REVIEWS AND NOTICES

Les droits sur les successions dans la Province de Québec: Traité théorique et pratique. By EUGÈNE RIVARD, Q.C. Quebec: Les Presses Universitaires Laval. (The book is sold by the author himself from 475, Avenue Lemesurier, Québec.) 1956. Pp. lxix, 573. ($15.00)

Succession duties were first imposed in Quebec in 1892 by the Quebec Succession Duties Act (now R.S.Q., 1941, c. 80, and amendments) and yet, notwithstanding the considerable importance of the statute and its wide effect, Mr. Rivard's book, published in November 1956, represents the first general study of the subject. It is so complete that it is likely to be the only one of its kind for a considerable time.

Les droits sur les successions dans la Province de Québec is a thoroughly documented and carefully detailed work. The author is the head of the Quebec Succession Duty Department and also its legal adviser. But his book is much more than a mere commentary on the Quebec Succession Duties Act or the reflections of a zealous administrator: it provides a searching analysis of the Quebec statute, of its origin and development, and in doing so it scrutinizes certain fundamental legal concepts applicable to the law of succession duties in any jurisdiction.

It is evident that Mr. Rivard is a student of the law, with a profound respect for the civil law of his province. No one can read his book intelligently, from end to end, without having at least a general knowledge of the Quebec Civil Code; and the countless detailed references to the civil law and its interaction with the Quebec Succession Duties Act will sooner or later make even Quebec lawyers and notaries scurry for their codes. This is not to say, though, that the book will be of no value to lawyers, and others, outside the province. The chapter on the Dominion Succession Duty Act (an unflattering appraisal to say the least) and that entitled "De l'application de la common law dans la Province de Québec" should prove to be of particular interest to non-Quebecers. The wide scope of the book may be gauged by the bibliography, where references will be found, not only to works on taxation in the United States, England, France and

other jurisdictions, but also to such books as John Stuart Mill's *Principles of Political Economy*, Dicey's *Conflict of Laws*, Blackstone's *Commentaries on the Laws of England* and Wegenast's *The Law of Canadian Companies.*

The book is most convenient to use. Each chapter is divided into numbered sections with headings, and a list of these, in sequence, is provided at the beginning of the book. At the end is an alphabetical table, or index, where the various subject-matters are referred to by section numbers. In addition there is an extensive table of cases, indexed by numbers, and a bibliography. The Quebec Succession Duties Act is set out in Annex I and the various reciprocal agreements with Great Britain and other countries in other appendices. Finally, there is a "Table de concordance" showing where the articles of the Civil Code and the sections of the provincial and federal acts are cited. It is difficult to imagine more complete machinery for the assistance of readers.

So much for general comment. After an introductory chapter, we find in chapter II a description of the relationship between the Quebec civil law and the succession duty statute, with references to the rules of the conflict of laws on the situs of moveable and immoveable property. In section 78, on page 37, the author explains why the Quebec Succession Duties Act lacks the definitions customarily found in tax statutes:

> A moins d'une dérogation formelle de la part du législateur, les règles et principes du Code civil ont leur place dans la Loi des droits sur les successions de la province et doivent en régler l'application.

The chapter (III) on "Des biens et mutations atteints par la Loi" is one of the most interesting. Mr. Rivard reviews thoroughly the different types of property dispositions or transfers that attract succession duties, such as those resulting from the various matrimonial regimes defined in the Civil Code, emphyteusis, partnership, insurance policies, gifts inter vivos, including gifts in trust, powers of appointment, and joint tenancy and tenancy in common, some of which of course are institutions foreign to Quebec law. No one is likely to read this chapter without increasing his knowledge of the Civil Code as well as the act.

In the next chapter the reader is introduced to the valuation of property for succession duty purposes. Of particular interest are the remarks on the valuation of the shares of a private company not listed on any exchange. Mr. Rivard refers to the various elements that are taken into account by the *fiscus* in arriving at valuations, but, perhaps because of his official position, he does not mention the wide differences of opinion that can legitimately arise over the application of the department's criteria. A just valuation is most likely to be reached if the state is willing to give ser-

ious consideration to the representations of the taxpayer. In doing so the state must be prepared to admit on occasion that its initial valuation was unduly strict and needs revision because of factors overlooked or underemphasized. It is in this realm of valuation of assets that the citizen most quickly learns whether the statute is being administered over rigidly. The chapter ends with a useful series of five tables showing the capitalized values of annuities or life rents, depending upon the type of payment envisaged and the age and sex of the person involved.

The situation of property, particularly moveable property, for succession duty purposes, which sometimes gives rise to vexing problems for the practitioner, is dealt with at considerable length in chapter V. The author refers to the common-law distinction between specialties and simple contract debts and demonstrates that, for all practical purposes, a similar distinction is made in Quebec: specialties are situate at the place where they are located, whereas simple contract debts are situate at the domicile of the debtor. Applying these two rules, he proceeds to discuss in turn the different kinds of bond, debenture, stock and other incorporeal property, illustrating his remarks with practical examples. The concluding page of this chapter provides a summary of its contents in the form of a "Table synoptique", which lists the various categories of property and shows where each is situate for succession duty purposes. As a ready reference, to provide a quick answer to the practitioner's problem, this table should prove invaluable.

Chapter VI, covering the liabilities of the estate—those admitted for succession duty purposes and those not—is followed by one on mechanics—the filing of the succession duty return and the other documents required.

The reader is given further evidence of the author's attention to detail in the chapter "De la liquidation des droits". How are estates taxed when adopted or illegitimate children are involved, when there has been a divorce, when heirs have died together (*comourants*) or, even, when there is property belonging to an Indian on a reserve? The answers to these and many other questions will be found here, all enlivened, as elsewhere in the book, by short dissertations on various aspects of the Quebec civil law, such as survivorship.

As a general rule, under the Quebec Succession Duties Act no transmission of property in an estate is permitted until a certificate has been issued attesting either the payment of duties or that none is exigible. The effect of this prohibition on the legal seizin of heirs and legatees under the general law is one of several miscellaneous subjects discussed in chapter IX.

Chapters X and XI, dealing respectively with the application

of the common law in Quebec and the Dominion Succession Duty Act, are the most controversial in the book. The first contains a criticism of the reasons for judgment of the Supreme Court of Canada in *The King* v. *National Trust Company, Limited*, [1933] S.C.R. 670, reasons that involved the application of common-law rules to the problem of the situation of certain incorporeal property. In the second, Mr. Rivard reviews the essential provisions of the federal act and compares it, almost always unfavourably, with the Quebec statute. He describes the Dominion Succession Duty Act as a hybrid document, containing many superfluous provisions and using a terminology often alien to Quebec law. In chapter XII he goes farther and attacks the constitutionality of parts of the federal statute as being an invasion of the provincial field of property and civil rights.

The spectacle of the top succession duty official in one jurisdiction in a federal state criticizing the succession duty statute of another may afford some taxpayers a measure of satisfaction, but it is not likely to evoke much sympathy in this case. The resident of Quebec is painfully aware of the shortcomings of the provincial legislation on this subject. He knows, for example, that gifts made or obligations undertaken in marriage contracts are not only permitted but encouraged by the Civil Code and yet the Quebec Succession Duties Act does not recognize them unless they are completed or fulfilled at least five years before the death of the donor or debtor. He knows, too, that the irrevocable disposition of property involved in an unconditional gift in trust, which is defined by the Quebec Civil Code and was recognized beyond peradventure by the Supreme Court of Canada in *Curran* v. *Davis*, [1933] S.C.R. 283, is disregarded by the Quebec act. In the circumstances comparisons do not seem very appropriate.

Les droits sur les successions is a textbook of considerable proportions, dealing with a complex subject. Of necessity I suppose, it is sometimes repetitious, and it is not always easy reading. But every effort has been made to infuse the often dry substance of the law with concrete illustrations. Here is an important book, unique in its field, and offering much of value to the student, teacher, lawyer, notary, accountant and estate expert. No one who wishes to increase his knowledge—either theoretical or practical—of succession duties in general or the Quebec Succession Duties Act in particular should, in the traditional phrase, be without it.

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The Approach to Self-government. By W. IVOR JENNINGS. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada Limited. 1956. Pp. viii, 204. ($3.25)

Sir Ivor Jennings' career of academic administration in Asia as Vice-Chancellor of the University of Ceylon, spanning more than a decade, provided him with a vantage point from which he was able to exercise a decisive influence in the preparation for Ceylon's transition from colonial status to ultimate self-government and independence within the Commonwealth. Now that he has returned to England, Sir Ivor has not abandoned his interests in the Commonwealth and in the British Colonial Empire. Apart from his guiding influence in shaping the constitutional structure of independent Ceylon, he was also retained to assist in the drafting of the Pakistan Constitution after the break-down of attempts to establish an American-type instrument for that country; and most recently he has participated in the deliberations of the drafting committee for the new constitution of Malaya.

When he was making his reputation as a young teacher of law before the last war, one of Sir Ivor's major achievements was his re-examination and re-statement, so as to accord with contemporary democratic conceptions, of the doctrines of the late A. V. Dicey, doyen of English constitutional lawyers. As a constitutional lawyer-in-action—the drafter, or adviser to the drafters, of the constitutions of newly independent, self-governing countries of the Commonwealth—Sir Ivor accords very closely to the ideas of his master. The constitutions the author has assisted in are generally notable for their essentially bald, skeletal nature; for their reproduction of basic institutional forms of the English constitution (especially the institutions of the sovereign, formally uncontrolled Parliament and the Executive responsible to and controlled by Parliament); and for their avoidance of the elaborate checks and balances that characterize American and Continental European constitutions. The constitution of Ceylon, for example, for which Sir Ivor was so largely responsible, represents the polar extreme of drafting to the prolix, exhaustive constitution of the new Republic of India, replete as the latter document is with a sounding Bill of Rights, Directive Principles of State Policy, the mechanical arrangements of federalism, and similar provisions.

Sir Ivor's book indicates clearly that the substantial assimilation to basic English constitutional notions, as reflected in Dicey, of the constitutions of Ceylon, in certain respects of Pakistan, and most recently of Ghana (the former Gold Coast Colony) is no accident but the result of conscious Colonial Office policy, where approval of the new constitutional instrument has been a condi-

tion precedent to granting of independence, and of behind-the-scenes counsel by British expert advisers where the constitutional drafting has occurred, as in the case of Pakistan, after the grant of independence. The author believes, in this regard, not merely that the British system of government is peculiarly suited to the needs of diverse peoples differing greatly in social and economic background and cultural experience, but that in the special circumstances of the grant of independence to the former British colonial countries it may be the only adequate system. For generations of Asian and African students trained during the colonial era in the spirit of Dicey, either in universities in England or in British-administered universities in their own countries, it is clear that American and Continental forms (the former of which Dicey mistrusted and the latter of which he generally misunderstood) may present some difficulties of practical, day-by-day, application. Earlier strictures advanced by Sir Ivor as to the dangers inherent in the Indian Bill of Rights—that it would inevitably be used, as similar-type provisions were used for a period in the United States, as instruments of reaction to delay much-needed social and economic reform—have been sustained in part by Indian judicial history since the adoption of the new republican constitution, though only in part.

But, conceding this point, may not the author assume too easily that English patterns of government are the only ones suitable for effecting the transition to democratic government of the newly independent countries of the Commonwealth? Granting that constitutional forms without a root in a people's past history are frequently meaningless in action, may not Sir Ivor go to the other extreme in writing off altogether the profound educational possibilities of "rationalised constitutionalism" on the Indian model and also the extent to which men of intelligence and good will can, with energy and application, translate institutional borrowings from other countries into their own country's felt experience? I thought that the author had here succumbed too much to the idea of legislative impotence in the purposive shaping of a liberal democratic society—something that Dicey, for example, in spite of his ample recognition of the customary, conventional element in English constitutional law, would never have conceded.

Sir Ivor mentions that the conception of an American-type executive, co-ordinate with but independent of the legislature, was considered at one time for Pakistan but then abandoned on the score that that system could easily be converted into a dictatorship; yet something of this sort had actually occurred, at the time Sir Ivor was writing, under the system provided by the British government under the old Government of India Act, 1935, in the guise of the Governor General's (Ghulam Mohammed) as-

sumption of over-riding prerogative powers in relation to the Prime Minister and Cabinet. As a model for general export to other countries, the English constitutional system seems to be deficient in that, lacking as it is in legal sign-posts to guide its working administration, it may rest too heavily on the socio-ethical elements (the acceptance of special "rules of the game" in Laski's phrase) that are present in English society but not always in others. Some greater disposition on the part of the Colonial Office lawyers to experiment with constitutional checks and balances, especially with the federal form as successfully practised in Canada and elsewhere, as a means of combining two or more racial or religious groups harmoniously within the framework of one society might have provided stronger guarantees than so far seem to have emerged—in Ceylon, for example—of respect for minority interests and claims. We can only speculate, here, about the extent to which apparently spontaneous preferences by the English legal advisers for simple, skeletal constitutional forms for the newly-independent countries were reinforced by pragmatic considerations that any overt preference on their part for more complex forms as a means of safeguarding minority interests might be misinterpreted as yet another tactic of "Divide and Rule".—in this case of stultifying sovereign law-making powers in the new countries in the name of minority rights.

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Cases on Torts. Selected and edited by W. L. MORISON, D. Phil., B.A., LL.B. Sydney, Melbourne and Brisbane: The Law Book Company of Australasia Pty. Ltd. Toronto: The Carswell Company Limited. 1955. Pp. xviii, 811. ($14.25)

This book, which represents the beginning or early stages of Australian experimentation with the American case-book method of legal instruction, might be a useful addition to any private library because it contains a number of Australian cases. Some of these are well reasoned. Several offer decisions which could be useful to anyone who cannot find what he wants by research through the digests and reports normally available in Canada. Perhaps I should be more specific. The book reports (with some condensations) just over one hundred cases. About twenty of these are Australian; the rest are English. If there are any Canadian, American or even New Zealand cases, I missed them.

The general arrangement, or order of presentation, follows

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that adopted by Salmond's text on torts. This probably appears natural and easy to a person who followed that path into the labyrinth. I did not. Perhaps no one path is any better than any other, and yet the book is primarily intended for students and students should, from time to time, pause and try to survey the whole field. For that purpose, I believe that the arrangement made by Pound when he condensed the two-volume Ames and Smith collection into one volume is as enlightening as any. My recollection (I have not seen the book for many years) is that it began with a consideration of intentionally inflicted harms, ran through negligently inflicted harms to the rarer liability for unintended non-negligently inflicted harms. Then followed Defamation and Deceit, and the book concluded with a consideration of liability for interference with advantageous relations. This arrangement presents a picture which can be quickly grasped and gives the student a conveniently large framework within which he can fill in his own details. It is the general arrangement followed by Wright in his recent collection of cases on torts, which is, I believe, in use in most (if not all) Canadian common-law schools.

Although I have followed other teaching arrangements, and found them more or less satisfactory, I prefer the one used by Pound and by Wright to the (to me) peculiar arrangement of Salmond.

The reason offered in the preface for following Salmond's arrangement (that the case book should serve as a companion volume to Salmond's text and be read concurrently with it) is not, in my opinion, a good one. If our university law schools are ever going to make a significant contribution to rationalizing the law, they must encourage students to think for themselves and not to rely on and therefore parrot what judges and text writers have said. Encouraging students to make up their own minds as to why a case was decided the way it was decided and as to what it can, without fear of successful contradiction, be said to stand for is not an easy task. A book designed to make students lean on a text writer makes this task more, rather than less, difficult. I do not mean to cast reflections on Salmond's text. It is a very useful book in its place, but its place is in the hands of a practitioner who wants to recall something he has forgotten or to be quickly introduced to some recent cases. Its proper place is not, in my opinion, in the hands of a student—particularly a first-year student. A third-year student is different. He either has learned to think for himself or probably never will, and a text in his hands will do no appreciable harm.

If one assumes that a case book on torts must be confined to approximately one hundred cases, I have no objection to the cases selected by Dr. Morison, who incidentally is Reader in Law in

the University of Sydney. They introduce the student to most of the fundamental conceptions and methods of reasoning employed by the courts in handling tort problems. But *Bourhill* v. *Young*, [1943] A.C. 92, and *In Re Polemis*, [1921] 3 K.B. 560, should, I think, be placed cheek by jowl, and both should be sidelighted by *Palsgraf* v. *Long Island Ry. Co.* (1928), 248 N.Y. 339. Again, I would not attempt to discuss the last-chance saga with anyone who had not read very thoroughly *Butterfield* v. *Forrester* (1809), 103 E.R. 926, *Davies* v. *Mann* (1842), 152 E.R. 588, and *British Columbia Electric Railway* v. *Loach*, [1916] 1 A.C. 719; 8 W.W.R. 1283. None of the three last-mentioned cases is selected. The section on liability for negligent misrepresentation contains only *Candler* v. *Crane, Christmas and Co.*, [1951] 2 K.B. 164 (C.A.). Perhaps what seems to me to be an oversimplification is justifiable. I do not know how much time is given to torts in Australian law schools, but torts is a tremendous field. Dr. Morison does include a thorough chapter on the property tort of conversion, which I am in the habit of expecting the course on first-year property to cover and which Wright's collection touches but lightly. Dr. Morison also includes a chapter on a master's liability for the torts of his servant, which we are in the habit of covering in Agency. There is no right or wrong to what Dr. Morison does or what we do and, for all his omitting the cases I noted and many others of my old friends, the author has reprinted 794 pages of cases for the student to read and understand. All of them are good enough cases and one cannot be expected to work all the good cases into a selection. The book contains a useful index, a table of cases cited as well as a table of cases reported, and a good table of contents.

One more criticism and I have finished. The book fails to reprint the name of the reported case at the top of each page. This is in my opinion an omission that students and anyone else who wants to use the book will regret, and it must have cost half as much to print the totally unnecessary "Cases on Torts" at the top of each left-hand page. The right-hand page top carries the chapter heading. I do not think that the chapter heading is as helpful as the name of the case, but it does no harm and may be of some use. If the chapter heading must go on top of the right- or left-hand page, the utterly useless "Cases on Torts" could be replaced at the top of the other page by the name of the case reported.

Notwithstanding these criticisms, I find the book useful and, since this collection is different in many respects from other collections of cases on torts, I believe that anyone else interested in the subject should find it a worthwhile book to have on his desk.

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Fundamental Law in English Constitutional History. By J. W. GOUGH. Oxford: The Clarendon Press. Toronto: Oxford University Press. 1955. Pp. ix, 229. ($3.75)

English legal history is the common heritage of the common-law world; but the heirs appraise and even inventory the assets differently. Thus the Americans have found in it basic principles as to the relationship between government and the people which were inserted in their constitutions, state and federal, regarded and interpreted by them as distillations of that historic background. English judges and historians currently disclaim any such principles in favour of the omnipotence of parliament, which is viewed essentially as a well-mannered supreme praesidium accustomed but not required to recognize rights appertaining to the subject. Mr. Gough undertakes to collect evidence on each side, a task which he performs admirably, and to arrive at a judgment, which he does less successfully, or at least less convincingly.

The historical survey does not, as the title might suggest, actually embrace the whole of English constitutional history. It deals intensively with the seventeenth century and to some extent with the peripheral periods of the later Tudors on the one side and the eighteenth century on the other. Little if anything is lost by this concentration, however, for it was in this era of the Stuarts, the Commonwealth and the Glorious Revolution that the problems emerged and the relevant ideas were refined. Mr. Gough has studied the writings and the judicial and parliamentary materials of the time and gives a sampling, he says not complete, yet very generous, of this documentary detritus. It may be doubted whether cumulation of other evidence would add significantly to the materials for judgment. What is presented amply illustrates the variety of attitudes toward the question of fundamental right and is of the greatest value to anyone interested in it.

It is quite clear that over the whole span of time the expression "fundamental law" or some variant was widely used. But what did it denote? Just as we use words to express our answers to the questions this generation asks, our ancestors spoke to the problems of their day. The continuity of the language gives a delusive appearance of an identity of meaning. The period covered by this book starts with the hegemony of the state and its law over the social order recently established, the condominium of the church and its law being already extinct but not yet forgotten. Parliament's work was still viewed by many as primarily judicial and whatever special status its commands had was attributed to its being the court of last resort rather than to its being a legislature. With this initial intellectual furniture, England entered a century of internal conflict which was of critical importance in

shaping her governmental institutions—conflict between King and Parliament, between Parliament and the Army, between Parliament and the popular forces associated with the Leveller movement. All the contestants successively seized on the concept of "fundamental law", each giving it a specific content to serve their particular purposes. Sometimes customary right and ancient usage (with frequent allusion to Magna Carta), sometimes "natural law" and "the law of reason", particularized occasionally along rigid lines of life, liberty and property repeated in late nineteenth century constructions of the American due process clause, sometimes *salus populi* were identified with "fundamental law". The sense in which the phrase was used fluctuated and there were not wanting those who rejected it utterly in favour of a notion of "sovereignty" regarded as inconsistent with "fundamental law". The main strength of Mr. Gough's book is his marshalling of this welter of evidence to reveal how everything was suggested and nothing was established. Even apparently clear statements become unclear on closer inspection and are shown in their context to support equivocally or not at all the uses made of them later. The absence from the English language of the *jus-lex, droit-loi* terminology which pervades continental legal discussions here had specially unfortunate consequences.

Mr. Gough's conclusions outrun his evidence, however. Undertaking to umpire a debate between Holdsworth and McIlwain, he is disqualified by his inescapable preliminary commitment to the position represented by the former. The doubts he raises he resolves uniformly in favour of that position without explicit or self-evident reasons. What he has done is to present a stage in political ideas when they were capable of evolving, as in fact they have evolved, into the contrasting forms currently represented by American and by English constitutional theory. Different as these are, each represents a legitimate development of one of the inconsistent positions blanketed by the unresolved ambiguity of the term "fundamental law", with no clear preponderance of the ample evidence adduced supporting the claims of one as against the other. Mr. Gough's espousal of what is no doubt the orthodox English position seems to rest on nothing more solid than sympathy with the familiar, fortified perhaps by latent Austinianism. His virtues are those of an anthologist, not of an analyst.

The book's subject is not of exclusively academic interest. The idea of fundamental law will not down, even though the author proclaims its demise in the title of his final chapter. With utterances from our Supreme Court as recently as the Quebec padlock law case and with articles in this review as current as Professor Lederman's of last year implying its continued vitality, it is far

from extinct even in the Commonwealth. A lawyer in Canada cannot therefore afford to dismiss it out of hand. He will find help in evaluating it historically from a perusal of this book.

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The Undefended Frontier

Because of our closeness to the United States, our similar institutions and habits and the way we do things, Americans often treat Canada, for business purposes, almost as a part of the United States. In a sense this is a good thing, a tribute to common sense. But it has its dangers if it leads American business men to treat branch plants in Canada just as if they were located in the United States. In my judgment, this is not likely to be the most successful method of conducting a subsidiary business enterprise in Canada. Certainly, it is not the method calculated to make the most friends and influence the most customers in Canada.

I suggest to you a very simple rule. Other things being equal, it is good business for a Canadian subsidiary of a foreign company to become as Canadian as it can, without losing the benefits of association with the parent company. In many countries, of course, there are rigid laws applying to foreign controlled companies, requiring them, for example, to give local inhabitants a share in the enterprise and requiring them to employ a minimum proportion of local labour and so forth.

There are no such laws in Canada. I hope there never will be. I believe that those who are prepared to share with Canadians in the risks of developing our country should be as free as Canadians themselves in deciding how to conduct their enterprise.

Nevertheless, anyone who does business in Canada should reckon with the pride and the legitimate pride of Canadians in their country. In other words, they should reckon with the normal feeling of nationalism which is present in Canada, just as it is in the United States. Canadians do not like to be excluded from an opportunity of participating in the fortunes, good or bad, of large-scale enterprise incorporated in Canada but owned abroad. . . . They do not like to see large-scale Canadian enterprises entirely dependent upon foreign parents for their research and top management. They do not like to see the financial results of large-scale Canadian enterprises treated as if they were the exclusive concern of the foreign owners.

I make bold therefore to offer three suggestions for the consideration of United States corporations establishing branch plants in Canada or searching for and developing Canadian natural resources: (1) provide opportunities for financial participation by Canadians as minority shareholders in the equities of such corporations operating in Canada; (2) provide greater opportunities for advancement in U.S.-controlled corporations for Canadians technically competent to hold executive and professional positions; (3) provide more and regular information about the operations of such corporations in Canada. (From an address by Mr. C. D. Howe, Minister of Trade and Commerce, to the Canadian Club of Chicago, October 15th, 1956).

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