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Warren Grover

Osgoode Hall Law School of York University

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THE FOREIGN INVESTMENT REVIEW ACT: PHASE I

Warren Grover*

1. Introduction

Environment and heredity are major factors in determining the behaviour of all human beings. As a nation, which is a collection of human beings, Canada could be said to have had a very mixed heredity coupled with a fairly constant environment. The most obvious constant parts of the environment have been the wall of impenetrable barrenness to the north, the seas to the east and the west and a more powerful half-brother to the south. There is not much one can do about the seas and the north¹ so it is natural for Canada to focus attention on its half-brother. Canada is usually preoccupied with an endless number of real or imagined problems emanating from the United States. The heredity of the country, if anything, exacerbates that preoccupation.²

When a Canadian talks about foreign control, he usually means control from the United States. This can be explained simply on the basis that the economic influence of the United States is the major pervasive element in the Canadian economy. But I suggest the reasons are more visceral. The Canadian who goes abroad finds he is thought of as an American and he does not like it. He maintains that an American is one who comes from the United States and a Canadian is something else

* Professor of Law, Osgoode Hall Law School of York University. Professor Grover has worked for the Foreign Investment Review Agency. The opinions in this article are Professor Grover's personal views and any similarity to the views or policies of the Agency are purely coincidental.

¹ One can develop the north, and Canadian policies in this area have been expanding for many years. The point I wish to make is that one cannot pass a law to decrease the problems raised by the weather and expect the weather to obey.

² This is particularly so in Ontario which has had a strong pro-British tradition. As the power of the British Empire waned and the power of the United States waxed, Ontario felt itself a part of the losing side. Quebec was able to maintain its own traditions and felt less keenly a sense of competition with the United States. This may account for the differing views on the advisability of foreign participation in the securities industry shown in the *Bouchard Report* (Quebec, 1971) and the *Report of the Ontario Inter-Departmental Task Force on Foreign Investment* (1971).

again.³ He admits, albeit grudgingly in many cases, that the magazines he reads and the television he watches originate in the United States. But he wants to believe in an identity of his own, separate from the American. On the other hand he recognizes the great benefits Canada has derived from American investment in Canada in terms of giving Canadians a high standard of living. So Canada searches for some way to establish a separate identity without losing the benefits of being the neighbour of the world's richest nation, with whom it shares a common language and an extensive undefended, largely unregulated, border. This is one of Canada's national dreams. The Foreign Investment Review Act could be viewed as the latest spike driven to secure that dream.⁴

It would be unfair to say that Canada is worried about only one foreign nation controlling the Canadian economy. If one were to assume that United States enterprises would willingly dispose of their holdings in Canada to other foreigners, Canada would still view with alarm the prospect of domination by possible successors such as the Germans, the Japanese or the Arabs. Accordingly, it is not surprising to find that recent⁵ attention has focused on the more general problem of foreign control while recognizing the dominant position the United States now plays in that control pattern. Both the Watkins⁶ and Gray⁷ Reports focused on the problems of foreign investment by any country. It is well known, however, that foreign direct investment in Canada, as opposed to portfolio investment, is highly concentrated in U.S. hands. Any legislation aimed at foreign direct investment will therefore apply most often to enterprises controlled by citizens of the United States.

³ Canada has been somewhat of a haven for disgruntled U.S. citizens such as draft dodgers, but these persons have not really altered the Canadian perspective which, in my view, has always been one of jealousy of the wealth and power of the United States coupled with a desire to remain in an independent position of moral superiority, the latter perhaps somewhat self-perceived.

⁴ With apologies to Pierre Berton whose entertaining books are full of examples of Canadian concern over American domination of the railroads.

⁵ In the early part of this century, the concern was directed more at the United States. Sir Wilfrid Laurier lost an election on the reciprocity issue, the slogan "No truck or trade with the Yankees" being very much in evidence, see Carrigan, *Canadian Party Platforms, 1867-1968* (Toronto, 1968) p. 61. Such a slogan would seem a bit gauche today but was relatively polite compared to the tirades against the United States then common in the Canadian press, see Ellis, *Reciprocity 1911: A Study in Canadian American Relations* (New York, 1968) Chapters X and XI.

⁶ Task Force on the Structure of Canadian Industry, *Foreign Ownership and the Structure of Canadian Industry* (Ottawa, 1968).

⁷ *Foreign Direct Investment in Canada* (Ottawa, 1972).

But direct investment does have more impact on Canadian identity than portfolio investment, so any emphasis on direct investment is an emphasis in the right place for several reasons.

The evolution of a foreign direct investment policy by Canada is still in the embryonic stage.⁸ Foreign direct investment can occur either by the infusion of new foreign capital into Canada or by the reinvestment of retained earnings by existing foreign controlled firms. These sources can be used to establish new businesses, either by starting from scratch or by acquiring an existing Canadian business, or they can be used to expand existing businesses either directly or through acquisitions. Probably the greatest amount of foreign direct investment now arises as a result of investing retained earnings within the established business.⁹ There is no indication of any legislation being promulgated federally to deal with this type of direct investment.¹⁰ The Foreign Investment Review Act does deal with acquisitions of existing businesses and with the establishment of new businesses.

The Foreign Takeovers Review Act was introduced in May 1972 as House of Commons Bill C-201. In its original form it applied only to takeovers of Canadian companies by foreign interests. Largely at the insistence of the New Democratic Party, the minority Liberal Government replaced it in 1973 with the Foreign Investment Review Act, the change in title indicating the increased coverage of the new Bill C-132 to include both takeovers and investments in new businesses by foreigners. This Bill received a great deal of attention from Committees of both the Senate and the House of Commons in the Summer of 1973. It was amended in several respects as it went through the House of Commons in the Fall of 1973. It passed through the Senate unscathed in one day in December 1973. It was designed to be proclaimed in two separate stages. Phase I, which is the subject of this article, relates only to takeovers. It was proclaimed in force on April 9, 1974. The second phase was to be proclaimed in force around the end of December 1974, but the provincial trade Ministers asked in December 1974 that the

⁸ A good article tracing the evolution and arguing for a stronger policy is McMillan, "After the Gray Report: The Tortuous Evolution of Foreign Investment Policy", 20 McGill L. J. 213 (1974).

⁹ Gray Report, pp. 24 *et seq.*

¹⁰ In reply to a question by Mr. Broadbent on October 18, 1974, the Prime Minister indicated that, while reinvestment of retained earnings in an established business might ultimately be regulated, there was no plan for such regulation at the present time. The *Report of the Select Committee on Economic and Cultural Nationalism* (Ontario) has recommended that foreign controlled firms having gross assets of \$25 million or more should be subject to an annual review by the Foreign Investment Review Agency, see Report, p. 92.

second proclamation be delayed. Second proclamation is set for October 15, 1975, as announced in the House of Commons on July 18, 1975.

The first proclamation¹¹ brought into effect s. 8(1) of the statute which provides that every non-eligible person proposing to acquire control of a Canadian business shall give notice to the Agency of such proposal. That notice triggers a review process which culminates in the Cabinet either allowing or refusing to allow the proposal. The process has the following statutory stages:

- (1) The non-eligible proposed acquirer files a notice with the Agency containing the information set forth in the regulations, which is very extensive.¹²
- (b) The Agency reviews the notice for completeness and, if the notice is complete, it sends a certificate to the acquirer by registered mail, setting out the date of the receipt of the completed notice.¹³
- (3) The Agency then negotiates with the acquirer with a view to obtaining suitable undertakings which the acquirer will agree to carry out if the investment is eventually allowed. These undertakings are meant to indicate the significant benefit to Canada involved in the transaction which is the statutory standard for permitting the investment. If this procedure takes more than 60 days then the proposed investment is deemed to be allowed.¹⁴
- (4) Once suitable undertakings are negotiated, or it becomes impossible to negotiate suitable undertakings, the Agency forwards the file to the Minister with its recommendation.¹⁵
- (5) At any time during the negotiations the 60-day period could elapse, so the Agency, on the direction of the Minister, may be forced to send out a notice advising the applicant of his right to make further representations. This notice, if sent, removes the 60-day maximum and no new maximum time period is imposed. In practice, 60 days is usually not long enough, so representation notices have become quite common.¹⁶
- (6) From the Minister a summary of the file goes forward to the Cabi-

¹¹ Technically, proclamation under s. 31(1) of the statute, 21-21 Eliz. II c. 41, brought into effect the whole statute except those parts relating to the establishment of new businesses, see s. 31(2). Effectively this meant that first proclamation brought subsection 8(1) into force.

¹² The regulations have four forms annexed to them which together make up the notice. These forms include one setting out the information involved in the takeover in summary form, one requiring a large amount of detail about the acquirer, one requiring detail about the target and a fourth setting out the acquirer's plans for the future of the target.

¹³ S. 8(4).

¹⁴ S. 13(1).

¹⁵ This procedure is virtually dictated by s. 9.

¹⁶ S. 11(1).

net with the Minister's recommendation as to allowance or not. Cabinet can either allow the investment where significant benefit to Canada is found or it can refuse to allow the investment or, if such has not already occurred, it can cause the Minister to issue a representation notice. If a representation notice has been sent and representations heard then the Cabinet must either allow or refuse to allow the investment.¹⁷

- (7) After informing the acquirer, the order agreeing or refusing to allow the investment is published in the *Canada Gazette*.¹⁸

This procedure was not the one envisaged in the Gray Report. That Report saw the Agency itself as a decision-maker. The introduction of the Federal Cabinet into the process has caused administrative problems of considerable magnitude, some of which are discussed later in this article. Yet the purpose of the Act demanded a high level of review at least for major takeovers.¹⁹ That purpose is set forth in s. 2(1) of the statute in rather ringing terms. It separates out two concerns, the extent to which control of Canadian commerce has become acquired by foreigners and the effect of such control on the ability of Canadians to maintain effective control over their own economic environment. If these matters are of national concern, as the subsection states, then a review of actions which could substantially increase such economic control would logically only be undertaken at a very high level. If one adds on the vague test for allowing such an increase, *i.e.*, that the foreign investment under review result is a significant benefit to Canada, it is not the type of judgment that could be left to civil servants in major cases.²⁰

¹⁷ S. 12.

¹⁸ The question of publication has occasioned a lot of discussion in the newspapers. Under s. 14 of the statute, the amount the Agency may publish is rather limited. It is questionable whether the real reasons for a decision by the Cabinet are ever really known anyway. Hence to publish more than the result and, in the case of allowances, a general statement of the believed benefits to Canada may be unrealistic. This is unsatisfactory to applicants who are searching for precedents and to newspapers hungry for public disclosure. It also has the unfortunate result of establishing some law firms with many foreign clients as the real experts in the field. Expertise can only be acquired by being involved in actual cases, if no reasons are given for decisions. The pressure for more disclosure will, in my opinion, ultimately force a retreat from the non-disclosure policy set out in s. 14.

¹⁹ Indeed reviews had taken place on an *ad hoc* basis in several instances prior to the enactment of the statute. Two examples would be the proposed sales of Home Oil and of Denison Mines.

²⁰ The Canadian civil service is not, in my view, held in as high regard as it should be or as the civil services in both the United Kingdom and the United States are presently held. The old idea of "those who can do and those who can't teach" is extended in Canada to include the civil servants with the academics or below. At most, this denigration of the civil service is only partly fair. Clearly a strong Review Agency is required even for the limited role now granted to it under the statute.

In summary, in the case of acquisitions, the acquirer must first determine if the statute applies to the proposed transaction at all. To do so he must answer three questions:

- (a) am I a non-eligible person, and if so,
- (b) am I proposing to acquire control of an enterprise, and if so,
- (c) is that enterprise a Canadian business enterprise.

If the acquirer fits within these three tests he must then establish to the Canadian Federal Cabinet that his proposed acquisition is of significant benefit to Canada. But he cannot talk directly to the Cabinet. In effect he talks to the Agency who advises the Minister who takes the matter to Cabinet. There is no appeal from the Cabinet's decision.²¹

The question as to applicability of the legislation is essentially a legal question, the question of significant benefit is an economic and political one.²² The next three parts of this article deal with the questions of applicability in takeover situations, which questions are as ineluctable to lawyers as they are incomprehensible to everyone else. Then I have included a short incursion into the question of significant benefit, an area whose implications are evident but where few guidelines are available. After a brief look at the administrative procedures and remedies, I have tried to examine some problems designed to be paradigmatic for a reader who is so indefatigable as to have persevered that far.

2. The First Legal Problem: Who is a Non-Eligible Person?

The most basic concept in the whole statute is the definition of a non-eligible person. No review is contemplated in either the acquisition of a Canadian business enterprise or in the establishment of a new business in Canada unless a non-eligible person is involved. On the other hand, one non-eligible person will taint the whole group of which he is a member, even if his participation is miniscule, under the wording of both subsecs. (1) and (2) of s. 8. The definition of "non-eligible person" in s. 3(1) divides itself into three parts:

- (a) a "non-eligible person" individual style;
- (b) a "non-eligible person" sovereign style; and
- (c) a "non-eligible person" corporate style.

²¹ Although the Cabinet can reverse itself which it has already done once, in the application of Canadian Bluebird International Inc. to acquire J. H. Corbeil Ltd., which was allowed in December 1974 after having been rejected in November 1974.

²² The Agency staff has a separate division—the Rulings Division of the Compliance Branch which deals with the applicability of the statute. The assessment of significant benefit is done by a separate group called the Assessment Branch.

Each of these categories has already caused problems.

Starting with the non-eligible individual, he is defined in the body of the statute to be an individual who is neither a Canadian citizen nor a landed immigrant within the meaning of the Immigration Act.²³ The statute then goes on to say "and includes" Canadian citizens not ordinarily resident in Canada and who are members of a class of persons prescribed by regulation. Thus, Canadian citizens not resident in Canada may be non-eligible persons if they fall into the classes set forth in the regulations. Those regulations provide that anyone who has applied for citizenship of another country or has been ordinarily resident outside Canada for five years immediately preceding the date²⁴ is required to give notice under s. 8(1),²⁵ and is usually to be considered a non-eligible person. The exceptions to the five-year rule²⁶ permit a person who has been resident outside Canada for more than five years to still qualify if he is an employee of the Canadian Government or of a Canadian business enterprise or if he is a university student or if, unless he has been non-resident for more than 10 years, he was ordinarily resident in Canada on his sixtieth birthday. Effectively therefore, there are four groups of "eligible" Canadian citizens:

- (a) those ordinarily resident in Canada;
- (b) those who have not been ordinarily resident in Canada for up to five years before the review notice was required;
- (c) those who have been non-resident for more than five years and who are employees of a Canadian concern or university students;
- (d) those who have been non-resident for more than five but less than ten years who were resident in Canada on their sixtieth birthday.

²³ Immigration Act, R.S.C. 1970, c. I-2, s. 2 provides in part:

"Canadian citizen" means a person who is a Canadian citizen within the meaning of the *Canadian Citizenship Act*;

"immigrant" means a person who seeks admission to Canada for permanent residence;

"landing" means the lawful admission of an immigrant to Canada for permanent residence.

There appears to be no definition of "landed immigrant" nor is the phrase used in the Immigration Act. It must mean a person who has been lawfully admitted to Canada for permanent residence.

The Foreign Investment Review Act is not clear as to whether the category "Canadian citizen" is also modified by a reference to the Immigration Act. If it is then the cross reference to the Canadian Citizenship Act does add some clarity to the phrase. That statute has elaborate provisions relating to various esoteric types of Canadian citizens.

²⁴ There is no date set forth anywhere in s. 8(1), (2) or (3).

²⁵ The Regulations do not refer to s. 8(2) but presumably this will be fixed prior to or at the time of second proclamation.

²⁶ There are no exceptions to the applying for citizenship of another country rule. The regulations were changed in April 1975. The revisions have been taken into account.

The landed immigrants are also further divided in the statute to make "non-eligible" those landed immigrants who have been resident in Canada for more than one year after they become eligible to apply for Canadian citizenship.²⁷

The second category of non-eligible person, a foreign sovereign, includes both national and regional governments or any agent of any of them. While it may be unlikely that any foreign government agency would attempt to buy control of a Canadian business enterprise directly if review by the Canadian Cabinet was a possibility, the situation has probably already arisen indirectly. On January 15, 1975, Anthony Wedgwood Benn, U.K. Secretary of State for Industry, announced that he would be introducing a Bill to vest in an Agency of the U.K. Government the shares of any large company in Great Britain which was in the business of making complete aircraft (other than helicopters). This nationalization of the British Aircraft Industry will presumably involve an acquisition of control of Canadian subsidiaries of the major U.K. aircraft companies.²⁸ Thus the prospect of the Canadian Cabinet reviewing a decision of the British Cabinet appears imminent.²⁹

The last but most important category of "non-eligible person" is the one of the corporate variety. Here the statute has a welter of rules, many of which are so technical that they invite planning for avoidance. But the start is simple. The definition says that a corporation, regardless of its place of incorporation, is a non-eligible person if it is "controlled in any manner that results in control in fact"³⁰ by a non-eligible person (of either the individual or sovereign variety) or by a group of persons any member of which is a non-eligible individual or sovereign. There is an expansion within the definition to say that the control may be directly through the ownership of shares or indirectly through a trust, contract or ownership of shares in another corporation. Control

²⁷ The Bill originally used the concept of 6 years' residence in Canada as being a cut-off point where the person was not a Canadian citizen. It was amended before third reading apparently to take care of a person who was resident in Canada before he became "landed"; see the Canadian Citizenship Act, R.S.C. 1970, c. C-19, s. 10 for some possible examples.

²⁸ According to the Official British Information Services Policy Statement 5/75, it is not clear whether subsidiaries are included.

²⁹ It should be noted that the likelihood of any showing of significant benefit to Canada seems remote. Presumably Britain would like to increase exports to Canada and decrease imports from Canada. Similarly if exports from the U.K. could replace products presently exported from the Canadian subsidiary, this would be in the interests of the British Government.

³⁰ What the words "in any manner that results in control" add to the "controlled in fact" concept within the definition is unclarified at present.

itself is never defined but the concentration on shareholder control in the definition suggests that, except where the statute clearly indicates the contrary, shareholding is to be the primary *indiciu*m of control.

As most business activity in Canada is carried on by corporations, it is not surprising that the statute singles out that form of business for very specific treatment. While the definition of the non-eligible person, corporate variety, appears on its face to be very broad indeed, the concept of corporate control has a very thorny history in the Courts, particularly in cases involving the Income Tax Act.³¹ The Foreign Investment Review Act provisions make it clear, however, that the question is *de facto* control not *de jure* control, the latter being the generally accepted concept until recently under the Income Tax Act.³² To buttress the control concept the statute introduces a set of presumptive thresholds. These are found initially in s. 3(2). That subsection provides that a corporation "is, unless the contrary is established"³³ a non-eligible person where 5 per cent of the voting shares³⁴ are owned by:

- (a) one non-eligible person, individual variety;
- (b) one non-eligible person, sovereign variety; or
- (c) one corporation incorporated elsewhere than in Canada.

Disregarding technical difficulties such as the words "owned

³¹ See *Materials on Canadian Income Tax*, 2nd ed., (Toronto, De Boo) pp. 709 *et seq.* The concept is important for taxation purposes because of the small business deduction allowable on the first \$100,000 of active business income in Canadian controlled private companies. If two corporations are associated, which essentially means that they are under common control, they must apportion the deduction available. If there is no common control they are each entitled to the full deduction. The various shareholding schemes devised by lawyers to ensure that one corporation is not associated with another are too numerous to attempt even a superficial coverage. It is probably fair to say that the Courts, aided by amendments to the Income Tax Act, have become less charitable to the taxpayer in the last 25 years, *cf.*, *M.N.R. v. Wrights' Canadian Ropes Ltd.*, [1947] A.C. 109, [1947] 1 D.L.R. 721, [1947] C.T.C. 1, and *M.N.R. v. Consolidated Holding Co. Ltd.*, (1971), 23 D.L.R. (3d) 546, [1974] S.C.R. 419, [1972] 72 D.T.C. 6007; Matheson, "Corporate Control Concepts and Tax Reform", XX Can. Tax J. 45 (1972).

³² See the dissent of Spence, J., in *Consolidated Holding Co. Ltd.*, *supra*, footnote 31.

³³ Some concern has been expressed from time to time as to whom the "establishing" must be done. It would seem that, in the event that the point becomes relevant in a Court proceeding (*e.g.*, on an application for an injunction under s. 19) the "establishing" would have to be done by the alleged non-eligible person to the Court. On the other hand, if it is a question whether the Minister ought to issue an opinion under s. 4(1) as to the eligibility the "establishing" would have to be done to the Minister.

³⁴ The subsection technically reads "5% or more of the voting rights ordinarily exercisable at meetings of shareholders of the corporation".

by",³⁵ it is immediately apparent that this is a very low threshold indeed. While the threshold was designed to change the burden of proof³⁶ it does more than that because the wording defines the corporation as a non-eligible person unless the contrary is established—it does not allow for any balancing of probabilities.

The second threshold in s. 3(2) relates to aggregate holdings by non-eligible individuals and sovereigns. In this case the magic number is 25 per cent of the voting shares for a corporation whose shares are publicly traded and 40 per cent of the voting shares of a corporation whose shares are not publicly traded. There is no suggestion that the shareholders whose holdings add up to the magic number must somehow be part of an identifiable group. Again the threshold is very low for many corporations who consider themselves to be thoroughly Canadian. But it is usually not very difficult to "establish" that control does not reside in a scattered group with no connecting strings. The effect of the thresholds nevertheless may be to put some corporations to what they will view as needless expense to establish the obvious.³⁷

Two subsections of the Act have an important impact on the threshold problem.³⁸ The most important of these is s. 3(6)(c), which provides, in effect, that the acquisition of a right, whether contingent or vested, under a contract to acquire or to control the voting rights attached to shares puts the person in favour of whom the right runs in the same position vis-à-vis control of the corporation as if he owned the shares. That paragraph is modified by para. (d.2) which provides that the corporation is not itself a non-eligible person by reason only of the

³⁵ The ownership question is a considerable problem when many shares are registered in the names of nominees. For example, investors in France seem to hold their shares through a nominee called SICOVAM which often shows on the share register of a public company as a substantial shareholder.

³⁶ See Mr. Gillespie's remarks, *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce* (1973), 23:26.

³⁷ In various key sector industries a so-called 25-10 formula has been established over the past few years. That formula allows foreigners in the aggregate to own up to but not over 25 per cent of the voting shares of a corporation within the key sector and any one foreign individual to own up to but over 10 per cent of the voting shares, see for example, the Bank Act, R.S.C. 1970, c. B-1, s. 56; the Loan Companies Act, R.S.C. 1970, c. L-12, s. 45; Regulations passed under the Securities Act, (Ontario), O. Reg. 600/74; *In the Matter of DuPont Glore Forgan Canada Limited*, [1974] Ont. Sec. Comm. Bulletin 133. It is not clear why the 10 per cent rule was lowered to 5 per cent under the Foreign Investment Review Act, although it is only a presumptive level and does not include "associates" under the Foreign Investment Review Act. These two distinctions do make it quite a different test.

³⁸ Reference could also be made to s. 3(7)(a) which states that a "group of persons" is not to be interpreted to mean everyone who owns shares unless they act in concert. This seems self-evident.

fact that a person has a right under para. (c). It would seem that the acquisition of the right may constitute a reviewable transaction although, if the right does not in fact result in the exercise of control, then the corporation to which the right applies is not a non-eligible corporation merely because of the existence of the right.

This rather convoluted expression of legislative intent may be clarified by two examples. If a person acquires a right to obtain 60 per cent of the authorized capital of a Canadian corporation upon the happening of certain contingencies then the acquisition of the right would constitute a reviewable transaction if the acquirer was itself a non-eligible person. But if, in fact, the acquirer of the right did not control the corporation, the right not having been exercised, the corporation would retain its eligible status so long as it was controlled by eligible persons despite any review of the granting of the right itself. On the other hand, if the presently controlling shareholders of a corporation are non-eligible persons, then the transfer of the voting rights pertaining to their shares would constitute the acquirer the "owner" of the shares even if the economic interests still lay with the original owners. If the acquirer was a non-eligible person then the corporation would remain non-eligible even though the control had shifted. The voting rights and the ownership of the shares are now either in fact or because of the deeming clause held by the acquirer and the corporation remains non-eligible. It is not "only" because of the acquisition of voting rights that the corporation is within the definition of non-eligibility.³⁹

The second subsection deals with the reliability of share registers in determining Canadian ownership of minor shareholdings. Under s. 3(5) it is provided that the Minister shall accept, as evidence that the shares in question are owned by an eligible individual, the fact that the address of the shareholder on the share register is shown to be within Canada if the registered holder holds less than 1 per cent of the issued shares and if the Minister is supplied with a statement signed by responsible officers of the company to the effect that the persons signing the statement have no reason to believe that the shares are owned by non-eligible individuals. This subsection is of limited utility because it does not apply to shares registered in the name of a corporation and it does not apply to holdings of greater than 1 per cent even if

³⁹ Section 3(6) is discussed again *infra* under the heading "The Second Legal Problem: Acquisition of Control".

such holdings are in the name of customary nominees.⁴⁰ Even in the case of holdings smaller than 1 per cent it only establishes a rebuttable presumption.

Section 3(6)(b.1) puts an upper limit on the tainting of a control group by the inclusion of non-eligible members. If a group controls the corporation and over 50 per cent of the voting shares of the corporation are held by members of the group who are eligible persons then the corporation is deemed to be "eligible" unless the group includes non-eligible members in excess of 20 per cent of the number of members of the group *or* non-eligible persons hold more than 20 per cent of the voting shares of the corporation. While this may appear to be only a minor concession to control groups, it is vitally important as the statute without this paragraph would allow a group to be tainted by any one member of the group being non-eligible. This often happens in Canadian families.

It has been recognized for decades⁴¹ that control of widely-held corporations is not in fact at the shareholder level. The Act takes some cognizance of this concept in s. 3(7)(b) and (c). Paragraph (b) on a fast reading would appear to say that if there is no control at the shareholder level then the board of directors is presumed to control the corporation. But this halcyon interpretation is befuddled by the closing words of the paragraph which state that the presumption is only valid "in the absence of any evidence that the corporation is in fact controlled by some other person or group of persons". The introduction of the word "any" is most unfortunate. It would seem to mean that if there is some tittle of evidence that the corporation is in fact controlled by one strong member of the board to whom other board members regularly kowtow then the presumption in favour of director control no longer exists despite the fact no other control has been established on the basis of all the available evidence.

Assuming that a corporation can bring itself within the two tests for director control, namely no shareholder control and no other person or group of persons in control, then para. (c) completes the picture. It specifically provides that if individuals who are themselves non-elig-

⁴⁰ It is very common for shares to be held by various Canadian chartered banks and investment dealers as nominees of their clients. Most shareholder lists of widely-held Canadian public corporations would show several such nominee accounts to be in excess of 1 per cent of the issued shares. There is no provision in any relevant statute to permit a corporation to demand from the nominee the names or nationalities of the beneficial owners.

⁴¹ The usual reference is to Berle and Means, *The Modern Corporation and Private Property* (New York, 1932).

ible persons comprise no more than 20 per cent of the number of directors on the board then the company is deemed to be "eligible". Conversely if such non-eligible directors comprise 50 per cent or more of the total number of directors then the corporation is deemed to be non-eligible. In the twilight zone between 20 per cent and 50 per cent the corporation is eligible if "it is established that no members of that body" who are non-eligible persons "and who exceed 20% of the total number of members of that body act in concert". Thus a corporation which has more than 20 per cent of directors in the non-eligible category must establish that the group do not "act in concert".⁴² This phrase has occasioned some difficulty in practice as directors usually arrive at a mutually acceptable plan of action for every important corporate decision. It would seem sensible to treat the phrase as meaning a course of action that has been planned and settled between the non-eligible directors in question before the board meeting at which the issues are to be discussed.⁴³ Thus, if three officers of a large non-eligible corporate shareholder are directors of a Canadian corporation they would "act in concert" if they regularly agree before the meeting on what stance they will assume on each item on the agenda.⁴⁴

While the welter of deeming and threshold provisions are difficult to sort through, there is a specific provision in s. 4(1) to seek a status opinion from the Minister which is binding upon him for two years if the material facts remain the same. An application for such a status opinion would be necessary if the acquiring corporation exceeds the threshold levels because the Minister is required to treat such an acquirer as non-eligible until the contrary is established. Thus if an acquisition were contemplated, the Minister would be on sound ground in issuing a demand⁴⁵ or in seeking injunctive relief.⁴⁶ While the acquiring corporation might then establish that it was not a non-eligible

⁴² The phrase "act in concert" is also used in s. 3(7)(a) but one gains no assistance in interpreting its meaning by looking at that paragraph.

⁴³ The phrase "concerted action" was defined in *State v. Jessup & More Paper Co.* (1913), 88 A. 449, 451 (Del. Sup. Ct.), a relator action by a shareholder to force disclosure of certain corporate information. Woolley, J., said concerted action was one that "has been planned, arranged, adjusted, agreed upon and settled between parties acting together in pursuance of some design or in accordance with some scheme". This definition has been subsequently approved in *Rock Creek Oil Corp. v. Moore* (1931), 41 S.W. 2d. 501, 504, (Tex. C.A.) and in *Stone v. Wingo* (1969), 416 F. 2d. 857, 860 (6th C.C.A.).

⁴⁴ The fact that they are officers of the same minority shareholder may be evidence that they would normally act in concert, see Glover, "Canada's Foreign Investment Review Act", 29 *Bus. Lawyer* 805 (1974), at p. 807, footnote 16.

⁴⁵ S. 8(3).

⁴⁶ S. 19.

person, the cost of doing so would be considerably higher.⁴⁷ On the other hand, where none of the presumptions in the statute as to non-eligibility are triggered it has become common for the acquirer's counsel to furnish to the selling shareholders on closing an eligibility opinion for the acquiring corporation.

3. The Second Legal Problem: Acquisition of Control

Once a potential applicant under the statute has decided as a status matter, that he is clearly a non-eligible person, the second question to be answered so far as acquisitions are concerned⁴⁸ is whether control has been acquired. The statute provides that control may only be acquired in one of two ways, the acquisition of shares or the acquisition of substantially all of the assets of the target business,⁴⁹ although amalgamations are included as a form of acquisition of control which may be subject to the review process in another provision.⁵⁰ Accordingly, the entering into of a supply contract or of an output contract which in fact shifts the control of a Canadian corporation into foreign hands is not a reviewable transaction even though the Canadian corporation thereupon becomes a non-eligible person. The definition of "control" for the purpose of determining eligibility is much wider than the concept of control in the definition of acquisition of control. This is needlessly confusing. The result is that a shift of control in fact may not trigger a review although the eligibility status of the underlying corporation has changed.⁵¹

In order to make it clear that different control concepts are involved than in status questions, the threshold levels are restated in a slightly different form. Thus the acquisition of 5 per cent of the voting shares by any person or group of persons⁵² is the acquisition of control of a

⁴⁷ On the other hand a confident eligible corporation may decide that a speedier resolution of the problem is available even if at an increased cost. The injunction under s. 19 can be brought forward on a 48-hour notice basis which is faster than the mail usually gets delivered in Ottawa.

⁴⁸ Under s. 8(2) the questions become whether a new business has been established and if so whether it is related to any existing business of the potential applicant. "Relatedness" is the subject-matter of a guideline which was issued at the time second proclamation was announced.

⁴⁹ S. 3(3)(a). In the case of an asset acquisition the "substantially all" rule must be modified by cross referring to s. 3(6)(g) discussed *infra*.

⁵⁰ S. 3(3)(e).

⁵¹ One obvious example would be the assignment of the management contract of an incorporated mutual fund to a non-eligible person, which is a common way of transferring control of a mutual fund, see *Rosenfeld v. Black*, 445 F. 2d. 1337.

⁵² The reader will recall there was no group concept in the non-eligible person 5 per cent threshold, 25 per cent being the relevant number for a group. The 5 per cent threshold is very low indeed in this case.

publicly traded corporation unless the contrary is established and the magic number is 20 per cent in the case of a corporation whose shares are not publicly traded.⁵³ In addition, the acquisition of more than 50 per cent of the voting shares is deemed to be the acquisition of control and there is no possibility of rebutting the presumption, unless the acquirer already had control in fact.⁵⁴ Furthermore, there is a step-transaction inclusion so that an acquisition done in one or more transactions, even if some of the transactions predated the Act, can give rise to an acquisition that makes the whole series of transactions into one reviewable transaction.⁵⁵ Thus a series of transactions which results in the acquisition of over 5 per cent of the shares of a publicly traded corporation by a non-eligible person will be considered to be an acquisition of control unless the contrary is established and if the acquirer or group of acquirers succeeds in acquiring more than 50 per cent of the shares, there is an irrebuttable presumption of an acquisition of control.⁵⁶

⁵³ It is worth noting that in s. 3(3)(b)(i) the acquisition of less than 5 per cent of a publicly traded corporation and less than 20 per cent of any other corporation is presumed not, from that fact alone, to constitute an acquisition of control.

⁵⁴ The wording of the paragraph leaves something to be desired because the exception only works for the corporation then acquiring the shares. Thus if a non-eligible corporation, X Co., owns all the shares of both Y Co. and Z Co., the transfer of the shares of Y Co. to Z Co. appears to be reviewable under s. 3(3)(d) despite the fact that ultimate control has not changed. This results because the acquirer (Z Co.) had no control before it acquired the 50 per cent. If the transaction were somehow carried out so that there was a transfer of actual control to Z Co. first (which might not be reviewable if neither assets nor shares were transferred), then subsequent acquisition of the shares would not be a reviewable transaction. This type of transaction, where form appears to govern over substance, is a frequent problem in this technical area of the statute.

⁵⁵ S. 3(8). *Quaere* if the section could be read the other way so that a series of transactions, some of which were reviewable but which ultimately resulted in the establishment of Canadian control would not be reviewable at all. This would appear possible where the transactions were all contingent one upon the other.

⁵⁶ That majority share ownership may not amount to control in fact was demonstrated in *Teck Corp. Ltd. v. Millar* (1972), 33 D.L.R. 288, [1973] 2 W.W.R. 385 (B.C.S.C.), commented upon by Frank Iacobucci, "The Exercise of Directors' Powers:—The Battle of Afton Mines", 11 *Osgoode Hall L.J.* 353. It should also be noted that there is a tag-end to s. 3(3)(d) which says that the acquisition of over 50 per cent of the shares of X Limited will not necessarily taint a joint venture to which X Limited is a party unless the joint venture was set up to avoid the provisions of the Foreign Investment Review Act. Thus if the non-eligible person wished to take part in a joint venture designed to acquire control of a Canadian business enterprise, the exception in s. 3(3)(d) would not allow the intent of the statute to be frustrated by the establishment of a Canadian corporation as a partner in the joint venture which partner the non-eligible person would acquire control of only after the joint venture succeeded in acquiring control of the target Canadian business enterprise. This is one of many examples where the statute has the appearance of extreme technicality thereby encouraging lawyers and others who are attuned to the intricacies of tax law to draw a parallel between the Foreign Investment Review Act and the Income Tax Act.

Before turning to the extensions on and the exceptions to the basic formulae for control acquisition, it is worth noting a peculiarity in the definition of acquisition of control. It is only in the case of a "Canadian business enterprise that is a Canadian business carried on by a corporation" that the acquisition of shares can be an acquisition of control. In all other cases control can only be acquired by the acquisition of "substantially all the property used in carrying on the business in Canada". But "Canadian business" is defined to include, in the corporate case, only corporations incorporated in Canada. A corporation incorporated outside Canada, even if doing business only in Canada, is a "Canadian branch business" not a "Canadian business". Thus, although both a Canadian branch business and a Canadian business are both Canadian business enterprises, there would only be a "Canadian business enterprise that is a *Canadian business* carried on by a corporation" if the corporation were incorporated in Canada.⁵⁷

A significant extension to the concept of acquisition of control may result through s. 3(6)(h). That paragraph provides that a business carried on by a corporation that is controlled by another corporation shall be deemed to be carried on by the controlling corporation as well as by the controlled corporation. Thus if a multi-national enterprise is based in the United States, the U.S. parent of the Canadian subsidiary is deemed to be carrying on the Canadian business. If there are only two tiers (*i.e.*, parent and subsidiary) the result would seem to be that the acquisition of substantially all of the assets of the parent, including the shares of the Canadian subsidiary, would be a reviewable transaction but the acquisition of control of the parent by a share acquisition would not be a reviewable transaction so far as the Canadian authorities are concerned. This results because a share acquisition is only caught by the definition of "acquisition of control" if the target cor-

⁵⁷ This technicality is an invitation to establish foreign corporations to transact business in Canada. Then a share sale by the ultimate owner to a non-eligible person would not be caught by the statute. If the foreign corporation was a resident of Canada as that term is interpreted at common law (see, *Bedford Overseas Freighters Ltd. v. M.N.R.*, [1970] C.T.C. 69, 70 D.T.C. 6072) then the branch tax provisions found in s. 219 of the Income Tax Act would likely not impact very heavily although the corporation could not be considered a "Canadian corporation" if incorporated after 1971, see s. 89(1)(a) of the Income Tax Act. If the ultimate owners of the corporation were Canadians this ruse would deprive them of the small business deduction under s. 125 of the Income Tax Act as it is only available to Canadian corporations. If the ultimate control is foreign, however, the establishment of the Canadian business through a foreign incorporated subsidiary is not beyond the realm of possibility if a sale of the shares of the subsidiary is contemplated in the relatively near future. Beyond the relatively near future, it is almost inevitable that the statute will be amended.

poration is incorporated in Canada.⁵⁸ If, however, there were three tiers (*i.e.*, parent, foreign child and Canadian grandchild) then the acquisition of shares in the foreign child would be the acquisition of all the Canadian assets of the parent, which parent was deemed to be carrying on business in Canada, and the transaction is then reviewable.⁵⁹

Turning to the extensions to the basic acquisition of control concept, there are at least five, without inventing any permutations or combinations, as follows:

- (1) An amalgamation of two or more corporations, the effect of which is to continue the amalgamating corporations as one⁶⁰ is deemed to be the acquisition of control by the amalgamated corporation of the business formerly carried on by the amalgamating corporations, except in the case of corporate reorganizations.⁶¹
- (2) Where the acquisition is by a person as a trustee the acquisition is deemed to have been made by a corporation of which the shareholders are the beneficiaries of the trust and the directors are the trustees of the trust.⁶²
- (3) The acquisition of a leasehold interest in any property used in car-

⁵⁸ There is a contrary argument which would run somewhat as follows:

- (1) The parent is a Canadian branch business because of s. 3(6)(h).
- (2) The acquisition of control of the parent resulted in the indirect acquisition of all the property used by the parent in carrying on business in Canada, to wit the shares of the subsidiary.
- (3) While the word "indirect" is not used in this part of the statute it is to be implied in appropriate cases in order to stop people doing indirectly what they could not do directly.

This argument would have much force if the real motive for acquiring the shares of the parent as opposed to its assets was the Foreign Investment Review Act. But if the real motive for acquiring shares was the ease of transaction or foreign tax considerations, the argument has less force. In the Senate Committee debates immediately before the passage of the Bill it was argued that the purchase of 10 per cent of the shares of a U.S. parent on the New York Stock Exchange would definitely trigger a review, see *Report of the Senate Standing Committee on Banking, Trade and Commerce*, December 11, 1973, pp. 23:7 *et seq.* This appears to be at least open to question.

⁵⁹ If this is the result of the clear wording of the Act then perhaps, as Mr. Gillespie promised the Senate on another specific but related point, the Act will be amended. For the Act should be read in the spirit of its purposes as set out in s. 2(1) and not to dissect its language to the point of enquiring how many angels can dance on the head of a pin.

⁶⁰ This concept of confluent stream amalgamation has finally been authoritatively accepted in Canada, *R. v. Black & Decker Mfg. Co. Ltd.* (1974), 43 D.L.R. (3d) 393, 15 C.C.C. (2d) 193, 13 C.P.R. (2d) 97 (S.C.C.).

⁶¹ S. 3(3)(c). The corporate reorganization exception is discussed, *infra*.

⁶² S. 3(3)(f). This equating of a trust to a corporation is also used in the foreign accrual property income provisions of the Income Tax Act.

rying on a business is deemed to be the acquisition of that property.⁶³

- (4) A part of a business that is capable of being carried on separately is itself a Canadian business enterprise and therefore the concept in the definition of "acquisition of control" that one must acquire "substantially all of the property used in carrying on the business in Canada" is cut down considerably.⁶⁴
- (5) The acquisition under a contract of a right that could eventually lead to an acquisition of control is itself an acquisition of control, subject to several exceptions.⁶⁵

Of these five only the last one is really necessary to discuss more fully in a survey article such as this. There is no more technical or difficult group of sections in the whole statute than the ones related to the acquisition of a right under a contract. It appears that the pivotal s. 3(6)(c) was derived from that well-known model of luminosity, the Income Tax Act. But the draftsman of the Foreign Investment Review Act was determined to surpass the Income Tax Act draftsman. Section 3(6)(c) provides, in so far as rights to shares are concerned,⁶⁶ as follows:

a person who has a right under a contract, whether written or oral and whether express or implied, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

(i) to, or to acquire or dispose of, shares of a corporation, or to control the voting rights attaching to shares of a corporation.

(except any such right arising under a contract that is entered into after the coming into force of this Act and that provides that the right is not exercisable until the death of an individual designated therein or any such right that is contingent upon the Governor in Council allowing the investment that is the subject of a right), shall be deemed to have the same position in relation to the control of the corporation as if he owned the shares

The emphasized portions reproduce the complete wording of

⁶³ S. 3(6)(e). This paragraph may be important in sale-leaseback transactions if one can read s. 3(8) to say that you can ignore the intermediate steps if you eventually wind up in the right place. Thus if a Canadian business was "sold" to a non-eligible financial institution but leased back to the original Canadian owner would the provisions mean that there was no reviewable transaction? If this was purely a financing transaction, such a result should cause no alarm. It can also be argued that a sale-leaseback is not caught anyway if the control of the business never leaves Canada. The definition of acquisition of control is not structured to force a contrary result as it is an exclusion type definition *i.e.*, it says control "may *only* be acquired". It does not say that any specific event must be considered an acquisition of control regardless of the fact that control has not changed.

⁶⁴ S. 3(6)(g). Section 3(6)(f) has a parallel concept for a business partly carried on in Canada and partly carried on elsewhere.

⁶⁵ S. 3(6)(c).

⁶⁶ There are similar provisions with respect to rights to acquire the assets of a business.

s. 251(5)(b) of the Income Tax Act with one or two changes in prepositions only. That subsection (or its predecessor under the old Income Tax Act) spawned at least two Tax Review Board cases in 1974 alone.⁶⁷ With all the extra verbiage added perhaps it will provoke even more litigation under the Foreign Investment Review Act. But the draftsman did not rest there.⁶⁸ He went on to set forth three variations in addition to the two contained in the parentheses of the pivotal paragraph itself as follows:

- (a) there is an exception where the right is acquired to safeguard a loan;
- (b) despite the fact that an acquisition of control may be deemed to occur because of the acquisition of the right, the corporation to whose shares the right relates is not itself made into a non-eligible person only because of that deemed acquisition (though it may be one for other reasons); and
- (c) where a right is acquired that is within the pivotal paragraph (or within the exception relating to safe-guarding loans) the exercise of the right is deemed not to constitute the acquisition of the shares to which the right is related.

In case all this seems crystal clear, the reader might ask himself if the granting of a right of first refusal is caught by the wording of the pivotal paragraph.⁶⁹

In addition to the five extensions with the five variations to the fifth extension, there are also five exceptions to the basic definition of acquisition of control, as follows:

- (1) The first exception, which has been mentioned already, is that the acquisition of less than the threshold numbers is not the acquisition of control standing by itself.⁷⁰
- (2) The second exception relates to a share acquisition by a securities dealer in the normal course of his business.⁷¹

⁶⁷ See *Toric Optical Ltd. v. M.N.R.*, [1974] C.T.C. 2095, 74 D.T.C. 1054; *St. George House of Vision v. M.N.R.*, [1974] C.T.C. 2211, 74 D.T.C. 1155.

⁶⁸ To be fair to the draftsman, paras. (d.1) and (d.2) of s. 3(6) were probably added in response to suggestions made in various submissions received, see, the various presentations before the House of Commons Committee, *Minutes of the Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, (1973) Issues No. 26 *et seq.*

⁶⁹ At least one can argue that it is not a right to acquire under a contract but rather the right to be asked if one would like to acquire, see Corbin, *On Contracts*, s. 261 and the cases cited therein.

⁷⁰ S. 3(3)(b)(i). This exception seems self evident.

⁷¹ S. 3(3)(b)(ii). This is presumably meant to be an underwriting exemption. It is drawn more broadly than that for people whose primary business is trading in securities. Whether it could be used by pension plans, mutual funds or other financial intermediaries is unclear but the likely answer would appear to be in the negative. Thus if a foreign mutual fund bought 6 per cent of the issued shares of a publicly traded corporation the presumptive threshold would still apply.

- (3) The third exception, which may not be an exception at all, relates to the acquisition and holding of land even if there is an intention of disposing of it at a profit.⁷² This exception was presumably introduced to counter the decisions in some tax cases⁷³ that have held that acquiring land with an intention of disposing of it makes the disposition profits taxable as business income. It is not inconceivable that one could extrapolate from these decisions to say that the acquisition of the land was the acquisition of a business. The wording of this subsection is a trifle awkward but on a careful reading it would seem that whether or not funds are expended to maintain the land in the condition in which it was acquired and even if funds are expended to improve the land for the personal use or enjoyment of the owners, the holding of the land is not the carrying on of a business. Thus the subsection may have two purposes: to provide that the acquisition of land with a view to disposition is not the acquisition of a business and also to provide that the holding of land, even if funds are expended for specified limited purposes, is not the carrying on of a business. It is suggested that this is a better interpretation⁷⁴ than saying that the acquisition could be the acquisition of a business although the holding subsequent to the acquisition was not the carrying on of a business.
- (4) The fourth exception is for the acquisition of shares by a venture capitalist if the acquisition is upon terms and conditions "not inconsistent" with those prescribed by the Minister. The terms and conditions of the venture capital exemption⁷⁵ define, in effect, what a venture capitalist is and set outside limits on the terms and conditions he may impose on the corporation to which he is supplying venture capital. The definition of venture capitalist has three definite tests;
- (i) the capitalist does not invest more than \$10 million in any single Canadian business corporation;

⁷² S. 3(9).

⁷³ *Regal Heights Limited v. M.N.R.* (1960), 26 D.L.R. (2d) 51, [1960] S.C.R. 902, [1960] C.T.C. 384, 60 D.T.C. 1270, is the seminal case on secondary intention which is the most difficult test in this area. The Income Tax Act defines business to include "an adventure or concern in the nature of trade" which words do not appear in the Foreign Investment Review Act. Thus the tax cases may be of little relevance.

⁷⁴ This seems to be the position taken by Hayden and Burns, *Foreign Investment in Canada*, 15013 (herein cited as Hayden and Burns).

⁷⁵ Published in the *Canada Gazette*, Part I of April 27, 1974.

- (ii) the capitalist makes available venture capital in Canada in the ordinary course of his business; and
- (iii) the capital is provided substantially in the form of equity participation or subordinated debt.

There are three other "normally" tests to be satisfied as well which are:

- (i) the capitalist does not normally acquire a majority of the shares of the corporation in which he invests;
- (ii) the venture capitalist normally sells the shares he has purchased within 5 or 10 years of acquisition; and
- (iii) no single venture, at original cost, normally represent more than 20 per cent of his venture capital portfolio.

If one is a venture capitalist within this definition then one can make an investment by acquiring shares of a corporation, other than a corporation principally in the real estate business, if one is prepared to dispose of the shares (and of control) within the time limits set out in the "terms and conditions", which terms vary according to the size of the business and the size of the holding of the venture capitalist. If the average annual net income of the corporation invested in has been less than \$200,000 in its three most recent fiscal years or if at least half of the investment is made in common shares then control must be divested from the capitalist within 10 years and his percentage ownership of any class of voting securities cannot exceed 33 per cent at that time. At the end of 13 years he must get the percentage ownership down to a maximum of 20 per cent. If the average net income of the corporation to be invested in exceeds the \$200,000 figure and less than 50 per cent of the investment is in common shares, divestment of control must occur within 5 years, by which time he cannot own more than 15 per cent of any class of voting securities. At the end of 7 years the percentage ownership must be down to a maximum of 10 per cent.⁷⁶

- (5) The fifth, and perhaps most important, exception relates to the acquisition of control to safeguard a loan or rights of redemption

⁷⁶ There are other requirements, such as filing certain prescribed material, the inclusion of which would only serve to make this article more prolix. The reasons behind a venture capital exemption stem from the difficulty small but growing businesses have when they are too big to remain private but too small to go public, see A. G. Griffin, "Merchant Banking—A Canadian Requirement", *Special Lectures of the Law Society of Upper Canada (Corporate and Securities Law)* (1972) 273, 276; the *Report of the Royal Commission on Banking and Finance* (1964) Chapter 12 (commonly referred to as the Porter Report). There is no published material relating to the use, if any, being made of this exemption by venture capitalists.

attaching to shares of a corporation if, in both cases, there is an enforceable agreement which provides that the control will be divested by the acquirer and vested in persons at arm's length to the acquirer upon the satisfaction of some condition that is likely to occur. It should be noted that this section is not confined to an acquisition of shares, although that would be the normal expectation for its use. It affords an interesting contrast, and planning possibilities, to a venture capitalist who is not prepared to live by the relatively rigid "terms and conditions" promulgated by the Minister.⁷⁷

4. The Third Legal Problem: What is a Canadian Business Enterprise

Assuming that the acquirer has decided he is a non-eligible person and that his proposed acquisition is an acquisition of control, there is one other basic question: whether the target business is a Canadian business enterprise. The statutory framework in this area is unencumbered with presumptive levels but the difficulties of interpretation are no less horrendous. A Canadian business enterprise is defined⁷⁸ to mean "a business that is either a Canadian business or a Canadian branch business". Presumably the words "a business that is" are redundant so one can turn immediately to the definitions of Canadian business and Canadian branch business. A Canadian branch business is defined⁷⁹ to be a business carried on in Canada by a corporation incorporated outside Canada that maintains an establishment in Canada to which employees of the corporation employed in connection with the business ordinarily report to work. This definition seems to require the satisfaction of four separate conditions, as well as the factual question of the jurisdiction of incorporation, as follows:⁸⁰

- (1) The foreign corporation must maintain *an establishment* in Canada. An "establishment" is nowhere defined⁸¹ and is bound to raise questions in view of the frequency of the use of the term "permanent establishment" in tax treaties⁸² and the judicial pro-

⁷⁷ S. 3(3)(b)(iv).

⁷⁸ S. 3(1).

⁷⁹ *Ibid.*

⁸⁰ In addition to the more general problem of what is a "business carried on in Canada".

⁸¹ There are a few judicial decisions on the meaning of "establishment" as that term has been used in other statutes, particularly statutes relating to conditions of employment, but I have found none in which the "establishment" was not obviously so, e.g., a hospital in *Jarvis v. Oshawa Hospital*, [1931] 4 D.L.R. 914, [1931] O.R. 482 or three offices and a repair shop in *Zehring v. Brown Materials* (1943), 43 F. Supp. 740, 743 (D.C. Calif.).

⁸² Indeed the term is defined in 16 of the 17 tax treaties to which Canada is a party that I have examined, the sole exception being the tax agreement with Jamaica.

nouncements in the disputes that have arisen as a result thereof.⁸³ In the Foreign Investment Review Act the fact that employees must report to work at the establishment indicates that it must be at least an office or fixed place of business maintained by the foreign corporation.

- (2) *Employees of the corporation* must report to work at the permanent establishment. This involves the old distinction between contracts of service and contract for services, which have been a source of much litigation over many decades, the Income Tax Act having spawned more cases recently than any other source.⁸⁴ A subsidiary question, which may invite artificial planning, is the concept that the employees must be employees of "the corporation". If a planner were to separate the employment function of a business into a separate entity from the one which maintains the establishment there is an argument that the definition of Canadian branch business has been avoided.
- (3) The employees reporting to work at the establishment must be *employed in connection with the business*. If these words add anything, they must mean that it is possible to have employees of the corporation reporting for work at the establishment who are employed in something else other than the business. It is difficult to discern just what planning opportunities may arise from this peculiarity.
- (4) The employees must "ordinarily" report for work at the establishment. Presumably if an office were rented but there were only travelling salesmen involved in the business plus a telephone answering service, so there were no employees at the establishment on a regular basis, then the fact that the salesmen used the office for certain meetings with customers or suppliers, would not make the foreign corporation's activities into a Canadian branch business.

⁸³ See *Consolidated Premium Iron Ores v. C.I.R.*, (U.S. Tax Court, 1975), 57 D.T.C. 1147, affirmed 59 D.T.C. 1112 (6th Cir. C.A.); *Tara Exploration and Development Co. v. M.N.R.*, 70 D.T.C. 6370, 6378 (Exch. Ct.) affirmed 72 D.T.C. 6288, 6290 (S.C.C.); *American Wheelabrator & Equipment Corporation v. M.N.R.*, 51 D.T.C. 285 (Tax A.B.).

⁸⁴ The deductions available under the Income Tax Act are more extensive, generally speaking, for non-employees than they are for employees. A convenient listing and short review of the major cases in England is found in the judgment of McKenna, J., in *Ready Mixed Concrete (South East), Ltd. v. Minister of Pensions and National Ins.*, [1968] 1 All E.R. 433 (Q.B.D.) cited with approval by Jackett, P., in *Alexander v. M.N.R.*, 70 D.T.C. 6007. For a more recent case involving receipts by an administrative officer from the university by which he was employed where the receipts were in respect of marking papers in courses he did not teach, see, *Elliott v. M.N.R.*, 71 D.T.C. 106 (Tax Rev. Bd.).

More important than a Canadian branch business is a "Canadian business" which is defined⁸⁵ in three ways, namely:

- (1) A business carried on by a corporation incorporated in Canada that maintains a Canadian establishment to which employees ordinarily report for work. The wording for this corporate variety of Canadian business is identical to the wording used to define a Canadian branch business so the problems need not be restated.
- (2) A business carried on in Canada by an individual who is either a Canadian citizen or a person ordinarily resident in Canada. Because of the inclusion of only individuals and corporations, the avoidance planner notices that foreign trusts, partnerships and individuals may not be covered. Trusts and partnerships are well-known vehicles in the real estate business. Their use may become more widespread.
- (3) Any number of individuals or corporations, if any one of the number is a corporation described in (1) above or an individual described in (2) above, who either alone or jointly or in concert with one or more other individuals or corporations of the same ilk are in a position to control the conduct of the business. The words "in concert" have been discussed above in another context.⁸⁶ But the final test in this definition, namely controlling not the business but controlling "the conduct of the business" suggest some form of day-to-day control. A corporation cannot control⁸⁷ conduct except through some individual, whether employee, officer or director. It is therefore arguable that if a Canadian citizen is the senior person involved in the day-to-day running of the business owned by a corporation, the business becomes a Canadian business regardless of where the corporation was incorporated. Indeed it does not even seem necessary for there to be an establishment if a Canadian individual is in charge of the day-to-day management of any business carried on in Canada.⁸⁸

⁸⁵ The definition subsection is s. 3(1).

⁸⁶ See text at footnote 42, *supra*.

⁸⁷ I suppose it may be argued that under the organic theory of corporate behaviour, in which a mind is imputed to the corporation from the person who directs it, a Court might take a different view. The organic theory has been accepted by the Supreme Court of Canada in *B.C. Telephone Company v. Marpole Towing Company* (1970), 17 D.L.R. (3d) 545, [1971] S.C.R. 321.

⁸⁸ By substituting definitions and deleting unnecessary words the statute literally reads: A Canadian business means a business carried on in Canada by any number of individuals or corporations if any one or more of those comprising that number are Canadian citizens or individuals ordinarily resident in Canada who alone or in concert with other Canadians control or are in a position to control the conduct of the business. It may be that a Court intent on broadening the scope of the review process would read these words very widely. As the conduct of any sizeable Canadian business on a day-to-day basis, is almost certainly run by somebody who is resident in Canada, this subparagraph of the definition could become of pervasive importance.

But the above three points avoid the more fundamental point of defining a "business". The statute has the type of definition which is familiar to tax lawyers but is not a definition at all. It says that business "includes any undertaking or enterprise carried on in anticipation of profit". While knowledgeable people have opined that this definition is so wide that it catches almost every conceivable real estate transaction,⁸⁹ there is one limiting factor, namely the words "carried on". These words occur not only in the definition of business but also in the definitions of Canadian business and Canadian branch business. Accordingly, there can be no Canadian business enterprise unless a business is being carried on. This may be a very important distinction if the cases under the Income Tax Act are relied upon. The definition in that statute of the word "business" includes "an adventure or concern in the nature of trade".⁹⁰ In the *Tara Exploration*⁹¹ case, Chief Justice Jaxett, who was then the President of the Exchequer Court, decided that the better view was that the words "carried on" are not words that can aptly be used with the words "an adventure", because carrying on something involves continuity of time or operations. Thus one who ventures into the taxation precedents to define "business" must be careful to choose cases which are not primarily concerned with the distinction between capital gains and income, and to concentrate on cases separating business income from property income.⁹²

Turning more specifically to the concept of "business" itself there are two separate questions. The first is whether the activities carried on by a person or group of persons are of such a character as to be capable

⁸⁹ See the submission of the Canadian Institute of Public Real Estate Companies, *Minutes of Proceedings of the Standing Committee on Finance, Trade and Economic Affairs* (1973) Issue 42, Appendix P, p. 285.

⁹⁰ Income Tax Act, s. 248:

⁹¹ *Tara Exploration and Development Co. Ltd. v. M.N.R.*, 70 D.T.C. 6370, 6376. The case was affirmed on other grounds in the Supreme Court of Canada, 72 D.T.C. 6288.

⁹² There is no paucity of tax precedents even so, see *Ginsberg v. M.N.R.*, 53 D.T.C. 445 (Tax A.B.); *Rubinstein v. M.N.R.*, 1962 D.T.C. 100, (Tax A.B.); *Martin v. M.N.R.* (1948), 3 D.T.C. 1199 (Exch. Ct.); *Walsh and Micay*, 65 D.T.C. 5293 (Exch. Ct.). A good article on the cases under the old Income Tax Act is Karp, "Rental Income: Property or Business?", 16 Can. Tax J. 191 (1968). The other area where "carrying on business" is a familiar test to corporate lawyers is with respect to the necessity to obtain extra-provincial licences, see *Weight Watchers International, Inc. v. Weight Watchers of Ontario Ltd.*, [1973] 1 O.R. 549, 31 D.L.R. (3d) 645, 9 C.P.R. (2d) 77 (H.C.J.).

of being called a business.⁹³ The second is whether all the activities carried on by a corporation are business activities because the very nature of a corporation is to be engaged in business.⁹⁴ The first question usually turns on whether there is a sufficient degree of activity to convince a Court that a business is carried on, with factors such as a telephone listing being treated as indicative of something other than merely passive behaviour. The second question, relating to activities of corporations in general, is really a philosophical one—should the fact of being a corporation, by itself, indicate the existence of a business.⁹⁵

Two paragraphs in s. 3(6) may have some relevance to the determination of the question of whether a specific business is a Canadian business enterprise. One of these⁹⁶ states that a Canadian business shall be deemed to be carried on in Canada even if it is carried on only partly in Canada and partly outside. This provision appears to have been inserted out of an abundance of caution except in cases where it is coupled with the second provision. This second and more troublesome provision⁹⁷ says that a part of a business that is capable of being carried on as a separate business is a Canadian business enterprise if the business of which it is a part is a Canadian business enterprise.

Take the case of a large foreign corporation which has a branch operation in Canada thus making the business a Canadian business enterprise. Suppose that foreign corporation decided to sell the assets of its Swiss branch. Is the Swiss branch a Canadian business enterprise? It is part of the over-all business of the foreign corporation, the Canadian branch of which is a Canadian business enterprise. If the statute

⁹³ In this area the various texts on partnerships such as Underhill and Lindley are helpful. The statutes (see for example the Partnership Act, R.S.O. 1970, c. 339 s. 2) define a partnership as the relation that subsists between persons carrying on a business in common with a view to profit. Business is in turn defined as a trade, occupation or profession. Thus a partnership has the concepts of "carrying on" and "in anticipation of profit" which are both included in the definition under the Foreign Investment Review Act. See also *Re Pszon*, [1946] 2 D.L.R. 507, [1946] O.R. 229, [1946] O.W.N. 280, 27 C.B.R. 130 (Ont. C.A.), leave to appeal refused [1946] 4 D.L.R. 303, 27 C.B.R. 240, for a discussion of the elements of what constitutes a business.

⁹⁴ This argument has been put very forceably in tax cases involving Canadian controlled private corporations, because of the small business deduction, see *Farlan Investments Ltd. v. M.N.R.*, 75 D.T.C. 12 (Tax Rev. Bd.); *Cosmopolitan Investment Co. Ltd. v. M.N.R.*, 74 D.T.C. 1252 (Tax Rev. Bd.). It is believed that both these decisions may be appealed.

⁹⁵ In my view it should not, but that is only the view of one academic on the value choices in the normative world. My view is consistent with the theory, long espoused in letters patent jurisdictions, that a corporation has all the powers and capacities of a natural person, including the capacity, I suggest, to be doing something which is not a business.

⁹⁶ Para. (f).

⁹⁷ Para. (g).

says that the sale of the Swiss branch is reviewable then the statute has a very broad reach indeed. The example is too ridiculous to take seriously. Is it so ridiculous, however, to contemplate that a large Canadian-based multi-national enterprise should be required to seek review before selling off its foreign branch operations to foreign interests and thus, perhaps, diminishing Canadian exports? If the issue arose in the latter context it is not inconceivable that the government might seek to review the transaction. If so then the first example follows logically from the same statutory paragraph.⁹⁸

Another provision,⁹⁹ inserted to deal with land acquisitions, has been discussed above in another context. That paragraph indicates that improving real property for personal use and enjoyment of the owner or holding the property without improving it (but making the necessary maintenance expenditures to keep it in repair) is not carrying on a business. It is doubtful if this provision limits the width of the "business" definition significantly. Indeed if a Court started down the logic-path that is based on the concept that the expression of one exception precludes others, the provision might well turn out to broaden the meaning attributed to the word "business". The only provision in the statute that clearly does narrow its application is found in s. 5 which provides that the statute does not apply to acquisitions where the gross assets of the target have a value below \$250,000 and the gross revenue for the last fiscal year was less than \$3,000,000.¹⁰⁰ But even these limitations are circumscribed for, in determining gross assets and revenues, one must take into account businesses associated with the target and, for new entrants into Canada, the minimum limits fall to zero on second proclamation.¹⁰¹

⁹⁸ The paragraph was presumably inserted to plug the large hole left in the definition of "acquisition of control" which requires that an acquisition, in order to be an acquisition of control, must be an acquisition of substantially all the assets of the target business. It is suggested that the draftsman has plugged the hole in a peculiar way with rather remarkable results, an occurrence which is all too familiar to tax practitioners attuned to the niceties of designated surplus.

⁹⁹ S. 3(9).

¹⁰⁰ The gross asset and gross revenue tests are further adumbrated in s. 4 of the Regulations, SOR/74-154.

¹⁰¹ See s. 31(3). The \$250,000 limit is far too low for the full Canadian Cabinet to spend its time debating the merits of a proposed acquisition. This limit likely derives from the information set out in the Gray Report, pp. 474 *et seq.* There it was estimated that there were 88 takeovers in 1968 and 85 in 1969 at a threshold of \$250,000. But inflation has changed the value of the dollar somewhat since 1969 and the review process was never envisaged as including a Cabinet decision by the Gray Report.

5. Exit the Lawyers: Significant Benefit to Canada

If the Foreign Investment Review Act applies to an acquisition, then the acquirer must seek to have the Cabinet allow the acquisition. Procedurally this is started by filing a notice with the Agency. Substantively the Cabinet is required by the statute¹⁰² to allow the investment if it concludes, "having regard to the factors enumerated in subsection 2(2)", that the investment is likely to be of significant benefit to Canada. The words "having regard to" would seem to preclude the Cabinet¹⁰³ from allowing considerations other than those set out in s. 2(2) to influence its choice.¹⁰⁴ This makes subsec. (2) of crucial importance. That subsection set out five criteria, which are the exclusive ingredients in "significant benefit to Canada", as follows:

- (1) The effect of the acquisition on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada.¹⁰⁵
- (2) The degree and significance of participation in the business enterprise or new business¹⁰⁶ and in any industry in Canada of which the business enterprise or new business forms a part.¹⁰⁷
- (3) The effect of the acquisition on productivity, industrial efficiency, technological development, product innovation and product variety in Canada.¹⁰⁸

¹⁰² S. 12(1). As to the possibility of *mandamus* lying against the Cabinet, the question is open to some doubt but the trend may be in that direction, see Note 89 L.Q.R. 329 and the cases cited therein.

¹⁰³ Technically it is not the Cabinet but the Governor in Council who makes the decision. Section 28 of the Interpretation Act, R.S.C. 1970, c. I-23, defines the Governor in Council to be the Governor General of Canada acting by and with the advice of the Queen's Privy Council for Canada. The Queen's Privy Council for Canada was established pursuant to s. 11 of the British North America Act, 1867, (U.K.), c. 3. Technically, under s. 9 of the British North America Act the Executive Government of Canada rests with the Queen.

¹⁰⁴ The only reason one might doubt this is the difference in wording in s. 10 relating to the Minister's opinion. Surely the Cabinet has as wide a scope for its conclusion as the Minister does for his opinion.

¹⁰⁵ As the Bill was originally drafted only the level of economic activity and employment were mentioned in this paragraph. These two factors appear to be a direct copy from the Gray Report, p. 457. The additions, which are consistent with the Gray Report, may be attributable to the position taken by the New Democratic Party, see the speech by David Lewis, Hansard (1973), 1st Sess. 29th Parliament, Vol. III, p. 2862.

¹⁰⁶ "New business" is a defined term meaning a business not previously carried on in Canada by the person in relation to which the expression is relevant. Thus it appears that Canadian participation in both the acquirer and the target are relevant considerations.

¹⁰⁷ This factor is suggested as one factor that might be taken into account by the Review Agency at p. 456 of the Gray Report.

¹⁰⁸ These factors are all set out on pp. 455 and 456 of the Gray Report.

- (4) The effect of the acquisition on competition.¹⁰⁹
- (5) The compatibility of the acquisition with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government of any province likely to be significantly affected¹¹⁰ by the acquisition.¹¹¹

As all these criteria are directly derived from the Gray Report, it is likely a fair inference that the approach to the review procedure there set out will be, in general, the approach adopted by the Agency, the Minister and the Cabinet. The one guideline not set out in the legislation which was specifically suggested in the Gray Report is the geographic location of the target business. It is likely that this could be properly taken into account by any reviewing authority under the general words in criteria (1) and (5).¹¹²

The specific reference to provincial policies within a federal statute is an interesting example of what may ultimately be a closer working relationship in the economic sphere between the provincial and federal governments.¹¹³ It is also a source of some problems administratively. Because of the 60-day deemed allowance provision¹¹⁴ it may be difficult to consult with several provinces as well as proceeding through

¹⁰⁹ Again see the Gray Report p. 457 and at p. 464 with reference to the relationship between the Agency and the Restrictive Trade Practices Tribunal. It is usually possible to argue that competition will be enhanced by a takeover if the acquirer is not already in the Canadian market. The introduction of a more economically viable entity is usually considered to have a positive impact on competition. Also the revitalization of a failing company can be argued to be beneficial to competition. It is interesting to speculate what happens if government policy does not encourage competition any more. In a speech in the House of Commons on February 6, 1975, the Minister of Energy, Donald Macdonald suggested that there was going to be a change "from a society founded on competition to one based more on sharing and compassion", House of Commons Debates (1975) Vol. 119, p. 2991.

¹¹⁰ The *Report of the Select Committee on Economic and Cultural Nationalism* has considered the impact of these words and recommended that Ontario require all the material now required to be filed federally to also be filed provincially by any non-eligible person acquiring control of a business enterprise carrying on business in Ontario.

¹¹¹ See the Gray Report, p. 456 and, with respect to provincial inputs, pp. 437 *et seq.*

¹¹² New Brunswick has been very energetically suggesting that foreign investment or any other investment should be welcomed to that region of the country, as Mr. Hatfield has repeatedly been quoted in the press as saying, particularly with respect to the Bricklin car. Mr. Hatfield's brief to the Commons Committee was very clear. See *Standing Committee on Finance, Trade and Economic Affairs* (1973) Issue 42, Appendix 14, p. 4:

The Government of New Brunswick's opinion on the proposed legislation is a simple and straightforward one—we see no need for it in our region of Canada and we believe that it would prove to be harmful to our attempts to attract and to accelerate industrial development.

¹¹³ A parallel in the opposite direction might be seen in the Business Corporations Act, R.S.O. 1970, c. 53 where s. 130(3) amended 1974, c. 26, s. 3, requires a majority of directors' meetings to be held in Canada rather than in Ontario.

¹¹⁴ S. 13.

three or four steps at the federal level.¹¹⁵ Yet provincial governments may demand consultation.¹¹⁶ If the target enterprise in question does business in all the provinces of Canada then each province might feel significantly affected by the proposed acquisition. Exacerbating this situation is the problem of when a policy is "enunciated" by a provincial government. If the federal authorities could rely on the concept that only publicly stated provincial policies needed to be considered, the job would be considerably simpler. But it would appear that "enunciated" is used in the sense of being stated precisely rather than stated publicly as specific representations from provinces significantly affected are envisaged in the statute.¹¹⁷

It is very difficult to give any guidance to potential applicants as to the weighting of various factors which might be considered to be of significant benefit to Canada. The most useful source of information would be a statement of reasons for both positive and negative decisions by the Cabinet. So far all that has emerged are press releases accompanying announcements that acquisitions have been refused or allowed.¹¹⁸ Until March 3, 1975 these had all been couched in general terms. The March 3rd press release set out ten components relevant to the determination of significant benefit, without giving any weighting to any of them although compatibility with industrial and economic policies was found to exist in each takeover allowed. The "benefits" which now appear to be of predominant importance are:¹¹⁹

(1) Employment effects. Increased employment has been mentioned in most of the press releases.¹²⁰ The interest is not only in an

¹¹⁵ As well as the Agency and the Minister, a committee of Cabinet considers each application before it is submitted to the full Cabinet.

¹¹⁶ Ontario seems to be the most demanding, if the approach of the *Report of the Select Committee on Economic and Cultural Nationalism* (Toronto, 1975) is any indication. Hayden and Burns suggest, 3-3, that the Quebec government successfully pressured the federal government to revise the Bluebird-Corbeil decision.

¹¹⁷ See s. 9(d) and s. 11(3).

¹¹⁸ Press Release of August 9, 1974 regarding the Brunswick Ozite merger; Press Release of September 11, 1974 regarding the acquisition of previously Dutch-controlled Mulder (Canada) Limited by the British controlled Blackwood Hodge Group; Press Release of December 23, 1974 relating to 14 applications. In the December press release Mr. Gillespie indicated that full disclosure on a case-by-case basis might be unfair. In the latest press release of March 3, 1975 there are some 14 allowed acquisitions and one disallowed. With respect to those allowed there is, in some cases, fairly detailed statements of the benefits to Canada. Attached to the release as an appendix is a table setting forth categories of significant benefit across the top and the acquisitions down the side. Then an "X" is placed in the column where significant benefit was shown. Press releases since March 3, 1975 have followed the same pattern.

¹¹⁹ See also Hayden and Burns, 7037 *et seq.*; Langford, *Canadian Foreign Investment Controls*, (CCH 1974, Toronto) pp. 19 *et seq.*

¹²⁰ The employment effects are required information to be submitted with the notice of proposed acquisition, see Regulations SOR/74-154. Schedule IV, items 2(e), (o) and (q).

increased number of jobs but increased participation by Canadians in the senior managerial positions.¹²¹

- (2) Projected plant expansion or modernization. This usually goes hand-in-hand with product rationalization or improved efficiency if the acquisition is horizontal. If the target company is on the verge of insolvency then the preservation of the existing plant and the existing employment would be considered a benefit in itself.¹²² Otherwise new investment is probably required.¹²³
- (3) Procurement of more Canadian goods and services or increased processing in Canada than existed under the previous management.¹²⁴
- (4) Increased participation by Canadians as shareholders and directors.¹²⁵ In the only reasons given in 1974 for a disallowance, the Minister said that a proposed takeover by Celanese Canada Ltd. of Westmills Carpets Ltd. was rejected because the government felt the target company should be able to continue and develop as a successful independent Canadian business enterprise. Celanese Canada publicly announced that the takeover would have resulted in 200 new jobs, vastly expanded plant, increased Canadian ownership, increased exports and expanded research and development.¹²⁶ It would appear that the increased Canadian ownership was in an over-all sense rather than in a control sense. Thus loss of Canadian control of the target has apparently been weighted very heavily in the scales. If the transfer of control had been from one foreigner to another with no effect on Canadian control either presently or prospectively, the benefits Celanese proposed might well have been considered significant. This is an interesting example of when the weighting afforded to the various beneficial elements might be changed depending on the type of transaction subject to review.
- (5) Increased exports from Canada. It is obviously possible for multi-

¹²¹ Gray Report, p. 455. See March 3rd press release relating to the Redstar acquisition of Marcoux Transit.

¹²² See Gray Report, p. 455 and Regulations SOR/75-154 Schedule IV, item 2(d).

¹²³ Indeed improved productivity and industrial efficiency have been a major factor in most of the allowances announced.

¹²⁴ Again the Regulations Schedule IV, item 2(g) and the Gray Report, p. 455 place emphasis on these factors.

¹²⁵ Legislative changes in the incorporating statutes have forced corporations to have a majority of Canadians on their boards of directors, see for example, the Business Corporations Act, R.S.O. 1970, c. 53, s. 122(3). Accordingly, it is hardly a benefit to Canada arising as a result of the acquisition that there are now a majority of Canadians on the board.

¹²⁶ See Hayden and Burns, 3-3 and 3-4.

national enterprises to allocate export markets amongst subsidiaries. It is widely assumed that this is likely to act against Canadian interests as Canadian exports may be curtailed if the Canadian subsidiary is not given export opportunities.¹²⁷ On the other hand the available data is very inconclusive. Some foreign controlled enterprises in Canada may have a disproportionately large share of the total export market for their group because they have been allocated it by the controlling parent. Still, on a case-by-case basis, it is realistic to expect the Canadian authorities to press at least for no diminution of exports. This is most likely to arise as a serious problem when a foreign government nationalizes a given industry, such as the British Aircraft Industry, which has Canadian subsidiaries. It is difficult to see why the foreign government would wish to increase Canadian exports. It may be that exports are a less important "benefit" than the others listed because they are susceptible to changes in foreign laws and other pressures over which neither the Canadian authorities nor the non-eligible acquirer have any control.¹²⁸

- (6) The location of additional research and development facilities in Canada.¹²⁹ This has a fairly high priority and is one area where the potential acquirer may be able to show benefits rather easily because the target may have done little or no research and development in Canada. The existence of various government assistance programs may make the introduction of research and development less costly than almost any other benefit.¹³⁰

The list of six items, though far from exhaustive,¹³¹ could be viewed as the major benefit items. The real trouble is that the significance of the benefit is the controlling test. There is no indication in the statute what "significant" means nor is it meant, I suggest, to be a concept amenable to legal analysis. It is meant to be a judgment call on

¹²⁷ There is a long discussion of the effects of foreign control on the export performance of subsidiaries in Canada in the Gray Report, Chapter 10. See also Hayden and Burns, 7052.

¹²⁸ Thus, for example, only four of the March 3rd allowances showed increased exports as a benefit that was obtained.

¹²⁹ See the Gray Report, pp. 133 *et seq.*

¹³⁰ Some of the government grant and loan programs are discussed in the Gray Report, pp. 349 *et seq.* The government of the United States, often under the guise of defence expenditures, has spent huge sums on research and development. The government initiative in this area is generally recognized as the key factor, see our example, Servan-Schreiber, *The American Challenge* (1968, New York), pp. 141 *et seq.*

¹³¹ Not included in my list of six is the impact on competition, which I mentioned earlier and a heading in the press releases entitled "Improved Product Variety and Innovation". It will be interesting to see if future press releases add more categories.

a case-by-case basis. While a "non-detriment" approach has been suggested¹³² as being more apposite in cases where any real benefit is unlikely to occur, such as in corporate reorganizations undertaken for tax purposes, that is not the approach in the statute. But the reviewing authorities clearly would anticipate that less benefits could rationally be expected in such cases.¹³³ For example, if an American parent had majority share control of one Canadian subsidiary and had another wholly-owned Canadian subsidiary, then the transfer of the shares of the wholly-owned subsidiary to the controlled subsidiary would presumably be a reviewable transaction. But, it is suggested, less "benefit" would be demanded by the authorities before allowing the transaction than would be demanded if the wholly-owned subsidiary was being transferred to a new U.K. parent.

The statute envisages that the acquirer may give undertakings to the Queen in right of Canada conditional upon the allowance of the proposed acquisitions. These undertakings are demanded by the Agency to ensure that the proposed significant benefit is something more than *brutum fulmen*. Thus the acquirer in his notice sets forth his proposals for the future of the target enterprise,¹³⁴ negotiates with the Agency as to the acceptability of the proposals¹³⁵ and signs undertakings embodying at least some of the results of the negotiations. These undertakings are made specifically enforceable by Court application¹³⁶ although the Minister has indicated that further negotiations would be a preferred route.¹³⁷ Except in the preparation of the undertakings, lawyers are not involved by the Agency in the process for determining significant benefit to Canada.¹³⁸

¹³² See, for example, the interchange between Senator Connolly and Mr. Macdonald, (1973) *Proceedings of The Standing Senate Committee on Banking, Trade and Commerce*, 23:10.

¹³³ In the press releases so far produced, some allowances seem to have had benefits in only three or four of the ten listed categories while others had benefits in all ten.

¹³⁴ That is what Schedule IV of the regulation is essentially concerned with.

¹³⁵ It is a tactical question whether the acquirer might hold back a bit in filling out the forms so he could have something to give to the Agency at the negotiation stage. Naturally the Agency likes to feel that it had a role in extracting more significant benefit for Canada.

¹³⁶ See s. 21.

¹³⁷ *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs* (1973) Issue 26, p. 16. It is still too early to tell whether the enforcement of these undertakings will be vigorously pursued. Undertakings given on acquisitions allowed can be published under s. 14(4)(c).

¹³⁸ This is not to say someone with legal training is precluded, but the statute does not suggest a legal definition of significant nor would wrangling over some standard likely accelerate the review process.

6. Administration and Enforcement

The Agency is headed by a Commissioner¹³⁹ and is divided into three branches: Compliance Branch, Assessment Branch, and Research and Analysis Branch. When a notice is received by the Agency, the Rulings Division of the Compliance Branch makes an initial review to see that the notice conforms to the requirements set forth in the regulations.¹⁴⁰ Once the notice is complete a certificate signed by the Commissioner is sent out setting forth the date of receipt of the notice.¹⁴¹

Then the file is transferred to the Assessment Branch which is responsible for negotiating undertakings and for advising the Minister as to whether the acquisition meets the significant benefit to Canada test. Provincial inputs are obtained by the Agency at this stage from the provinces affected. Under the statutory wording the Agency is to send all the material to the Minister and, if he feels he has sufficient information to allow the investment, he is obliged to so recommend to the Cabinet.¹⁴² But s. 11 envisages that at any time during the assessment process the Minister may decide he will be either unable to complete the assessment¹⁴³ or unable to make a positive recommendation to the Cabinet. In such a situation the Minister is then required to cause the Agency to send a notice to the applicant advising him of his right to make further representations. This notice stops the running of the 60-day time period for a deemed allowance.¹⁴⁴ The notice gives the applicant 30 days to notify the Agency of a desire to make further representations. If no further representations are forthcoming then the Minister completes his assessment and sends to the Cabinet a summary of the material filed (except written undertakings and provincial submissions which are sent up in full).¹⁴⁵

In the more usual case negotiations simply continue with the Agency although the parties have the right to make further representations in a more formal way. If the parties so desire, the Agency is required to no-

¹³⁹ Under s. 7(2) the Governor in Council appoints the Commissioner. In fact there is now a Commissioner and a Deputy commissioner.

¹⁴⁰ It usually does not, so the applicant is sent a deficiency letter.

¹⁴¹ S. 8(4).

¹⁴² S. 10.

¹⁴³ These important words in s. 11(1) make it proper for the Minister to stop the clock. If the 60-day time period is insufficient, the sending of the notice is not a mere device; it was intended for that purpose.

¹⁴⁴ S. 13(1)(c).

¹⁴⁵ It is peculiar but only under s. 11(2) are the provincial representations and the applicant's undertakings required to be submitted in full by the Minister. There is no requirement for a recommendation by the Minister under this subsection although his opinion is presumably sent forward to Cabinet.

tify the Minister who is required to offer the parties a reasonable opportunity either in person or through counsel to make further representations.¹⁴⁶ Eventually the process of negotiation¹⁴⁷ comes to a halt and the Minister sends to Cabinet a summary of all the material together with his recommendation. The ultimate decision is made by the Cabinet which either allows or refuses to allow the proposed acquisition.¹⁴⁸ A copy of the order made by the Cabinet is sent to the applicant and published in Part I of the *Canada Gazette*.¹⁴⁹

In the event that a non-eligible acquirer of a Canadian business enterprise does not file the notice required under s. 8(1) the Minister has two remedies available. Either he may demand that the acquirer file a notice with the Agency¹⁵⁰ or he may apply for an injunction to a superior Court.¹⁵¹ If a demand is served by the Minister and the acquirer does not respond, then the Minister has three choices:

- (1) He can launch an investigation.¹⁵²
- (2) He can apply to a superior Court to render the investment nugatory.¹⁵³
- (3) He can proceed through the appropriate channels to have the

¹⁴⁶ S. 11(3). While it appears that the Minister must personally decide who should hear the representations in view of the statutory wording, it is suggested that the Minister is not required to hear the representations himself, see Interpretation Act, R.S.C. 1970, c. I-23, s. 23(2) as amended by the Statutory Instruments Act, 1970-71-72, c. 38, s. 28.

¹⁴⁷ I should note that writers who have had some experience with making applications to and negotiating with the Agency have been very laudatory to the Agency personnel. See for example, Hayden and Burns; Arnett in a paper delivered in Toronto in September 1974 entitled "The Foreign Investment Review Act after Six Months".

¹⁴⁸ S. 12(1). It should be noted that Cabinet can refer the matter back for a s. 11(1) notice if that has not already occurred, s. 12(2).

¹⁴⁹ There appears to be no requirement for publication although a deemed allowance must be registered with the Clerk of the Privy Council under s. 13(2). The Statutory Instruments Act, 1970-71-72, c. 38, s. 24, provides that any person can inspect any statutory instrument that has been registered. Why a different treatment was accorded in the statute for the deemed allowance from a Cabinet decision to allow is not clear. It seems that the Minister assumed publication in the *Canada Gazette* was mandatory, see *Minutes of Proceedings and Evidence of The Standing Committee on Finance, Trade and Economic Affairs* (1973), Issue 42, p. 36.

¹⁵⁰ The demand must be by registered mail or personal service and must indicate that nature of the proceedings which could follow if the demand is ignored, s. 8(3) and (3.1).

¹⁵¹ S. 19. The injunction may be *ex parte* if time constraints force such a result, otherwise it is on at least 48 hours' notice to the party sought to be enjoined.

¹⁵² The powers on an investigation, which are set out in ss. 15-18, are quite extensive. Presumably the investigation would be carried out by the Compliance Branch of the Agency with appropriate help from the Department of Justice.

¹⁵³ This drastic remedy is fully described in s. 20. The possibilities include an order by the Court requiring the acquirer to dispose of the shares or assets. In the case of a foreign acquirer the Court may vest the shares or assets in a trustee, have the trustee sell them and remit the proceeds, after paying the trustees' fees, to the foreign acquirer.

acquirer charged with a summary conviction offence for failure to obey the demand.¹⁵⁴

With this arsenal of remedies available to the Minister it would be a courageous acquirer indeed who did not attempt to keep on side with the Agency.

There is, of course, the availability of a Ministerial opinion as to whether or not an acquirer is a non-eligible person. That opinion is not likely subject to review by the Federal Court.¹⁵⁵ Accordingly, if the potential acquirer cannot convince the Minister to issue a favourable eligibility opinion, he may have little or no recourse. If he goes through with a proposed acquisition after the Minister has refused to give him an opinion, a demand under s. 8(3) is presumably a foregone conclusion. If he bows to the demand he has conceded the Minister's point. If he does not, he is guilty of a criminal offence. He may be able to challenge the propriety of the issuance by the Minister of the demand notice in the Federal Court.¹⁵⁶ If the Court accepts jurisdiction it could issue an order restraining the Minister from proceeding further under the statute, *i.e.*, from proceeding with the criminal prosecution. But that is a pretty circuitous route to a businessman. These provisions may be one indication that the statute was not intended to be a lawyer's delight. The Agency not the Court was intended to be, and in practice is, the focal point of action.

The Agency also has the job of enforcing the undertakings given on acquisitions which are allowed. Again this will be undertaken by the

¹⁵⁴ S. 24(2). Note that this subsection is devastating in that, if the acquirer believes it is not a non-eligible person, it is still guilty of an offence if the Minister has served a notice under s. 8(3) and the acquirer does not file. Directors and officers are liable also under s. 27.

¹⁵⁵ Stikeman in his article "Foreign Investment Review: Canada's New Medicine", *The Business Quarterly* (Autumn 1974) p. 77 states that in such a case an investor may apply to the Federal Court for leave to obtain a declaratory order. Presumably this is pursuant to s. 18 of the Federal Court Act. Chief Justice Jaccett in his book on *The Federal Court of Canada, A Manual of Practice* (1971, Ottawa) suggests on p. 18 that s. 18 does not create a new kind of proceeding. It is not a usual proceeding for a Court to review a ministerial opinion. On the other hand the Court might, in its discretion, grant a declaratory order, on the application of an affected party, construing the meaning of the words of the statute. The *locus standi* of the applicant may be in doubt but the decision of the Supreme Court of Canada in *Thorson v. A.-G. Can. (No. 2)* (1974), 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138, 1 N.R. 225, gives the litigant some hope.

¹⁵⁶ In a presentation before the Senate Committee, Mr. Fred Gibson of the Department of Justice stated that s. 18 of the Federal Court Act could be used by an acquirer to seek a declaration that the Minister lacked authority to issue a notice under s. 8(3) and to restrain the Minister from proceeding further under the provisions of the Bill, see *Proceedings of the Standing Committee on Banking, Trade and Commerce* (1973), 23:17. Mr. Gibson seems to indicate in the same passage that a direct review of a Ministerial opinion under s. 4(1) would not be possible. Mr. Gillespie indicated he would seek an amendment to the statute if the review process proved to be inadequate.

Compliance Branch. While the statute has provision¹⁵⁷ for Court enforcement, it is much more likely that further negotiations will ensue. It would not be surprising to find the Assessment Branch heard from at this point as well, as it negotiated the original undertakings.

The third branch of the Agency, Research and Analysis, is responsible for long range research into what constitutes significant benefit to Canada on an industry-by-industry and province-by-province basis.¹⁵⁸ Personnel from this branch will have the major input into the development of policies that are ultimately issued as guidelines. The Branch is also responsible for the preparation of the annual report.

7. Some Problem Areas

The above analysis is little more than an overview of the statute. It should demonstrate that the Foreign Investment Review Act is very technically drafted, particularly throughout s. 3. On the other hand, there are sweeping provisions, such as s. 2, where the applicant is left with little guidance. These two polar extremes cause many problems for the Agency and for applicants. By considering a few typical problem areas the nature of these difficulties can be appreciated.

(1) Corporate reorganizations

A reorganization within a corporate group where there is no change in the ultimate control of the group may or may not be subject to review. If the reorganization takes place by way of amalgamation there is a specific statutory exception that makes the transaction not subject to review.¹⁵⁹ But if the two corporations which it is desired to combine are not within the same incorporating jurisdiction, amalgamation in the statutory sense may be impossible. For example, a parent owning two subsidiaries may seek to sell the shares it owns in one subsidiary to the other subsidiary or to sell the assets of one subsidiary to another subsidiary. If all three corporations (the parent and two Canadian incorporated subsidiaries) are non-eligible then the acquisition of control by one subsidiary of the other technically will be a reviewable transaction.¹⁶⁰ Yet the Canadian business enterprise has not changed nor has

¹⁵⁷ S. 21.

¹⁵⁸ Hayden and Burns, 30,004.

¹⁵⁹ Section 3(3)(e) and see the brief of the Canadian Bar Association, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs* (1973), Issue 42, Appendix R, pp. 469-70.

¹⁶⁰ To trace the language through in the case of a share sale the sister company has acquired more than 50 per cent of the voting shares of the target company. Thus it has acquired control under s. 3(3)(d) unless "the person or group of persons acquiring the shares had, at the time of the acquisition, control in fact". Now the only acquiring corporation is the sister corporation and it had no previous control at all.

the ultimate control really changed.¹⁶¹ In such a case the Agency or the Minister might agree that this is not the type of situation where a full Cabinet review is appropriate. What alternative courses of action are available to the authorities to implement that decision?

The Agency could demand that a notice be filed and then pass the matter on to Cabinet with a suggestion that a "no detriment" view of significant benefit would be appropriate. This would still involve putting the matter before Cabinet, a body whose responsibilities are heavy enough without adding to them unnecessarily. Alternatively Cabinet might instruct the Agency to just sit on the notices for 60 days thus bringing into play the deemed allowance provisions. This is inappropriate as the deemed allowance was designed to be a fail-safe mechanism, not a method of handling awkward disputes.¹⁶² In addition, it would put the applicant to the unnecessary expense of filing a detailed notice which was never intended to be used. Alternatively again, the Agency might write a letter to the applicant saying that, in its opinion, the matter was not one that was appropriate to review within the spirit of the statute. Such letters have been written but it is doubtful if they are of any binding effect.¹⁶³ This may not be too important if in practice the letters are treated as binding on the Minister.¹⁶⁴ It has the advantage of permitting the Agency to cut down the amount of material that needs to be filed in any particular case before the letter is sent out as no notice is officially acknowledged.¹⁶⁵ As a final alternative the Minister might issue guidelines under s. 4(2). That subsection provides that guidelines may be issued with respect to the application and administration of any provision of the Act. Whether

¹⁶¹ This is one of the examples Macdonald was concerned about when he appeared before the Senate Committee, see *Proceedings of the Standing Committee on Banking, Trade and Commerce* (1973), Issue 23, pp. 7 *et seq.* Since this article was written the Minister has issued guidelines on corporate reorganization in an attempt to rationalize the impact of the statute. The various alternatives for administrative action are still true.

¹⁶² See the exchange between Mr. Gillespie and Mr. Stevens, *Minutes of Proceedings of the Standing Committee on Finance, Trade and Commerce* (1973), Issue 23, p. 33.

¹⁶³ See *De Galindez v. King* (1906), 15 Que. K.B. 320, *affd* 39 S.C.R. 682; *Salter v. M.N.R.*, 52 D.T.C. 148, 6 Tax A.B.C. 193; *McClyment v. M.N.R.*, 68 D.T.C. 715; *Kennedy v. M.N.R.*, [1929] Ex. C.R. 36.

¹⁶⁴ After many years of sticking to the position that no binding opinions could be given, the Department of National Revenue decided in 1970 to issue advance rulings in respect to definite transactions which rulings are "binding upon the Department as long as the law as constituted at the time the ruling is given remains unchanged", Information Circular 70-6. Until 1974 the rulings were not published but became known by the tax grapevine. In 1974 the department decided to publish the rulings after taking out the names of the parties in order to preserve confidentiality.

¹⁶⁵ A certificate of receipt is required to be issued under s. 8(4) if a complete notice is filed. The certificate date marks the start of the 60-day automatic allowance provision of s. 13.

such guidelines can properly cut down on the reach of the statute as a matter of pure law is open to debate.¹⁶⁶ As a practical matter they could be made as binding on the Minister as the advance rulings under the Income Tax Act and could be published.¹⁶⁷

(2) Real estate acquisitions

Real estate investment and development is obviously different from manufacturing and processing. Yet the legislative definition of significant benefit is essentially derived from the Gray Report which regarded the suggested guidelines as applicable mainly to the manufacturing and resource industries.¹⁶⁸ But the statute is not drafted that way. Instead an attempt has been made to preclude some real estate acquisitions from the reach of the statute. Thus in s. 3(9) it is specifically provided that the holding of real estate and the expenditure of funds to maintain it in the condition in which it was acquired is not, for these reasons alone, carrying on a business. Accordingly, the acquisition of such real estate would not be the acquisition of control of a Canadian business enterprise. As the Bill went through the House and Senate a large number of criticisms were levelled at the provisions in so far as they affected real estate.¹⁶⁹ The result was that the Minister

¹⁶⁶ It is submitted that a Minister with the power to issue guidelines should be able to fill out the vagaries of the Act in a way consistent with its over-all design and be bound by his own guidelines. The authority to issue guidelines even in the absence of the statutory provision is clear, see *R. v. Port of London Authority, ex p. Kynoch Ltd.*, [1919] 1 K.B. 176 which has been followed in Canada in *Re Hopedale Developments Ltd. and Town of Oakville* (1964), 47 D.L.R. (2d) 482, [1965] 1 O.R. 259 (C.A.) and in *Re North Coast Air Services Ltd. and Air Transport Committee of the Canadian Transport Comm'n* (1972), 32 D.L.R. (3d) 695, [1972] F.C. 390 *sub nom. Re North Coast Services Ltd.* But such guidelines are treated in those cases as not having any binding effect in the sense of fettering the Minister's discretion. There is a suggestion, however, in more recent cases that the law is changing to say that not only may administrative authorities issue guidelines but they may, at least somewhat, fetter their discretion by so doing, see *British Oxygen Co. Ltd. v. Minister of Technology*, [1970] 3 All E.R. 165 (H.L.) which was followed in *Cummings v. Birkenhead Corp.*, [1971] 2 All E.R. 881, see also *Lever (Finance) Ltd. v. Westminster Corp.*, [1970] 3 All E.R. 496, Comment, 34 Mod. L.R. 335 (1971). In a Tax Review Board decision it has been held that the Minister is bound by an Interpretation Bulletin where a taxpayer has relied on it, *Bowen v. M.N.R.*, 72 D.T.C. 1161, which is believed to be under appeal. This concept of reliance by a person affected being relevant to any change in the interpretation of the law was the basis of Cardozo's famous opinion in *Great Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358 affirming 7 P. 2d 927 (Montana S.C.), see Comments 25 Va. L. Rev. 210 (1938), 60 Harv. L.R. 437 (1947).

¹⁶⁷ The fact that guidelines are given a specific statutory foundation in the Foreign Investment Review Act should support their validity as a form of delegated legislative power.

¹⁶⁸ Gray Report, at p. 456, footnote 1.

¹⁶⁹ See the various briefs in the *Appendices to the Minutes of Proceedings of the Standing Committee on Banking, Trade and Commerce* (1973) Issue 42.

promised that he would publish guidelines under s. 4(2) concerning the application of the Act to real estate.¹⁷⁰

These guidelines were tabled by the Minister in the House of Commons on March 22, 1974. In the preamble to the guidelines it is specifically stated that the guidelines do not have the force of law but are designed to serve as a guide to the manner in which certain provisions of the statute are to be administered. The guidelines are said to identify factors which may indicate whether or not a person acquiring control of real estate is acquiring control of a Canadian business enterprise.

The two major factors set out in the guidelines are:

- (1) The nature of the property in the sense that if it is a "business property" as opposed to a "circulating asset" the acquisition will be reviewable. The guidelines then set out several categories of "business property" including goodwill, lists of accounts payable and other items remote from real estate. But there is a subparagraph called "rental property" which states that the activity of earning rents on an economically or commercially significant scale is usually a business. The subparagraph then goes on to say that if the gross value of the property exceeds \$10 million then the activity is deemed to be economically or commercially significant. "Circulating assets" are then defined to include anything that is not a "business property" except anything with a value over \$10 million. The conclusion that this guideline suggests is that any real estate acquisition where the value of the property exceeds \$10 million is *prima facie* reviewable.¹⁷¹
- (2) The circumstances of the transferor and the transferee. As two examples of the application of this factor, the guidelines provide that, if the transferor is a corporation, that fact tends to mean it has disposed of a business, but if the transferee is to put the property to a different use from that of the transferor then that tends to mean there is no acquisition of a business. Perhaps this part of the guidelines is trying to deal with the question of whether the continuation of the business by the acquirer is relevant to the problem of what has been acquired. Thus if X acquired raw land from Y to build a shopping centre, does the fact that Y previously farmed the

¹⁷⁰ See *Proceedings of the Senate Standing Committee on Banking, Trade and Commerce* (1973) 23:28. Mr. Gillespie said he would not only issue guidelines with respect to the question of real estate but he would also "elaborate on these guidelines". I know of no such elaboration.

¹⁷¹ Arnett took the same view in a paper he delivered in September 1974 entitled "The Foreign Investment Review Act after Six Months", see footnote 147, *supra*.

land make the acquisition subject to review? The answer may depend on whether the livestock or farm equipment are also acquired.¹⁷² It may also depend on whether you say Y was selling a farm or was selling a potential shopping centre site.¹⁷³ The guideline raises the question but offers no solution.

The real estate guidelines end up with two subsidiary points not necessarily related to real estate. The first point is that the guidelines dismiss as irrelevant whether employees report to work or not in characterizing a given activity as a business. One would have great sympathy for this position were it not for the statutory definitions of Canadian branch business and Canadian business.¹⁷⁴ The second point is that the guidelines state that the provision in s. 3(6)(g) relating to the severability of parts of a business is interpreted to mean that the severance into a separate business must have been completed before the acquisition. This latter point could considerably cut down the reach of the statute if applied in areas other than real estate.

While the guidelines may not be very helpful to a potential non-eligible acquirer of real estate, it is difficult to suggest what the Minister ought to do in the absence of a definite government policy as to the advisability of foreign investment in the real estate field. To the extent that such foreign investment is by a developer who wishes to erect homes for sale or rent to Canadians, the developer can be seen as contributing to the supply of homes which may be beneficial in the major urban areas where homes are scarce and costly.¹⁷⁵ On the other hand the investment in land by foreigners merely to hold the land for future sale without improving it¹⁷⁶ may withhold otherwise available land from the market and drive up land prices even further. Meanwhile several provinces¹⁷⁷ have adopted statutes designed to curtail or prohibit foreigners from either purchasing real property or obtaining it under

¹⁷² Before the Senate Committee, Mr. Gillespie said:

If a person were to buy a farm as an operating business then technically that would be reviewable. But if a person were to buy a farm, that is to say a piece of land and not the business, that would not be. It would be that kind of clarity and distinction I would hope to be able to put out in the guidelines.

¹⁷³ There may be some analogy to the "pith and substance" doctrine of constitutional law.

¹⁷⁴ The provisions have been discussed above. If the guideline is saying that these words are not apposite and therefore will be ignored in the administration of the statute, with respect to real estate transactions, there is much common sense to such an approach. But is it legally sound?

¹⁷⁵ The Registered Home Ownership Savings Plan under the Income Tax Act is one government response to the problem of home purchases. It indicates that encouraging home ownership is a government policy.

¹⁷⁶ Which is currently encouraged under s. 3(9).

¹⁷⁷ P.E.I., Nova Scotia, Ontario and British Columbia.

Crown grants. It may well be that the federal government should encourage foreign developers and discourage foreign investors in the real estate area (which is exactly contrary to the way the statute is presently written) and leave it to the provinces to ensure significant benefit through planning legislation and other provincial statutes.¹⁷⁸ Until a clear policy is developed the non-eligible persons in the real estate business have a difficult row to hoe.¹⁷⁹

(3) Canadianization of non-eligible persons

Many corporations which are clearly non-eligible persons under the statute will not be able to expand or develop without subjecting themselves to review. One example of this type of corporation would be a conglomerate that specializes in purchasing failing companies with a view to building up the management strength until the business becomes profitable again. Another would be real estate holding companies that can only expand by purchasing further properties. Other non-eligible corporations may prefer to become "eligible" to avoid any question of the applicability of the statute, particularly after second proclamation.¹⁸⁰ The statute provides an incentive to become "eligible" which has led to several attempts at compliance by avoidance.¹⁸¹

In a typical case, the non-eligible person is an established business in Canada whose largest shareholder is a foreign corporation in the same general line of business. Initially the foreign parent¹⁸² appointed

¹⁷⁸ The inclusion of real property within the scope of the Foreign Investment Review Act is one area where there may possibly be a constitutional problem. See Amett, "Canadian Regulation of Foreign Investment: The Legal Parameters" 50 Can. Bar Rev. 213 (1972), for a perceptive analysis of the constitutional problems in general.

¹⁷⁹ In the December list of approvals and disapprovals there is a refusal to allow a West German company to acquire control of the Rockhill Apartments of Montreal, no reasons being given. It would appear that in this type of acquisition there is little significant benefit to Canada which the acquirer can show unless the benefits derived from the proposed disposition of the sale proceeds by the vendor are taken into consideration. In the March 3rd press release one acquisition of an office rental business in Westmount, P.Q. was approved. The reason given was not related to the purchaser but to the proposals of the seller as to the investment of the proceeds.

¹⁸⁰ While this article has not dealt with the review of the establishment of new businesses under the statute, it is worth noting that, at least so far as corporations presently doing business within Canada are concerned, second proclamation may not have a tremendous impact because the related business guidelines are drawn broadly. The Gray Report stated at p. 467: . . . because of the potential new activity and competitive stimulus of new investment, the bias would probably be in favour of allowing new investment. Takeovers would likely be looked at more critically.

¹⁸¹ I am indebted to George Glover for bringing this phrase to my attention at a seminar given to some political science students at the University of Toronto in November 1974. I have heard it used often since so I am not sure of its origin.

¹⁸² By parent I am not referring necessarily to ownership of over 50 per cent of the voting shares but rather to the ownership of a sufficient number of shares to constitute *de facto* control.

all the directors and the senior officers were drawn from personnel already in the employ of the foreign parent. As the business matured, Canadians took over many of the senior management positions, and Canadian residents became a majority of the members of the board of directors.¹⁸³ Sometimes a majority of the shares were held in Canada but if so they were widely dispersed and the foreign parent still had voting control if it chose to exercise it. In such a case, so long as voting control resides abroad the non-eligible status will remain. To sell the controlling shares at the present time could be to dispose of a valuable asset at distress prices¹⁸⁴ with no guarantee that the shares would be purchased by Canadians.¹⁸⁵ The possibility of splitting off the voting rights on the control bloc and vesting those rights in Canadians is attractive, particularly if the Canadians are well known to the foreign parent through service on the Canadian board¹⁸⁶ and if such action could make the Canadian enterprise "eligible".

The Agency has taken the view that the transfer of voting rights without the corresponding transfer of equity ownership is not by itself sufficient to change the ultimate control of the corporation.¹⁸⁷ It is interesting to speculate, however, whether a fixed commitment also to dispose of the equity ownership over a reasonable period of time would be viewed with more favour. In view of the availability of an opinion under s. 4(1) it is conceivable that the Minister could bargain with the foreign parent towards an acceptable formula for gradual Canadianization.¹⁸⁸ To date there has been no publication of eligibility opinions. If

¹⁸³ Sometimes this was required by statute, see, for example, the Companies Act (B.C.), 1973, c. 18, s. 131.

¹⁸⁴ The stock market has been recovering somewhat in 1975 but is still far below its peak of earlier years.

¹⁸⁵ It is possible to have constrained shares under both the Ontario and Federal Corporations Acts but these have not been widely used. See the Business Corporations Act, R.S.O. 1970, c. 53, s. 47. Of course, if the shares were all acquired by foreign interests there might be a reviewable transaction that would be little solace to the selling shareholder. A private sale to Canadian investors is sometimes not possible.

¹⁸⁶ This appears to be the situation with respect to Bovis Corporation, see Hayden and Burns, 3-1.

¹⁸⁷ This statement by the Commissioner, Richard Murray, reported in the *Globe and Mail* on December 3, 1974 is quoted in Hayden and Burns, *ibid*.

¹⁸⁸ Such an approach is foreshadowed in the Gray Report, p. 459 where it is suggested that the reviewing authority might bargain for a joint venture with Canadians in certain cases. Note this would give a positive role to the Minister because it is his opinion, not Cabinet's, under s. 4(1). As the opinion is binding on the Minister, no remedies can be invoked. For a possible example, see "SW of Canada's Citizenship Bid", *The Financial Post*, Feb. 22, 1975, p. 18.

they became a positive instrument under the statute then publication would assume a greater importance.¹⁸⁹

The three examples above are designed to indicate that the statute and guidelines, if read literally, may not be tailored to deal with certain problem situations. If the statutory language is read broadly and the applicants as well as the government are willing to make adjustments in order to fit the statutory provisions into a sensible over-all policy framework, then the statute can and will work, even without amendments. But the government will have to articulate policy more clearly and there will have to be mechanisms developed so that interested parties can be made aware of the current state of development. Representation from affected areas have been heard at the Bill stage but there is a need for a continuous input. The worst thing that could happen would be to have the application of the statute decided on narrow, technical grounds and the criteria for significant benefit shrouded in mystery.

8. Conclusion

Many countries who have no anxiety as to their identity, who are geographically distant from major sources of foreign investment and who have a lower preponderance of foreign control than Canada, have found it expedient by one means or another to review or limit investment by foreigners.¹⁹⁰ Canada's Foreign Investment Review Act is a direct approach by Canada to set up a bureaucratic structure, with Cabinet control over ultimate decisions, to screen both foreign acquisitions of existing Canadian businesses and new business ventures by foreign interests in Canada. The legislation is innovative and demands from both the Agency and the applicants flexibility and resilience if the screening process is to be administered fairly and effectively. There is every indication that both sides are exhibiting such flexibility and resilience. It may be unfortunate that it was felt necessary to enshrine the provisions relating to the applicability of the statute in such technical,

¹⁸⁹ I have not examined the thorny question of publication versus secrecy in any detail although I have mentioned it with respect to publication of reasons for approvals and disapprovals. It was recognized by the Minister before the statute was enacted, see *Proceedings of the Senate Standing Committee on Banking, Trade and Commerce* (1973) 23:29. Section 14 of the statute prohibits disclosure except in limited circumstances and there is a specific offence in s. 25 for violation of s. 14. Hayden has put the case for disclosure quite forcefully, Hayden and Burns, 2,003-1 *et seq.* The disclosure of eligibility opinions may be more contentious than the disclosure of reasons for decisions at the review stage.

¹⁹⁰ Australia has legislation that is somewhat similar to the Canadian statute. Many countries, such as the U.K., use currency controls instead of direct review of foreign investment. Even the United States appears to be worried, see Young, "The Acquisition of United States Business by Foreign Investors", 30 *The Bus. Lawyer* 111, (1974), and see *Penthouse Magazine*, March, 1975 pp. 50 *et seq.*

convoluted terminology. No doubt all the phrases are not apt for application to all industries. Nevertheless the real basis of the statute is working. The Cabinet does make decisions and even reverses itself. The Agency has shown itself willing to challenge schemes of compliance by avoidance but equally willing to communicate freely with any applicant. So far no compelling case for statutory amendment has emerged, in the sense that the system has been tested and found wanting. In such a new area, that is quite an achievement.