of the economy, but also in the grant of a limited monopoly to present members of the industry. The definition of this quasi-monopoly, which is under exclusive federal control, is somewhat circular: A bank is permitted to perform such business "as pertains to the business of banking."¹⁰

Although the original and 1967 bank acts were acceptable to both industry and government, governmental policy has not always coincided with the desires of the industry. In 1967, the interest ceiling was raised¹¹ and, accordingly, the banks channeled more money into consumer

⁷ I. BAXTER, *supra* note 5, at 2.

⁸ See ROYAL COMM'N ON BANKING AND FINANCE, REPORT (1969) [hereinafter cited as PORTER COMM'N REPORT]. The Commission's aim was "to promote continued evolution of the financial system, to encourage it to be creative and competitive, and to ensure that it is sound. In our view, an appropriate regulatory environment is one which permits quiet and efficient adaptation of our banking machinery to the changing needs of borrowers and lenders . . ." *Id.* at 357. While the Commission did mention soundness and protection for the depositor, it is interesting to note a new emphasis on competition and creativity in the system.

⁹ The United States and Great Britain do not use a central act and corporate charter to regulate the industry.

¹⁰ CAN. STAT. c. 87, § 75(1) (e) (1967).

¹¹ *Id.* § 91.

loans;¹² shortly thereafter, however, the Canadian government became concerned with inflation. In an attempt to curb excessive buying pressure, the government was forced to seek a reduction of the availability of consumer loans by acting through the Governor of the Bank of Canada.

Governmental efforts in the field of banking have been directed toward the creation and maintenance of an economically powerful banking system capable of maintaining a strong competitive position vis-à-vis other financial institutions; the relationship between the bank and the customer has been of only incidental concern.¹³ The result has been that the five Canadian banks which hold more than 90 percent of industry assets are in an exceedingly strong competitive position, and entry into the banking industry is extremely difficult due to the system of nationwide branch banking. The government has benefited from this result by achieving more effective control over national monetary policy.

BANKING UNDER THE B.N.A. ACT

Section 91(15) of the British North America (B.N.A.) Act¹⁴ makes banking in Canada a matter for federal regulation. Due to the explicit nature of the statute, the issue most often litigated has been whether a certain activity constitutes "banking," and the courts have construed this term broadly.¹⁵ This broad interpretation of the term "banking" has resulted in the federal government's exercising a largely preemptory regulatory power over banks and other closely related financial institutions, even though these institutions may perform functions which are apparently distinct from the functions enumerated in the Bank Act.¹⁶

¹² The intent behind the raising of the interest ceiling may have been the stimulation of new competition within the financial community. See 1 HOUSE OF COMMONS DEBATES, CANADA, 27th Parl., 1st Sess. 904-05 (1966). Mr. Jack Davis (private member) stated that one of the main arguments for the removal of the ceiling was "because it would generate greater competition among the chartered banks, the trust and loan companies, etc." He pointed out that "chartered banks have not been growing as rapidly as other institutions in the monetary field. . . . [t]he Porter Royal Commission found that chartered bank deposits . . . in the post war period, have little more than doubled. The mortgage and loan companies' assets have risen more than six-fold. The trust companies' assets have gone up about seven times." *Id.*

¹³ A. ROGERS, *FALCONBRIDGE ON BANKING AND BILLS OF EXCHANGE* 57 (7th ed. 1969).

¹⁴ 30 Vict., c. 3, § 91(15) (Can. 1867).

¹⁵ *Tennant v. Union Bank*, [1894] A.C. 31 (P.C. 1893) (Can.) involved the conflict of a provincial act with the federal banking statute. Lord Watson stated that section 91(15) "comprehends 'banking' as an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker." *Id.* at 409.

¹⁶ The province of Alberta attempted to license and control "credit institutions," but it expressly excluded functions regulated under the Bank Act. Nonetheless, this was considered an unconstitutional infringement of the federal power under 91(15). In justifying this holding, Viscount Simons indicated that the term "banking" should

The equity market is a matter for provincial control; however, neither the federal government, in controlling banking, nor the provincial governments, in controlling the sale of securities, can regulate completely bank activity in the equity market. The federal government must relate its control of securities to banking, and it would be beyond federal jurisdiction to enact legislation with regard to trading or registration of securities.¹⁷

There are several examples in both provincial and federal statutes of attempts to blend jurisdiction. Banks are specifically mentioned in the Ontario Securities Act of 1966,¹⁸ however, section 18(4)¹⁹ exempts banks from registration of trades, and section 19(5)²⁰ exempts bank officials from registration as investment counsel. The Bank Act of 1967 does not allow banks to be named in a prospectus and establishes percentage limitations on the securities a bank can hold.²¹ There is not, however, one all-embracing act which covers bank activity in the securities market and any legislative attempts in this area necessarily must operate within the framework of the constitution and the B.N.A. Act. Self-regulation, coupled with governmental self-interest, may provide the setting for change.

THE NATURE OF CURRENT REGULATION

Federal jurisdiction over banking is exercised exclusively through the Bank Act of 1967²² and section five makes the Act itself the corporate charter of the bank. Banks, therefore, are special statute companies, subject to the doctrine of ultra vires, and the legislature is the grantor of the corporate charter.

The Act is not aimed at the preservation of assets. There are no defined relationships of assets-to-debt or of assets-to-capital, and section 72, dealing with cash and secondary reserves, is the only provision which deals with asset control. The Bank Act does not restrict the amount of interest banks can charge their customers or pay to their creditors.²³

not be restricted to what it meant at the time the Act was passed. Attorney-general of Alberta v. Attorney-general of Canada, [1947] 4 D.L.R. 1, 9.

¹⁷ See ONT. STAT. c. 142, §§ 6-17 (1966).

¹⁸ ONT. STAT. c. 142, §§ 18, 19, 118(b) (iv) (1966).

¹⁹ *Id.* § 18(4).

²⁰ *Id.* § 19(5).

²¹ CAN. STAT. c. 87, § 76 (1967).

²² *Id.* c. 87.

²³ Until 1967 the banks could only charge a maximum of six percent interest; however, banks can now charge interest as they see fit. *Id.* § 91. Regulation of insurance company investments, however, is extensive, explicit, and appears to be concerned with safety. See Canada & British Insurance Companies Act, CAN. REV. STAT. c. 31, § 63 (1952).

Similarly, the Bank Act does not delineate the rights and liabilities which exist between banker and customer. This relationship is dealt with by the common law.

The Bank Act does contain extensive provisions regarding such areas as incorporation, structuring, and capitalization. These features are in line with the corporate charter provision of section five. In addition, enforcement provisions allow for audit, inspection, and disclosure; however, banking activities are neither explicitly stated nor rigidly controlled.

The banks' freedom of activity is most apparent in section 75, which is analogous to the purpose clause in the charter of a business corporation. This section is framed in broad, general terms and the permitted activities are summarized in section 75(1)(e). The Act characterizes the nature of the banking business in sections 75 through 98, which apply primarily to lending activities.²⁴ On the basis of these sections, the "business of banking" could probably be defined as the short-term lending of money.

The rationale for this characterization by the legislature may be found in traditional concepts concerning the relationship between bank and depositor, which place heavy emphasis upon liquidity. The Bank Act, however, is broad enough to permit a change in the role of the bank, even as a short-term lender, and product differentiation—which includes the creation of diverse savings and loan plans—can help to minimize the emphasis on liquidity.

EQUITY PARTICIPATION BY BANKS

Prior to enactment of section 76 of the 1967 Bank Act, there was no express prohibition concerning bank equity holdings; however, banks could not engage in a trade or business, be named in a prospectus for the sale of shares, or deal in their shares or the shares of other banks. Only these prohibitions, coupled with traditional reluctance on the part of banks to enter the equity market, restricted banks' equity holdings.

Section 76 reflected recommendations made by the Porter Commission.²⁵ The three major parts of this section deal respectively with the following areas: (1) stock restrictions applicable to holdings in "ordinary" companies; (2) stock restrictions applicable to holdings in trust and loan companies; and (3) exceptions to the rules.²⁶ There are no regulations explaining or modifying this section, nor has there been any

²⁴ CAN. STAT. c. 87, §§ 76, 77, 94-98 (1967) (common stock holdings, bank debentures, and unclaimed balances, respectively).

²⁵ PORTER COMM'N REPORT at 372.

²⁶ CAN. STAT. c. 87, § 76 (1967).

litigation or reported enforcement of its provisions. Enforcement has been based on extrajudicial means which chiefly rely upon the close liaison between the federal government and the bankers, the use of hearings and submissions, and the decennial revision of the Act. Any limitations on the bank's role in the equity market must therefore be determined from the statute itself.²⁷

The first part of section 76 deals with the ownership of shares in ordinary corporations. The section is framed in the negative, suggesting that the legislation does not encourage stock ownership. Its prohibitions relate only to voting shares in Canadian companies, leaving banks free to buy nonvoting Canadian shares and voting or nonvoting foreign shares.

Under section 76(1)(a), a bank may own no more than 50 percent of the issued and outstanding voting shares of a corporation so long as the aggregate price to the bank is less than five million dollars.²⁸ If the aggregate purchase price is more than five million dollars, the bank may hold not more than 10 per cent of the issued and outstanding shares.²⁹ The critical figure is five million dollars. If the bank spends less than that sum, it may hold up to 50 percent of a company's voting shares; if the bank spends more than five million dollars, it may only hold 10 percent or less.³⁰

Section 76(2)(a) controls indirect ownership of Canadian securities. A bank may not hold shares in a foreign corporation whose ownership of a Canadian company's shares exceeds the limits set on the banks themselves. The prohibition, however, generally does not preclude bank ownership in foreign corporations, nor does it preclude ownership in nonresident foreign corporations that actually do business in Canada.

It is important to note the implications of these provisions. The 50 percent and 10 percent restrictions appear to be directed toward control; however, it is legal, rather than actual or working control that is the thrust of the statute.³¹ Furthermore, the limitation on voting shares

²⁷ As a general rule, litigation under the Bank Act is not an adversary proceeding between the government and the bank. The only litigation arises, in fact, when an individual's rights may involve the Bank Act's provisions. In seeking to interpret the legislation, therefore, the emphasis is not on a case study, but on the hearings and submissions preceding the statute.

²⁸ CAN. STAT. c. 87, § 76(1)(a)(i) (1967).

²⁹ *Id.* § 76(1)(a)(ii).

³⁰ As the divesting of a bank's interests need not be before 1971, many of the current holdings in trust companies are not yet "illegal." CAN. STAT. c. 87, § 76(1) (1967).

³¹ It is beyond the scope of this article to discuss what constitutes actual or working control over a public issue corporation. See generally *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962) (Friendly & Clark, JJ. concurring). It is clear that it is not actual control which is contemplated in the Bank Act but merely ownership of a

alone is unrealistic; control may be exercised within the strictures set. Moreover, section 76 cannot force diversification insofar as that term implies liquidity. The section is also highly flexible. It suggests that banks can exercise indirect controls. Banks can control mutual funds or holding companies and are relatively free to make equity-oriented arrangements while not owning stock directly.

The second part of section 76 relates to the ownership of shares in trust or loan corporations. In these provisions, there is not a five million dollar guide. The chartered bank may own no more than 10 percent of the issued and outstanding voting shares in a trust or loan corporation and, regardless of value, excesses must be divested before July 1, 1971;³² moreover, section 76(2)(b) expressly precludes ownership of shares in a foreign corporation that may have more than a 10 percent voting right in a Canadian trust or loan company. Again, however, the ownership of foreign trust or loan companies is not prohibited.

The rationale underlying section 76 is multifaceted. Traditionally, banks have not heavily invested their assets in common stocks³³ and the felt need for liquidity has inhibited banks from entering the equity market. At the same time, the general statutory scheme of the Bank Act has operated to keep banks in a generally favorable competitive position vis-à-vis other financial intermediaries, perhaps in large part to provide government influence over the nation's money supply. Section 76 can be viewed as a tool which is necessary to keep the banks flexible and competitive, with inspection and decennial statutory revision available to correct any obvious abuse. It was considered preferable, therefore, to give the banks tools for competition before the need arose, and leave it to these quasi-public enterprises to use the instrument with discretion.

The government's desire to keep the banks in a good competitive position, while preserving a kind of inter-modal competition between banks and trust companies, resulted in separate section 76 treatment of security holdings in trust and loan companies. A specific subsection deals with

certain percentage of voting stock; however, the influence which an institutional investor can exert over a portfolio corporation by using the pressure of the market often bears no relationship to the percentage of voting stock which it owns in the corporation. See Baum, *Catalyst for Change: Mutual Funds in Canada*, 59 *Geo. L.J.* 249, 293 (1970).

³² See note 30 *supra*.

³³ The Porter Commission stated that, in 1962, only \$1.1 billion of the banks' holdings were in provincial, municipal, and corporate securities. A small portion of this was in all forms of securities and all of these holdings were growing at a considerably slower pace than loans. PORTER COMM'N REPORT 126. Aside from the consideration of the bear market at the time, this holding of well under five percent of total assets was attributed to the fixed dollar nature of liabilities and the risks and skills of investment in the area.

bank holdings in trust companies.³⁴ This reflects the Porter Commission's attempt to prevent banks from operating in areas in which they possess little expertise, so that they might better exploit their strength. For example, the controls imposed over security holdings in ordinary corporations were thought to be a method of insuring against the bank's dealing in goods, wares, and merchandise or engaging in a trade or business.³⁵

The third part of section 76 involves exception to the earlier provisions. Under section 76(3), if after having acquired securities the bank gains voting rights that would violate the restrictions, it is allowed two years from that time to divest itself. After-acquired voting control which would arise on the conversion of preferred shares, warrants, or debentures is exempted from this provision. Although the exception seems straightforward, a bank could be in an influential position even before the after-acquired control became a reality. In instances where a bank is placed in a controlling position by its realization on the security of shares, a five-year divestment period is provided by section 76(4). The section exempts the banks from a forced disposition which could be prejudicial.

Section 76(5) is a discretionary provision. Except in certain circumstances, such as those envisioned by section 76(4), the Minister of Finance may order divestment of shares when a bank has effective control over a trust or loan corporation through allowed holdings in ordinary corporations.³⁶ This subsection recognizes that listed percentages alone are not always the measure of actual control and seeks to implement the goal of competition between financial institutions. As a result, under no circumstances of ownership may banks control trust and loan companies.

Sections 76(6), 76(7), and 76(8) are corollaries to the previous restrictions and exceptions. A bank may exceed the limits set by section 76 so long as it divests itself within two years and the Minister has discretion to extend divestment periods so long as the aggregate of the extensions does not exceed two years. Finally, the Export Finance Corporation of Canada and bank service corporations, as defined in section 76(9), are exempted from the operation of section 76.

Section 76(9), the definitional subsection for the various corporations

³⁴ PORTER COMM'N REPORT 372. "The purpose of [section 75(2)(b)] . . . is primarily to ensure that banks do not overextend themselves in fields in which they are not expert but it also acts to prevent intensive banking control of other businesses."

³⁵ CAN. STAT. c. 87, § 75(2)(b) (1967).

³⁶ It is only by way of controlling ownership that the legislation seeks to realize its aims. The legislation does not aim at "marriages" that are not based in ownership. There is no control over informal arrangements or common goals that may be present.

named in the section, raises several issues. Bank service corporations, which can be owned by a bank, are defined as those companies that hold property for, provide ancillary services to, or own adjoining property to the bank and its branches. While the section seems relatively clear and harmless on its face, the exemption from section 76 of this type of corporation has dramatic possibilities. In urban centers, where real estate booms are big business, banks may effectively control major Canadian corporations and actively engage in the real estate field through the use of bank service corporations.³⁷

A second issue raised by the definitions contained in section 76(9) is the meaning of "trust and loan companies." As defined, the trust and loan companies which banks may not control are those which are described by the federal acts and which accept deposits from the public. Without commenting on possible plans, the legislation suggests freedom of activity in the provincial areas;³⁸ moreover, a bank need only divest itself of the deposit-gathering function of a trust company and might still retain control of a trust and loan company's investment counselling services without violating the letter of the law.³⁹

From a statutory viewpoint, section 76 is relatively clear. It is the banking industry's view of, and reaction to, this section, however, that is of primary importance. Section 76 must serve as a guide to future banking policy.

The banking industry is extremely powerful in Canada. It is important to determine how the industry views this power and to what ends this power will be applied. The definition of the banking function by the Porter Commission, insofar as it is keyed to liquidity, probably is more restrictive than that which would be urged by members of the banking industry. The Porter Commission distinguished the banking function on the basis of the liabilities which banks assume—that these liabilities are liquid, and that the public uses them as a means of pay-

³⁷ The ownership of plazas, shopping malls, office buildings, and the like must be considered major activity when viewed in light of land values in urban centers. The bank offices in ventures such as the T-D Centre are only a minor aspect of the business that the Centre carries on.

³⁸ There is no express prohibition on the ownership of provincially incorporated trust companies. Regardless of the actual activity that is carried on, the definitions as presented are narrow, to say the least.

³⁹ A trust company can conduct a normal business while not accepting deposits from the public; a bank retaining control over the trust company's operations will not be in violation of the provisions of the Act which deal with bank ownership of trust companies.

ment—and the Commission felt that banks must be defined in terms of liquidity.⁴⁰

Within the context of liquidity, banks perform two major functions: They accept deposits and make loans. Traditionally, in this capacity they are seen as a reflection of the national need,⁴¹ and when new facilities or services are called for they are met relative to the overall financial environment and the prevailing legal framework.⁴² The Bank Act establishes only the outer limits of this framework. The agency in charge of applying the Act to the industry is the Bank of Canada, and its Governor, Louis Rasminsky, has made it clear that the function of banking is not strictly confined and that the role of financial intermediary is merely an extension of this function.⁴³

The Canadian chartered banks controlled approximately 42 percent of all assets in the hands of Canadian financial intermediaries by the end of 1968.⁴⁴ Effective management of these assets would be a difficult task if liquidity were the sole criterion for bank investment. The need for liquidity, however, remains an obvious concern for banks. This is reflected in the fact that by June 5, 1969, over 60 percent of total bank assets were in loans of some kind. Statistics indicate that security holdings are only three percent of total bank assets. Yet, if one assumes, as do the banks in their own charting,⁴⁵ that everything not a loan, cash resource or other fixed asset is a security investment, the three percent figure rises to between 25 and 30 percent. It would certainly appear that the generalized statistics do not fully reflect current banking activity.

Since the 1967 statutory revision, banks have experienced a sudden and steady growth. The changes gave bankers an opportunity to expand their existing financial services. In fiscal 1968, total assets increased by 15.6 percent, total loans by 13.2 percent, total securities by 19.3

⁴⁰ *Proceedings of the Standing Comm. on Finance, Trade and Economic Affairs: Decennial Issue of the Bank Act*, 27th Parliament, 1st Sess. 743 (1966).

⁴¹ Coleman, *The President Speaks*, 75 *THE CANADIAN BANKER* 17, 18 (1968).

⁴² *Id.* at 18.

⁴³ Financing economic growth in a country like Canada involves transferring purchasing power from those individuals who want to save to those who need to borrow. Banks profit by supplying savers with a wide variety of financial obligations tailored to the particular needs of the savers, and by allocating the resulting pool of funds to borrowers in exchange for financial obligations which are tailored to the particular needs of the borrowers. Remarks of Louis Rasminsky, Governor of the Bank of Canada, before a meeting of the Institute of Canadian Bankers, Montreal, Jan. 20, 1969.

⁴⁴ GOVERNOR OF THE BANK OF CANADA, *ANNUAL REPORT TO THE MINISTER OF FINANCE* 42-43 (1968).

⁴⁵ Remarks by J. H. Coleman, Vice President and General Manager of the Royal Bank of Canada to the Toronto Society of Financial Analysts, Toronto, Oct. 16, 1968.

percent and total cash resources by 21.4 percent.⁴⁶ In absolute figures, the bulk of new funds went into lending, and although the percentage of total assets in securities dropped, there was an increase in the total amount so invested.

The raising and subsequent elimination of the six percent interest ceiling, permitted by section 91 of the 1967 Act, brought dramatic change.⁴⁷ This ceiling had long inhibited an aggressive banking policy and, to a degree, had led to forced conservation. The limitation on the amount banks could charge for use of their capital prevented banks from participating in more lucrative but higher risk areas, such as consumer lending.⁴⁸ It also severely hindered banks in competing for the deposit and savings dollar. In 1951, banks controlled 53 percent of the assets of Canadian financial intermediaries; by 1962, they held only 46.7 percent.⁴⁹ Since the 1967 revisions, however, banks have been regaining lost ground.

The competition for deposits, among banks themselves as well as with other institutions, is evidenced by extended service, product differentiation, and advertising. Using the interest rate as a means of competition, however, could endanger stability in gross savings. At one point, competitive bidding for large block funds of fixed term deposits became so intense that Governor Rasminsky advised the banks against such activity. Shortly thereafter, an informal ceiling on interest paid on deposits became bank policy. Competition through diversity of services, however, has continued.

This competition has significantly increased the contact between the banks and the public. The banks have introduced both business and individual consumers to the cashless society. The Bank of Nova Scotia, for example, offers a low-cost "current account" which keeps track of daily expenditures and income. In order to simplify payroll distribution, "payroll accounts" serve as a method of saving on stationary costs, protecting a business from loss or theft, and keeping payroll information confidential;

⁴⁶ *Id.*

⁴⁷ "First established in 1777 in Quebec, maximum lending rates were subsequently set for all banks. The rate was standardized at 7% in 1867 and remained there until 1944 when it was reduced to 6% as a move toward lower interest rates in a cash-short, post-war world. The limit stayed at 6% until May 1, 1967" Hopkins, *Impact of the Bank Act*, 74 THE CANADIAN BANKER 52, 53 (1967).

⁴⁸ It was not until the Bank Act revision of 1954 that the field of consumer lending was made available to the banks. The banks, however, were reluctant to enter this higher risk area too heavily, because of the six percent ceiling which had forced them to work with a small margin of profit. The Bank of Nova Scotia was the most aggressive in the area of consumer loans until the recent Bank Act revisions.

⁴⁹ P. Lusztiq, *An Analysis of the Concentration of Economic Power in the Hands of Institutional Investors: The Canadian Perspective* 20 (1965) (unpublished).

the company issues one paycheck, and the bank credits individual employee accounts. This device promotes the bank's business not only with the company but with employees as well. Related to "payroll accounts" is the more inclusive "lock box service" by which the bank does the accounting for a particular business. The company has all its incoming checks sent to a post office box, and the bank clears the box daily, adjusts the company's accounts, and provides it with a convenient statement. Banks also provide collection services, international banking services, and financial and marketing information for business development. In addition, they have introduced a special instrument whereby businesses can obtain short-term loans in blocks of \$100,000 or more of the bank's surplus funds. Some of these instruments are negotiable or transferable.

The same management facilities are, to an extent, available to the individual consumer. A nonchecking savings account was introduced, for example, which brought the depositor more than six percent interest, contrasted to the older savings accounts with checking privileges which yielded only three to three and one-half percent. Another variation in the product offered to the public is the savings certificate, with terms from one to six years, which earns the equivalent of about seven percent simple interest per annum if held for six years. The depositor can pay either by cash or by installments for his certificates, and they are redeemable at face value plus accumulated interest at any time, in any branch of the issuing bank.

In the struggle for the savings dollar, other specialized installment savings plans have been created. One includes life insurance on the amount of the ultimate savings goal. The bank pays for the insurance, but the customer applies directly to the insurance company for his coverage. The plan usually requires monthly deposits for a term of approximately 50 months, and generally the maximum goal is approximately \$3,000. If the depositor dies, his beneficiary or estate receives life insurance in the amount of the savings goal, the total deposits to that date, and a cash bonus based on the amount deposited.

In the area of debt, the most significant innovation has been the introduction of bank credit cards and check guarantee cards. The Bank of Nova Scotia and the Bank of Montreal use a check guarantee system which is relatively inexpensive to establish.⁵⁰ The Toronto-Dominion,

⁵⁰ BUSINESS WEEK, Feb. 27, 1965, at 58. Because Chargex was not set up as an independent corporation and its activity defined as a "financial service," the four banks concerned were able to avoid any problems with the 50 percent, five million dollar restriction of sections 76 (1) (a), (i) and (ii) of the Bank Act. This structure has also proved valuable as a tax advantage since heavy initial losses encountered can be subtracted from current profits. Thus, the banks have been able to finance a totally new

the Commerce-Imperial, the Royal Bank, and La Banque Canadienne Nationale jointly promote a bank credit card system, "Chargex," patterned after the Bank of America plan implemented in California in 1959.⁵¹ With "Chargex," banks have demonstrated the capability and the technology to provide the individual consumer with service comparable to that provided to business.⁵² Lloyd Calver of the Toronto Dominion Centre states that the present Chargex system provides for instant accounting. Excesses by the consumer are guarded against by a floor limit—the maximum amount that can be transacted on any one sale without verification through the computer center by the merchant—and by computer scanning of the individual account. For amounts above the floor limit, the merchant must phone the computer center to have the account checked and to obtain a code number for that particular sale, which number must be on the Chargex slip forwarded to the bank. If the Chargex system is accepted, as trends in the United States indicate it will be, it is reasonable to believe that, ultimately, this check will be accomplished through a touch-tone telephone system. By use of computer language cards, the retail merchant will communicate directly with the computer for information with respect to customer financial ability.

Chargex is a continuation of the service, traditionally performed by banks, providing the media to facilitate the exchange of goods or wealth. Just as banks abandoned the haulage of coin boxes by stagecoaches, banks will be compelled to use electronic circuitry to transfer money assets from one individual to another. Although the function of Chargex is one with which banks have long been familiar, the role of the banks in this process is significantly different from their role in the check collecting and paying process. With Chargex, banks are not intermediaries; rather, they buy the accounts receivable and levy a floating charge against the merchant and individual consumer. Member merchant accounts are discounted from four to six percent. As sale volume increases, regardless of profit the cash flow to the buying banks accelerates.

business operation without creating a new corporate entity. Internal financing of this nature could affect other expanding industries, especially during periods of scarce capital.

⁵¹ The system also features a 30-day free credit position for the public, but if the amount outstanding is not paid within this period the balance is treated as a loan. The interest on the balance is 1½ percent per month (18% per annum) on balances up to \$500, and one percent per month (12% per annum) on balances exceeding \$500.

⁵² Remarks of J. H. Coleman, Vice President and General Manager, Royal Bank of Canada, to Society of Financial Analysts, in Toronto, Oct. 16, 1968. Mr. Coleman also pointed out that the Chargex system was not as profitable as that of its American counterpart, nor even as some of the other lending institutions in Canada, and that efforts would be continued to increase the rate of return under this system.

Thus, the success of the banks flows directly from the success of the member-merchants.

The monthly invoice received by the individual consumer indicates the minimum amount that need be paid. Pressure is not exerted to have the consumer exercise his 30-day free credit. The credit card system is not only a money-transfer mechanism but also a means of lending money, and both of these are regarded by the industry as banking functions. By performing these functions, the banks would seem to be attempting to conform to their new image of being in the business of filling the customer's need for financial services. The recognition of the customer as the source of all profit would seem to be the basis for this orientation.

Banking's new image is also promoted by recent innovations in bank architecture and advertising. The marble edifice and hard-nosed credit manager have largely been replaced by modern, informal interiors and attractive girls in mini-skirts; television commercials project an image similar to that of a friendly loan company. Of central importance to the new image, however, is bank involvement and participation in the business of the community.

BANK ACTIVITY AS IT RELATES TO EQUITIES

When the government freed the banks of Canada from the maximum restrictions on fixed interest charges, it permitted the banks to retain their position as the dominant financial institutions in Canada. Through the banks' renewed strength, the government continued to enjoy strong controls over monetary policy. The question remains, however, whether the consumer will be benefited as well. Governor Rasminsky has argued that consumer benefits flow not from undue concentration in the financial system but from improved access to credit, cheaper credit, or greater return on savings.⁵³

Profit, however, largely results from meeting consumer demands which are more complex than simple access to credit, cheaper credit, or greater return on savings. In seeking goods or services, consumers may not always know what is in their best interest and, if they do, may not be willing to make the rational choice.

Canadian banks remain concerned with the profitability of their operations vis-à-vis other lending corporations in Canada and the American banking industry.⁵⁴ It is significant that Canadian banks have closely

⁵³ Remarks of Louis Rasminsky, Governor of the Bank of Canada, to Institute of Canadian Bankers, in Montreal, Jan. 20, 1969.

⁵⁴ Bunting, *One Bank Holding Companies: A Banker's View*, HARV. BUS. REV., May-June 1969, at 99. Mr. Bunting sets out the formula for a bank wishing to convert itself

scrutinized the development of the American system. For example, although the structure of Canadian banking is not amenable to the development of one-bank holding companies,⁵⁵ there may be a more subtle means of creating a Canadian counterpart. Thus, there would seem to be a common question, applicable both to the American and Canadian industries, whether banks, because of their money-creating power, legal protection from excessive competition and tremendous financial strength, should be more limited than other corporations in their ability to diversify and buy nonbanking companies.⁵⁶

In examining the multifaceted role and potential of the Canadian banking industry, the question arises as to what form any limitation should take, if in fact there should be any limitation at all. If this examination reveals a complex industry not structured upon historic norms, industry structure must be considered in determining which public policy is to be observed in banking regulation.

In 1962, the Royal Bank, the Banque Canadienne Nationale, Montreal Trust, the Canada Trust Co., and General Trust of Canada created Roy Nat Ltd., the purpose of which was to provide financing for Canadian business firms which were too large to take advantage of the Small Business Loans Act but too small to go to the capital market.⁵⁷ Of the \$10 million subscribed to provide the paid-in capital, Royal accounted for 41.5 percent and Banque Nationale 34 percent.⁵⁸ Roy Nat lends amounts of \$25,000 or more at interest rates determined by the particular circumstances and takes mortgage bonds, debentures, preferred stock, unsecured notes or common stock as security; however, Roy Nat appar-

into a holding company. Essentially, the process involves the creation of a subsidiary, a "phantom" corporation existing only on paper. The original stock of the parent bank is then exchanged for shares in the subsidiary so that the stockholders wind up owning the corporation, which has the bank as its only asset. Such a construction would also allow banks to enter any industry, although all one-bank holding companies have heretofore confined themselves to financial activities. *Id.* at 102. Bunting's formula would encounter serious difficulties in Canada, however, since there is a limitation on the holding of bank stock so that no one company could purchase all of the bank shares. CAN. STAT. c. 87, § 67 (1967).

⁵⁵ Nadler, *One Bank Holding Companies: The Public Interest*, HARV. BUS. REV., May-June 1969, at 107.

⁵⁶ ROYAL BANK OF CANADA, SUBMISSION TO STANDING COMM. ON FINANCE, TRADE, AND ECONOMIC AFFAIRS, app. V, at 2299 (1966).

⁵⁷ *Id.*

⁵⁸ Bank ownership of any more than 10 percent of a corporation's voting common stock is clearly prohibited by section 76 of the Bank Act. At the hearings, it was generally agreed that Roy Nat would not be exempt under section 76(8) as a "bank service corporation." The fact that the section was to be retroactive in effect was one of the main reasons for Royal Bank's disclosure of purpose and its strong stand in seeking changes in the original bill. *Hearings before Standing Comm. on Finance, Trade and Economic Affairs: Decennial Revision of the Bank Act*, 27th Parl., 1st Sess. 837 (1966).

ently does not seek control through ownership of a company's voting stock.

Ownership by a bank of 10 percent of any corporation's voting common stock was prohibited by unamended clause 76 in the draft bill C-222. In the discussions, it was generally agreed that Roy Nat would not be exempt under section 76(8) as a "bank service corporation";⁵⁹ moreover, clause 76 would be retroactive. Thus, the Royal Bank, by disclosing Roy Nat's purpose, sought to have the bill changed. During the hearings, the committee was concerned with the relationship between the five Roy Nat sponsors. At one point the Chairman noted that ownership was not necessary for what he termed "a very useful relationship" and the Royal Bank representative agreed. The Committee was assured that none of the sponsors would interfere in any way with the operations of Roy Nat and the Royal Bank emphasized that no one sponsor had a controlling position. The Royal Bank's representative seemed successful in convincing the committee that no undesirable effects would result and, indeed, that Roy Nat filled a gap in the Canadian economy. Operations such as Roy Nat, U.N.A.S. Investments, Kinross Mortgage Corp., and Markborough Investments, Ltd. appear to have been saved by the final amendments to section 76 which permit bank ownership of more than ten percent of the corporations which do not accept deposits. In fashioning the amendments, the legislators were concerned with preventing concentration of power in the hands of a few, but they also recognized the need to encourage the growth of smaller business units and promote participation in new joint ventures.⁶⁰

In some instances, the distinction between bank investment in debt and in equity is blurred, and some loan agreements seem to fall into the latter category. Recently, the Royal Bank agreed to loan Becker's Milk

⁵⁹ Committee recognition of the pressing need for such amendments is shown in the remarks of Canadian Finance Minister Sharp, who pointed out that the government did not want to present proposals that would have an "unnecessary limiting effect upon useful bank activity." *Financial Post*, Mar. 18, 1967, at 19, col. 3.

⁶⁰ The Porter Commission provided additional support for this position by stating that it "did not wish to see the new legislation inhibit useful innovations and improvements in the financial system by preventing or restricting bank participation in new joint ventures . . ." PORTER COMM'N REPORT 371 (1964).

A good example of this type venture can be seen in the operation of a new private company called International Capital Corporation Limited. The Royal Bank, in association with United Corporations Limited, is believed to hold a "substantial majority of the stock." The company is expected to take minority equity positions in growth companies that cannot readily obtain funds through other channels, although the possibility of *control* or *outright purchase* is not excluded. As a merchant bank, the company can also provide management and financial services, and can act as a catalyst for a group of investors. *Financial Post Corp. Service, Current Info. Card on Royal Bank of Canada* (Mar. 7, 1969).

Co. Ltd. up to \$4 million.⁶¹ Becker is entitled to take down the loan until December 31, 1971. The loan is secured by the issuance of a series of debentures at an interest rate one percentage point above the bank's prime rate existing at the time of issue. One of the conditions of the loan is an "equity kicker," a device used by insurance companies for years but, until recently, not used by banks.

Becker's Milk listed an additional 25,000 nonvoting participating class B preferred shares without nominal or par value. The Bank purchased 13,000 of these shares at a price of \$16.37, a figure roughly five dollars above the market price. The Bank is also entitled to receive warrants to purchase an additional 12,000 class B shares. For every \$500,000 of loan taken down by Becker, Royal receives 2,000 warrants for class B shares. Each warrant will purchase one share at 10 percent above what the closing bid price was on the day before the take-down of the loan. Such equity participation by banks is no longer unusual. Bank of Canada statistics⁶² indicate that in 1968 nonbank investors increased their new corporate stock holdings by approximately 50 percent over those in 1966, while the banks increased their security holdings by over 30 percent.

The willingness of banks to participate in industrial operations was evidenced recently by a proposal made by Maclean-Hunter Cable TV Ltd.⁶³ The Toronto-Dominion Bank indicated a willingness to provide much of the financing necessary to cable the Niagara Frontier if it could obtain up to 30 percent of the equity in the venture. The Canadian Radio-Television Commission refused to allow this, expressing concern over the long-term implications of allowing banks to take equity positions in licensee corporations.⁶⁴

The extent to which the dynamism displayed by the larger banks will affect governmental efforts to increase competition by establishing a severed relationship between banks and trust companies is still unclear. For example, both the Scotia and Toronto-Dominion must dispose of more than 857,000 shares, with an estimated value of \$9.5 million, before July 1, 1971. Assuming that the restrictions in the Bank Act will require a number of other divestitures, perhaps of equal or greater magnitude, one can appreciate possible difficulties which may arise in locating buyers. The prohibitions of interlocking directorships⁶⁵ and the

⁶¹ Financial Post Corp. Service, Report on Becker's Milk Co. Ltd. (Dec. 23, 1968).

⁶² GOVERNOR'S ANNUAL REPORT, *supra* note 44, at 48.

⁶³ Toronto Globe & Mail, Apr. 17, 1969, § B, at 3, col. 9.

⁶⁴ CAN. RADIO-TV COMM'N DEC. No. 69-320, July 28, 1969, at 2. It is interesting to note that at the time equity participation was sought, the bank was still willing to finance the operation if such ownership participation was found to be undesirable.

⁶⁵ CAN. STAT. c. 87, § 18 (1967).

10 percent limitation of holdings⁶⁶ with respect to trust and loan companies are not all-encompassing since the definition of loan and trust companies requires the acceptance of deposits from the public.⁶⁷ Thus, it may be possible for banks to sell the deposit-accepting portions of their affiliated trust or loan companies and be limited only by the more liberal restrictions in sections 18 and 76 of the Bank Act, which control ownership and interlocking directorships in other Canadian corporations.⁶⁸ It is easy to understand the criticism of the limitations imposed by sections 18 and 76 by C. F. Mackenzie, President of Canada Permanent Mortgage Corporation, who recognizes the relative security from takeover which results when a chartered bank has a substantial holding in a company such as Canada Permanent; moreover, insofar as the new legislation forbids a bank director from being a director of a loan or trust company, Canada Permanent could potentially lose the services of 14 directors.⁶⁹

Chartered banks own extensive trust operations in other jurisdictions. If banks decided to participate actively in the fiduciary and management aspects of trust company business, not only could they acquire up to 50 percent or \$5 million in a corporation of this sort, but could also farm such business to their foreign trust subsidiaries. The larger Canadian banks have sufficient built-in expertise in their foreign trust operations to establish their own fiduciary enterprises in Canada without the need for acquisition. Accordingly, the Porter Commission recommendations become even more difficult to implement. Legislative enactment, by itself, may not be able to achieve the desired separation between banks and trust companies because banks have too great an interest in trust company operations.

By offering portfolio investment services for investors, banks are

⁶⁶ *Id.* § 76.

⁶⁷ The words "and that accepts deposits from the public" are found both in section 76(9)(d) and section 18(6)(a) of the Bank Act dealing with share ownership and interlocking directorships.

⁶⁸ Section 18(7) provides: "A person who is a director of a [Canadian] corporation . . . is not eligible to be . . . a director of the bank after the first day of July, 1971, when other directors of the bank constitute one-fifth or more of the board of directors of the corporation."

⁶⁹ The services of the bank directors who are members of Canada Permanent's board have not been lost entirely. In 1966 H. S. Gooderham and F. G. Gardner were directors of both Canada Permanent Mortgage Corp. and of the Toronto-Dominion Bank. In 1968, their positions were slightly altered so that neither Gooderham nor Gardner were directors of the Toronto-Dominion Bank; however, Gardner remained a director of Canada Permanent and an officer of the Toronto-Dominion Bank while Gooderham was a Director of Canada Permanent and an officer of Canada Permanent Trust. Although Mr. Gardner's association with the Toronto-Dominion Bank is still substantial, it does not seem to be contrary to law.

competing with the mutual funds which, historically, have held themselves out as specialists, skilled in the ways of the equity market. For example, Roy Fund Ltd. is associated with the Royal Bank of Canada; and Corporate Investors Ltd. is partially owned by the Toronto-Dominion Bank.

Each bank has a different approach to fund operations. Roy Fund is distributed by Roy Fund Distributors Ltd., a wholly owned subsidiary of United Bond and Share Ltd. The Royal Bank claims to have no ownership interest in either company, and its relationship with Roy Fund is described as an attachment with no equity position.⁷⁰ T. H. Coleman and J. B. Morgan, two key officers of Royal, are listed on the 1968 Roy Fund board of directors. Among the features advertised by Roy Fund are a maximum acquisition charge of three percent, the right to purchase fractional shares, and no charge for redemption. The reason given for the relatively low acquisition charge is the absence of brokerage fees. Roy Fund shares are available solely through Royal Bank branches. Royal receives compensation as the Fund's transfer agent, shares in the three percent commission for processing sales, and provides fund and shareholder accounting services⁷¹ thus participating in the management fee of one-half of one percent.

The association between Toronto-Dominion and Corporate Investors Ltd. is quite different. Corporate Investors Ltd.'s authorized capital includes six million class A shares and 4,000 class B shares, each with a par value of 25 cents.⁷² The two classes have similar rights except that class B shares are not subject to redemption and have the right, voting separately and as a class, to elect three members of the board.⁷³

The Toronto-Dominion Bank has realistic control over company operations through its 100 percent ownership of the class B shares.⁷⁴ Yet, because the class A shares have voting rights, the bank is within the 50 percent limit of section 76, and because of the nominal value of the class B shares, the bank is also well within the \$5 million limit. Unlike Roy Fund, the acquisition charge for Corporate Investors is 8½ percent. Under its agreement with Corporate Investors Ltd., Toronto-Dominion provides management, administrative, and investment counseling services to the Fund; and Loomis, Sayles & Co. (Canada) Ltd. is under contract to the marketing division to manage the portfolio for the Fund. Corporate Investors pays the distributor one-half of one percent per annum

⁷⁰ Financial Post, Apr. 22, 1967, at 24, col. 2.

⁷¹ *Id.*

⁷² CORPORATE INVESTORS LTD., PROSPECTUS 3 (Apr. 26, 1968).

⁷³ *Id.* at 4.

⁷⁴ *Id.* at 6.

of net fund assets for its services.⁷⁵ The Toronto-Dominion Bank owns 50 percent of Corporate Investors (Marketing) Ltd. and 50 percent of Loomis, Sayles & Co. (Canada) Ltd. The other 50 percent of the two companies is owned by Loomis, Sayles & Co., Inc. (Boston).

For the most part, these bank-investment service relationships have worked quite well, the only sign of difficulty arising from differences in the nature of their corporate structures. Toronto-Dominion was refused permission by the Quebec Securities Commission to have details about Corporate Investors Ltd. available at its branch counters, presumably because of its equity position in the company.⁷⁶

Comparison of the services provided by Royal Bank and the Toronto-Dominion reveal differences only of degree. Royal performs the traditional functions of a bank, acting as transfer agent and accountant in merely accepting orders for Roy Fund at its branches. Nevertheless, Royal's business volume and its compensation for services rendered are directly tied to the performance and success of Roy Fund. Clearly, Royal has no less an interest in Roy Fund, despite the lack of ownership, than the Toronto-Dominion has in Corporate Investors. Nonetheless, the Toronto-Dominion has involved itself directly in managing Corporate Investors, while Royal has acted with greater restraint.

The Royal Bank, however, has moved decisively in areas in which express legal sanction has been given. For example, prior to the new provisions, banks had been able to invest in bonds and debentures issued against mortgage securities, but had been prohibited from granting mortgage credit directly. Banks are now permitted to make conventional mortgage loans by section 75 of the Act,⁷⁷ and in order to remain flexible and continue to take on new mortgages at the ever-increasing rates of return, they have been developing a second mortgage market.⁷⁸ An example of this is Royal Bank's establishment of Roymor Ltd., an entity purchasing mortgages which have originated in and been processed by the bank. Royal is an equal partner in the venture with Interior Trust Co. of Winnipeg.⁷⁹

⁷⁵ *Id.* at 7.

⁷⁶ Royal Bank did not encounter this problem with Roy Fund, and Toronto-Dominion has not encountered the same difficulty in other provinces.

⁷⁷ CAN. STAT. c. 87, § 75 (1967). This change recognizes that banks no longer concern themselves primarily with short-term loans. The law contemplates an appropriate degree of liquidity in light of the well-defined cash requirements which will confront the bank at any particular time.

⁷⁸ Remarks by J. H. Coleman, *supra* note 45.

⁷⁹ Interior Trust is owned as follows: 40 percent by Royal Bank, 40 percent by the United Corp., Ltd., and 20 percent by St. Maurice Gas Inc. Royal Bank owns less than a 10 percent interest in St. Maurice Gas. Financial Post Corp. Serv., Current Info. Card on Royal Bank of Canada (Mar. 7, 1969).

Closely related to mortgage activity is the activity permitted by section 76(8) which exempts holdings in "bank service corporations." All of the banks seem to have taken advantage of this provision and have created companies to hold their realty. The Toronto-Dominion Bank and Cemp Investments Ltd. are equal partners in the Toronto-Dominion Centre Limited. The company owns and operates a \$145 million commercial complex in downtown Toronto, which includes a banking mall and plaza. There are similar operations underway throughout Canada.⁸⁰ The Toronto-Dominion's equal partners in a multimillion dollar project in Vancouver are the T. Eaton Co. of Canada and Cemp Investments Ltd. This development will include a Toronto-Dominion Bank Tower, an Eaton's Department Store, a shopping mall, two office buildings, and a hotel.⁸¹

CONCLUSION

Are the Toronto-Dominion's interests, outlined above, within the 50 percent, five million dollar limitation, or are these developments exempt from these restrictions because they qualify as bank service corporations? If the latter is correct, a question arises concerning the extent to which a bank may be permitted to become involved in commercial operations through the use of a bank service corporation. Banks are not content merely to act as lending institutions; instead, they seek to share actively in the profits of community development. To the extent that they will also be sharing in the losses, rather than receiving a fixed return by way of interest, they may provide less security than in the past. It is unclear whether the banks' view of themselves and the role they are in fact playing comport with public policy, perhaps because public policy has not been clearly formulated.

Section 76, which deals specifically with bank ownership of corporate stock, presented an opportunity to shape public policy, and the amendments to the original bill were made specifically to accommodate the banks' holdings in such companies as Roy Nat, Kinross, and U.N.A.S. New provisions in the section also permit banks to invest up to five million dollars in voting stock, giving them leeway to make arrangements to control almost any Canadian corporation; moreover, the new limitation is not on total investment but rather on investment in voting stock.⁸² The wording thus effectively eliminates any restrictions on chartered banks from gaining control of a majority of Canadian corpora-

⁸⁰ TORONTO-DOMINION BANK, ANNUAL REPORT 2 (1968).

⁸¹ *Id.* at 6.

⁸² *Hearings, supra* note 58, at 3329.

tions.⁸³ Section 76 also prohibits banks from holding more than 50 percent of the voting stock of any Canadian corporation;⁸⁴ however, this restriction easily can be avoided by the skillful use of associated holding companies.

As a result of competition, bankers have begun to respond to a growing consumer demand. Out of this response has emerged the bank which can render, directly or indirectly, any service sought by the consumer. In an industry where federal power, at least in theory, is absolute, this expansion could not have occurred without government consent. The government could have restricted the banks to a traditional role emphasizing liquidity and deposit protection, but it chose not to do so. This decision may have been based upon the desire to maintain banks as the dominant financial institution, thereby allowing efficient execution of monetary policy.

Other alternatives existed. The decision might have been made to maintain the dominance of the industry without maintaining the prevailing exclusivity of the banking fraternity. For example, the government could have followed the recommendations of the 1964 Royal Commission on Banking and Finance and permitted trust companies to act as banks with grant of a federal charter. Equity oriented banks, however, are in a position through size to dampen interinstitutional competition. Through acquisition and advertising, they may bring to bear the full weight of the national enterprise in any one of their branches.

Moreover, banks are moving into positions of major influence in non-financial enterprises. In a single business, a bank can be a lender of funds, holder of equity, depository of corporate revenue, accountant, director, and financial advisor. What makes this alliance potentially unhealthy is the possibility that corporate goals may be—or, indeed, in some cases should be—at variance with bank objectives, particularly if the latter are purely short-term objectives. As a matter of policy the Canadian Radio-Television Commission has made unequivocal its view that banks and other financial institutions should not be permitted equity participation as a condition to funding broadcasters. Licensees have a fundamental, exclusive responsibility to the Commission and, through it, to the public. No other group or business, as a matter of public policy, should be allowed to dilute that obligation.

This determination of public policy has not been made in areas in-

⁸³ *Id.* The Committee hypothetically suggested the situation where a bank, along with five million dollars in voting stock, might also take up to \$100 million in nonvoting preferred stock and even more, should they desire, in debentures. Total investment is unlimited for all practical purposes.

⁸⁴ CAN. STAT. c. 87, § 76 (1967).

volving the banks' equity participation in corporations not licensed by the Canadian Radio-Television Commission. Ownership of voting stock is not the only means by which a controlling influence can be exerted over a corporation; especially in light of the bank service corporation, it is at least questionable whether there are any realistic limitations on the banks' ability to control Canadian business corporations.