

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. LIII

MAY 1975 MAI

NO. 2

THE FOREIGN INVESTMENT REVIEW ACT AN ANALYSIS OF THE LEGISLATION

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I. Introduction.

The purpose of this article is to assist Canadian practitioners in comprehending and dealing with the broadest and perhaps most significant manifestation of restriction and control over foreign investment in Canada. We refer to the review and regulatory scheme imposed by the Foreign Investment Review Act.¹ This Act is merely the most recent in a series of legislative forays into foreign investment control, but its significance arises from its broad framework and wide application. The preamble of the Act describes it as,

An Act to provide for the review and assessment of acquisitions of control of Canadian business enterprises by certain persons and of the establishment of new businesses in Canada by certain persons.

An examination of the mechanics of the Act will be assisted by a review of the purposes for which it was enacted. The legislation was passed to enable Canadians to maintain effective control over their economic environment, which is viewed as a matter of national concern.²

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¹ S.C., 1973-74, c.46. See also the Foreign Investment Review Regulations, S.O.R./74-154, March 7th, 1974, P.C. 1974-477, March 5th, 1974, pp. 1033-1052. The law and statistics in this article are stated as of March, 1975.

² *Ibid.*, s.2(1).

This article is not intended to deal with, nor do the authors purport to have a broad knowledge of, the social, political or economic aspects of the debate on the matter of foreign ownership of or investment in the economic, financial or natural resources of Canada.³ This is a subject which has received the benefit of much writing, broad and informed debate, and increasing public awareness and concern.⁴ In examining the policy framework within which the Act has been constructed and is being administered, we refer to several articles or papers prepared and presented on the matter of the need for, and benefits and detriments of, foreign investment in Canada. These references by no means form a complete review of the writings on the subject, and this article is not intended to be a scholarly survey of such studies.

1. *Early Legislation.*

Perhaps the first widely-known and significant concern over foreign ownership of important Canadian industry arose during the planning for the construction of the Canadian Pacific Railway. Sir John A. Macdonald, whether through political expediency or a visionary awareness of future Canadian concerns, took extensive steps to ensure that the directors of the company building and operating the Canadian Pacific Railway were British subjects, or more specifically, were not American citizens. Vast quantities of foreign capital, primarily raised through the use of debt instruments, were utilized in the construction of the railway, and a substantial proportion of the managerial and technical expertise which completed the task was drawn from the United States.

³ There have been several studies conducted and reports prepared for both federal and provincial governments respecting this topic. These include: Final Report, Royal Commission on Canada's Economic Prospects (Ottawa, 1957), "Gordon Commission Report"; Report, Royal Commission on Banking and Finance (Ottawa, 1964), "Porter Commission Report"; the report of the Task Force on the Structure of Canadian Industry, Foreign Ownership and the Structure of Canadian Industry (Ottawa, 1968), "Watkins Report"; Report, Commons Standing Committee on External Affairs and National Defence, Special Committee Respecting Canada-U.S. Relations, No. 33 (Ottawa, 1970), "Wahn Committee Report" and the various reports of the Ontario Select Committee on Economic and Cultural Nationalism.

⁴ It is interesting to note the reaction of international business commentators to the legislation. In an article contained in its April 6th, 1974 edition, *The Economist* referred to the actions of the Government of Newfoundland respecting ownership of the British Newfoundland Corporation Limited and stated: "But the threat [of expropriation] itself has shown that even in Canada foreign investment may be no more safe than in the third world." In a subsequent commentary on the Brinco transaction and growing Canadian nationalism, *The Economist* stated in its April 20th, 1974 edition: "In the wake of the Brinco affair, multi-nationals have begun to queue for confiscation insurance for their Canadian operations."

Clearly the importation of all of capital, management skills and technical capabilities has a long and very important place in the history of this country. However, it is interesting to note that substantial concern about this reliance has existed almost since the time of Confederation. Within ten years of the driving of the last spike in the Canadian Pacific Railway, Macdonald's concern about the nationality of railway directors was embodied in an amendment to the Railway Act⁵ which required a majority of directors of all railways obtaining federal financial assistance to be British subjects.

The matter of increasing foreign dominance of Canadian industry and resources received little legislative attention until the early 1960's. At that time the Government of Canada introduced a series of amendments to legislation regulating what were perceived to be the "key sectors" of the Canadian economy. These were principally aimed toward financial institutions.⁶

The legislation was directed toward two fronts: nationality of directors and ownership of shares. The amendments imposed a requirement that three-quarters of the directors be Canadian citizens ordinarily resident in Canada. The restrictions on the ownership of shares generally permitted one non-resident to hold up to ten per cent, and all non-residents to hold in the aggregate up to twenty-five per cent of the shares. These restrictions were introduced into the Bank Act,⁷ the Canadian and British Insurance Companies Act,⁸ the Loan Companies Act,⁹ the Trust Companies Act,¹⁰ and subsequently, the Investment Companies Act.¹¹ The ability to impose restrictions on the ownership of shares in certain federally-incorporated companies was introduced as "constrained-share company" provisions in the Canada Corporations Act.¹²

⁵ S.C., 1904, c.32, s. 5, as am. by S.C., 1919, c.68, s.113(3), and now contained in R.S.C., 1970, c.R-2, s.53(3).

⁶ An excellent summary of this legislation is contained in two studies prepared by the Foreign Investment Review Agency, Policy Division, Policy Development and Analysis Branch, headed: *Selected Readings In Laws and Regulations Affecting Foreign Investment in Canada*, March, 1972, and *Extracts from Provincial Laws and Regulations Affecting Foreign Investment in Canada*, November, 1972.

A summary and commentary on Canadian legislation regulating foreign investment is contained in Ivan R. Feltham, and William R. Rauenbusch, *Economic Nationalism*, in R. St. J. MacDonald *et al.* (eds), *Canadian Perspectives on International Law and Organization* (1974), p. 885.

⁷ S.C., 1966-67, c.87, ss10(4), 18(3), 20(2) and 52-56.

⁸ S.C., 1957-58, c.11 s.3; and S.C., 1964-65, c.40, s.3.

⁹ S.C., 1964-65, c.40, s.38.

¹⁰ S.C., 1964-65, c.40, s.30.

¹¹ S.C., 1970-71-72, c.33, ss10-15.

¹² R.S.C., 1970 (1st Supp.), c.10, s.4.

At the time of amendment of the federal financial sector legislation, certain provisions were introduced into the Income Tax Act with a view to fostering a greater degree of Canadian ownership of the voting shares of companies.¹³ The rate of withholding tax levied on payments of Canadian corporations to non-residents was reduced by five percentage points when the Canadian corporation had a "degree of Canadian ownership" (basically when twenty-five per cent of the voting shares were owned by, and twenty-five per cent of the directors were, Canadians). Subsequently, a number of other provisions were introduced in federal income tax legislation. These included a limitation on the deductibility of interest where debt financing greatly exceeded funds from equity ownership and retained earnings (generally described as "thin capitalization"),¹⁴ a limitation on the deductibility of advertising expenses except in publications owned and managed by Canadians and typeset, printed, edited and published in Canada,¹⁵ a provision establishing the transfer value for property between a taxpayer carrying on business in Canada and a non-resident person,¹⁶ and the limiting of the so-called "small business deduction" to private corporations controlled by Canadians.¹⁷

The matter of culture and communications has been dealt with in part under the Broadcasting Act¹⁸ and a Direction to the Canadian Radio-Television Commission¹⁹ issued by the Governor in Council pursuant to that Act. This Direction prohibited the granting of broadcasting licences to persons who are not Canadian citizens or "eligible Canadian corporations",²⁰ or who are non-Canadian governments or agents. This prohibition applied to applications by existing licensees for renewal, except that for the first renewal only they could be approved by the Canadian Radio-Television Commission or the Governor in Council despite being in violation of the ownership restrictions.

Many provinces, and particularly Ontario, have enacted

¹³ S.C., 1964-65, c.13.

¹⁴ S.C., 1970-71-72, c.63, s.18(4).

¹⁵ S.C., 1965, c.18, s.4. It is this section, now appearing as S.C., 1970-71-72, c.63, s.19(2), that has heretofore provided a special status for the Canadian editions of Time Magazine and Reader's Digest. In an announcement on Jan. 23rd, 1975, the Secretary of State for Canada stated that this grandfather provision was to be deleted.

¹⁶ *Supra*, footnote 14, s.69(2) and (3).

¹⁷ *Ibid.*, ss125 and 89(1)(a) and (f).

¹⁸ S.C., 1967-68, c.25, ss 2(b), 7(1), 22(1) and 27(1).

¹⁹ Broadcasting Act, Direction to the Canadian Radio-Television Commission, S.O.R./69-590, as am. by S.O.R./71-33.

²⁰ *Ibid.*, para. 4.

legislation controlling foreign investment.²¹ This legislation is similarly structured on a "key sector" basis, and has been directed in most cases to financial institutions, although the approach has been broadened to include resources such as land.²²

It is clear from this brief summary that the matter of restrictions on foreign investment has been the subject of attention, although narrowly directed along specific lines, for some time. However, the Foreign Investment Review Act is the first federal statute of general application which has imposed controls and a review process on take-overs and new direct investment.

2. Government Review of Specific Transactions.

The imposition of restrictions on foreign investment or controls in respect of key sectors of the Canadian economy has been buttressed on several occasions by specific and selective *ad hoc* intervention by both federal and provincial governments. The federal government interfered in 1971 to prevent a foreign take-over of Denison Mines Limited, and again in 1972 regarding the proposed acquisition of Home Oil Company Limited. Strangely, however, when the shares of Supertest Petroleum Corporation Limited were offered for sale to B.P. Canada Limited in 1971, although there was some public debate, no government action was taken.

As well, provincial governments have on occasion taken a restrictive stance in areas of high foreign concentration. Although the Government of Ontario was not prepared to intervene in the sale of The Ryerson Press or W. J. Gage Limited, it, along with the federal government, took steps in 1972 to allocate several million dollars to assist the faltering Canadian publishing industry. The Ontario government also did take steps to prevent the sale of McClelland and Stewart Limited.

²¹ For example, the following Ontario Statutes: The Business Corporations Act, R.S.O., 1970, c.53, as am., ss122(3), 130(2), 132(2) and 133(1) and (3); The Credit Unions Act, R.S.O., 1970, c.96, as am., s.38; The Insurance Act, R.S.O., 1970, c.224, as am., especially Part XVII; The Investment Contracts Act, R.S.O., 1970, c.226, as am; The Loan and Trust Corporations Act, R.S.O., 1970, c.254, as am., s.150 *et seq.*, and R.R.O., 1970, Reg. 570, s.11; The Paperback and Periodical Distributors Act, S.O., 1971, c. 82, as am., ss 8 and 9; The Pension Benefits Act, R.S.O., 1970, c. 342, as am., s.28; and R.R.O., 1970, Reg. 654, s.14 as am. by O.Reg. 387/74, s.1; The Securities Act, R.S.O., 1970, c.426, as am by S.O., 1971, c.31; and O.Reg. 600/74; The Trustee Act, R.S.O., 1970, c.470, as am., s.26 *et seq.*

²² The Land Transfer Tax Act, 1974, S.O., 1974, c.8, as am. by S.O., 1974, c.16 and c.93; and The Land Speculation Tax Act, 1974, S.O., 1974, c.17, as am. by S.O., 1974, c.107 and c.121, s.2(2).

Repeated government intervention further underscored the need for legislation of a general nature and broad application to dispense with *ad hoc* reaction in favour of an atmosphere of certainty and predictability which is necessary to attract and maintain foreign investment. It became apparent that it was necessary that the Government of Canada, if it intended to participate in this kind of review or control over foreign investment, must establish and administer effective and workable guidelines and controls to provide certainty and continuity by which business transactions may be effected.

3. *Formation of Government Policy.*

The result of this concern, and of the increasing involvement of the Canadian public in the debate over foreign ownership, was the establishment of a working group by the government to assist the Hon. Herb Gray, P.C., M.P. who had been given the responsibility of bringing forward proposals to deal with the question of foreign investment. The proposals are contained in a document known as the *Gray Report*²³ which was published by the federal government but was specifically prefaced as not being a statement of government policy. The *Gray Report* is a broad and comprehensive examination of the matter of foreign investment in Canada, and contains specific conclusions and suggestions for alternative policy approaches. The Act is clearly framed within and its operation is obviously guided by the contents of this *Report*. There is a striking resemblance between the factors set forth in subsection 2(2) of the Act to be considered in determining whether a proposed acquisition is or is likely to be of significant benefit to Canada, and the criteria or significant factors listed at page 455 of the *Gray Report*. As well, it would appear that the whole of chapter 25 of that *Report* has been used as a blueprint for the Regulations and the Guidelines promulgated under the Act.

At page 462, the *Gray Report* sets out the following types of foreign investment transactions as being those which might or should be subject to a review process:

- (i) take-overs of Canadian firms, whether Canadian or foreign controlled, by foreign interests and whether the acquiring firm was or was not already established in Canada;
- (ii) new enterprises established from an external base (*i.e.*, foreign companies making direct investment in Canada for the first time);
- (iii) new licensing and franchising arrangements;
- (iv) major new investments by existing foreign controlled companies in Canada;

²³ Foreign Direct Investment in Canada (Ottawa, 1972).

(v) existing foreign controlled companies, even if they are not planning major new investments;

(vi) major new investments abroad by Canadian based multinational companies.

4. *The Foreign Investment Review Act.*

On May 4th, 1972, the Government of Canada introduced into the House of Commons Bill C-201, the Foreign Takeovers Review Act.²⁴ This legislation was directed to the review of take-overs of Canadian businesses by non-residents. Accordingly, its activities were restricted only to the first of the six categories set out above. The take-over provisions of that Bill were very similar to those contained in the Act, but did not deal with direct foreign investment. After some considerable debate, including discussion and approval by the House of Commons Standing Committee on Finance, Trade and Economic Affairs and consideration by the Standing Senate Committee on Banking, Trade and Commerce, the Bill died on the order paper in the fall of 1972.

On January 24th, 1973, the government reintroduced the Bill as Bill C-132, the Foreign Investment Review Act. This Bill had clearly taken into account some of the criticisms of Bill C-201 contained in comments made to the Commons and Senate Committees. The take-over provisions of Bill C-201 had been continued, but in addition specific provision had been made for review of direct investment in certain instances. As well, certain amendments had been made to make the legislation administratively more workable, including broader and more useful exemptions from the definition of the phrase "acquisition of control". The Bill was passed by the House of Commons on November 26th, 1973, and was passed by the Senate and received Royal Assent on December 12th, 1973. The Act contemplates two proclamation dates, the first of which relates to take-overs ("Phase I") occurred on April 9th, 1974. The provisions dealing with review of new direct foreign investment ("Phase II") are to come into force on a day to be proclaimed, and as yet no such proclamation has occurred.²⁵

²⁴ Fourth Sess., 28th Parl., 21 Eliz. II, May 4th, 1972.

²⁵ On December 20th, 1973, the Minister of Industry, Trade and Commerce, spoke in the House of Commons of his desire to implement Phase II as early as possible. At that time he tabled "Preliminary Guidelines: Related Business" discussed below. The statement and Guidelines are set out in News Release 79/73 of the Department. See also House of Commons Debates, Vol. VIII, 1st Sess., 29th Parl., Dec. 20th, 1973, pp. 8926-8929.

5. *Constitutionality of the Act.*

A brief reference should be made to the constitutional basis upon which the Act is founded. It has been enacted by the Parliament of Canada and could conceivably fall within the provisions of paragraph 24, "Naturalization and Aliens" or paragraph 2, "Trade and Commerce", of section 91 of The British North America Act.²⁶ It may also fall under the residuary power contained in the broad opening words of section 91.

On the other hand, it is arguable that the regulation of investment is a matter touching upon property and civil rights within the provinces, and, accordingly, falls under paragraph 13 of section 92.

To date, we are not aware of any proposal to test the constitutionality of the legislation, and it is clearly the view of the Government of Canada that it is *intra vires* its constitutional authority. Others share this opinion.²⁷ At the time Bill C-132 was being considered by the Commons Committee, it was apparent from the submissions presented by the Governments of the Provinces of New Brunswick²⁸ and Ontario²⁹ that there was a difference of opinion as to the constitutionality of the proposed legislation, particularly as it may affect transactions in real estate. However, since that time no specific steps have been taken by either of those governments to contest the authority of the Parliament of Canada to enact the statute, and it would appear that any such challenge will have to come from a disgruntled applicant.

II. *The Review Agency and the Application of the Legislation.*

The legislation is concerned with two types of foreign investment in Canada, and provides³⁰ for the creation and authority of the Foreign Investment Review Agency "to advise and assist the Minister in connection with the administration of this Act". The Agency is headed by a Commissioner and is divided into three branches, the functions of which are as indicated in the chart below.

²⁶ The British North America Act, 1867 (U.K.), 30 & 31 Vict., c.3, as am.

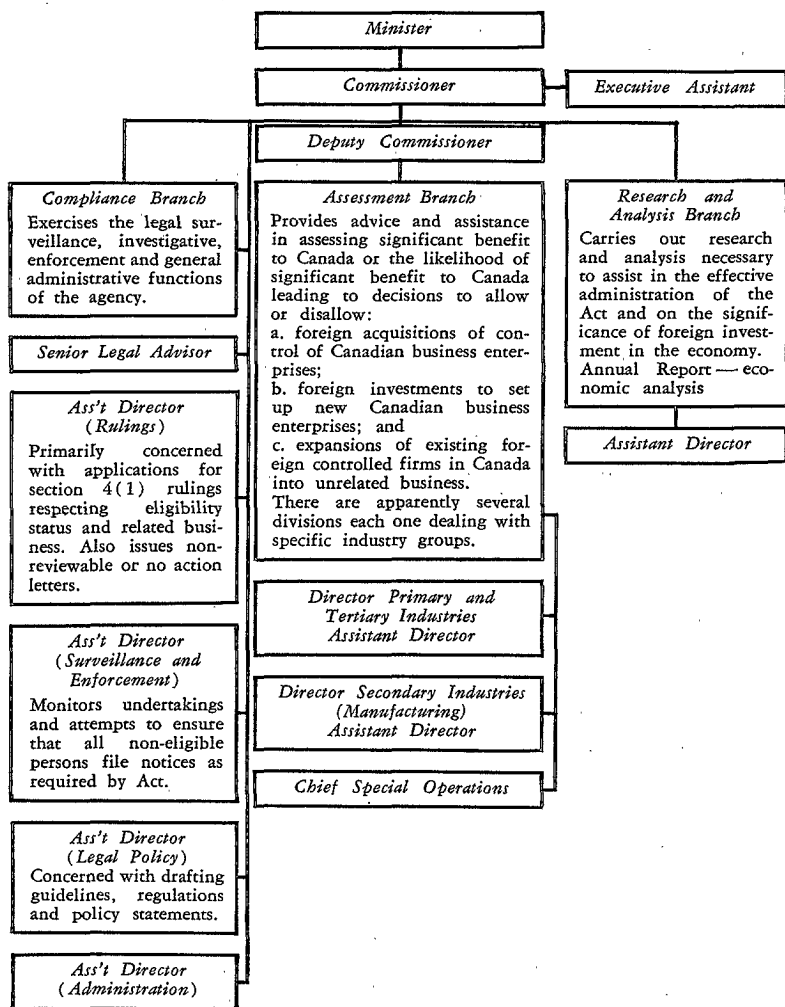
²⁷ E. James Arnett, *Canadian Regulation of Foreign Investment: The Legal Parameters* (1972), 50 Can. Bar Rev. 213.

²⁸ House of Commons, *Minutes of Proceedings of the Standing Committee on Finance, Trade and Economic Affairs*; 1st Sess., 29th Parl., Issue No. 42, July 19th, 1973, Vol. II, Appendix "H".

²⁹ *Ibid.*, Vol. III, Appendix "S".

³⁰ *Supra*, footnote 1, s.7(1).

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The first type of reviewable transaction, Phase I, is the acquisition of an existing Canadian business. The second, Phase II, is the establishment of direct investment in Canada by non-residents.

The provisions relating to take-overs are intended to subject to review the "acquisition of control" of a "Canadian business enterprise" by a "non-eligible person". The quoted phrases are

defined terms in the legislation, and each of them is dealt with at length below. The take-over provisions enact the screening process contemplated in paragraph (i) quoted above from the *Gray Report*.

The Act provides for a review of two forms of direct investment by non-residents: the entry into Canada by that non-resident for the first time; and the entry into an unrelated business by that non-resident which already carries on another business in Canada. These provisions respecting new and unrelated businesses partially implement paragraphs (ii) and (iv) of the areas for review quoted above from the *Gray Report*.

The implementation of Phase II has been delayed, according to the Minister, pending familiarization with and broad experience in administering the Phase I provisions. In a statement by the Minister on December 20th, 1973,³¹ he indicated that it would not be delayed for a lengthy period of time, and in fact it was the desire of the government that it be implemented as rapidly as possible. Pending such implementation, the Minister has requested³² that foreign investors who are making plans for large new investments in Canada come forward to discuss with the Agency on a voluntary basis the nature and extent of these investments. It would appear that the Minister would also wish to be informed of investments relating to cultural activities or the development of new technology. While this is desirable from an administrative point of view, it is very difficult to expect voluntary compliance, particularly when the framework within which compliance is expected is so tenuous.

III. *Major Definitions.*

1. *Regarding Phase I.*

The Act will only apply to transactions involving the "acquisition of control" of a "Canadian business enterprise" by a "non-eligible person". The components of each of these elements are dealt with below so as to determine the application of the review process.

(a) *Non-Eligible Person*

The intention of the legislation is to review certain types of conduct by a "non-eligible person". That term is defined in subsection 3(1) to mean:

- (i) an individual who is neither a Canadian citizen nor a landed immigrant;

³¹ *Supra*, footnote 25.

³² *Ibid.*, p. 8926.

- (ii) an individual who is a Canadian citizen but is not ordinarily resident in Canada and is a member of a class prescribed by regulation;³³
- (iii) an individual who is a landed immigrant who has been ordinarily resident in Canada for more than one year after the time when he first became eligible to apply for Canadian citizenship;
- (iv) a government or an agency of a government of a country other than Canada or a political subdivision of such country;
- (v) a corporation, no matter where incorporated, that is controlled in fact through any mechanism by any person described in (i) to (iv) above, or by a group of persons any one of whom is a person described in (i) to (iv) above.

This definition is extended in part by the provisions of subparagraph 3(7)(c)(iii), in that if a corporation is deemed to be controlled by its board of directors, it is a "non-eligible person" if fifty per cent or more of the total number of directors are non-eligible persons.

It has been our experience that the majority of persons involved in transactions which may be reviewable by the Agency are corporations. This would appear to be a view shared by the draftsman of the Act, who has created a lengthy and involved series of provisions and presumptions dealing with the status of corporations as "non-eligible persons". The underlying stipulation is that a corporation is a non-eligible person if it is controlled *in fact* by a non-eligible person or by a group of persons one of which is a non-eligible person.³⁴ We understand that the Agency is construing the concept of control in this context to include non-share control, such as through management, licensing, technology, pooling or market-sharing agreements or arrangements where the circumstances are such as to warrant this type of construction.³⁵

The Act contains certain presumptions as to non-eligibility of corporations. Where five per cent or more of the voting shares

³³ The prescribed categories of persons are set out in subsection 3(1) of the Regulations.

³⁴ *Supra*, footnote 1, s.3(1), "non-eligible person", para.(c).

³⁵ It is difficult at times to distinguish between the concept of "control in fact" as it applies to non-eligible persons and the key provision of "acquisition of control". As set out in s.3(3)(a), control of an incorporated Canadian business enterprise can be acquired only by the acquisition of shares or property. However, the Agency takes the view that these provisions are not intended to limit the application of the "control in fact" test. It should be noted that in s.3(6)(h) the legislation expands on the wording of the "control in fact" test in wording similar to that which the Agency wishes to infer in s.3(3)(a). Perhaps an argument can be made that, had Parliament intended those words to be applicable to this definition, it would have included them therein. *Supra*, footnote 1.

are owned by any one individual described in paragraph (a) of the definition of "non-eligible person", or government or agency described in paragraph (b) of that definition, or corporation incorporated elsewhere than in Canada, the corporation is, unless the contrary is established, a non-eligible person. In the case of corporations the shares of which are publicly traded, if twenty-five per cent or more of the voting shares, and in the case of corporations the shares of which are not publicly traded, if forty per cent or more of the voting shares, are owned in the aggregate by such persons, governments or agencies, or corporations, the same presumption is applicable. The intention of these presumptions is, in the view of the Minister, to locate that point at which the burden of proof as to the eligibility or otherwise of the corporation shifts from the Agency to the applicant.³⁶ However, the combination of widespread foreign ownership of securities in many Canadian corporations and the relatively low levels of presumption will operate to bring many corporations within the purview of the screening process at first blush.

Paragraph 3(6)(a) states that the shares of a corporation are publicly traded only if they are,

... publicly traded in the open market in the manner in which shares would normally be traded by any member of the public in the open market.

This presumably would include shares listed on a stock exchange or traded in the over-the-counter market.

In addition to the definition of non-eligible person and the presumptions discussed above, the Act contains a number of provisions intended to deal with specific situations. Thus paragraph 3(6)(b) states that where two or more persons are in a position to control a corporation, they are deemed to control it whether or not they are part of a larger group unless it is established that they deal with each other at arm's length. Accordingly, in situations where a corporation is controlled by a small group, one of the members of which is a non-resident, it may be necessary to go to some lengths to establish that the non-resident deals with the others at arm's length. This provision is augmented by paragraph 3(6)(b.1), which provides that,

- (i) where the controlling group consists of both eligible and non-eligible persons,
- (ii) the eligible persons who are members of that group hold more than 50% of the voting shares of the corporation, and,
- (iii) the non-eligible persons who are members of that group do not constitute more than 20% by number of the group or do not hold more than 20% of the voting shares,

³⁶ *Op. cit.*, footnote 28, Issue No. 26, June 5th, 1973, p. 26:11.

the corporation is deemed to be controlled by a group within that group consisting only of the persons who are not non-eligible persons. Further, it is deemed not to be controlled by any other group of persons. In terms of structuring normal transactions, this may prove to be a particularly significant and useful provision, in that it will permit a non-eligible shareholder to be part of the control group and yet obtain the benefit of being deemed not to control where the share and directorship representation is confined to twenty per cent. Clearly in the case of a conflict between paragraphs (b) and (b.1) of subsection 3(6) the opening language of the latter paragraph will govern.

Paragraph 3(7)(b) deals with a situation which may be common with widely-held publicly traded corporations: no one person or group of persons can be said to control the corporation. The paragraph also deals with corporations without share capital. In both cases, in the absence of evidence to the contrary, the corporation is presumed to be controlled by the group of persons comprising the board of directors or similar body. Where not more than twenty per cent of the members of that body are persons who are described in paragraphs (a) or (b) of the definition of "non-eligible person" (that is, individuals or agents of a government who are non-eligible persons), the corporation is deemed not to be a non-eligible person; and where more than twenty per cent but less than fifty per cent of the members are in that category, the corporation is deemed not to be a non-eligible person if the non-eligible members who exceed twenty per cent do not act in concert with one another. However, if more than fifty per cent of the members are persons so described, the corporation is deemed to be a non-eligible person.

Paragraphs (c), (d), (d.1) and (d.2) of subsection 3 (6) deal with options to acquire shares or assets. While these provisions are more particularly concerned with the acquisition of control, those dealing with the acquisition of rights to acquire or dispose of voting shares or the rights in respect thereof may also be relevant in determining whether a corporation is a non-eligible person.

Paragraph 3(6)(c) provides that where a person has a right under a contract to acquire or dispose of voting shares, voting rights or property, he shall be deemed to have the same position in relation to control of the corporation as if he owned the shares, rights or property.

Paragraph (d) of the subsection provides that the acquisition of the right shall be deemed to constitute the acquisition of the shares except where it was acquired to safeguard an interest in

respect of a loan or consideration for the sale or assignment of rights. In that the acquisition of the shares has been deemed to have taken place at the time the right is obtained, paragraph (d.1) provides that the exercise of the right is deemed *not* to constitute the acquisition of the shares. Paragraph (d.2) provides that where a non-eligible person has a right to acquire shares or voting rights, "the corporation is not a non-eligible person by reason only of" the operation of paragraph (c).³⁷

It is possible that the effect of these paragraphs in combination would permit a non-eligible person to acquire the rights, and thereby be deemed to have received the shares, and rely on the operation of paragraph (d.2) to save the corporation from, by that fact alone, becoming a non-eligible person. Further, by paragraph (d.1), the exercise of these rights is deemed not to have any effect. This raises the interesting question of whether by the operation of these four paragraphs it is possible for a non-eligible person to acquire shares in a corporation through the use of rights without converting that corporation into a non-eligible person. We doubt that this is intended to be the effect of these provisions, and we anticipate that a court in attempting to deal with the question would look to whether the corporation was controlled in fact by the non-resident.

Paragraph 3(3)(f) provides that the eligibility of a trustee who is acquiring or establishing a business shall be determined on the basis that the acquisition is deemed to have been made or the business established by a corporation of which the beneficiaries of the trust are deemed to be the shareholders, and the trustees are deemed to be the members of the board of directors. We confess that we have some difficulty in the application of this provision as it relates to the beneficiaries. In general beneficiaries do not exercise any control over a trust, and accordingly we are unsure as to how beneficial interest is to be translated into respective shareholdings. In the absence of guidance on this matter, we suggest that as "shareholders" the beneficiaries would not be in the same position to control the trust that normal shareholders would be, and therefore the deemed corporation would fall within the provisions of paragraph 3(7)(b). Accordingly the provisions of paragraph 3(7)(c) would provide that the membership of the deemed board of directors (that is, the trustees) would govern in determining eligibility.

³⁷ Unfortunately, while the language in paragraph 3(6)(c) deals with rights to both acquire and dispose of shares or property, the concluding language of that paragraph and paragraphs (d) and (d.1) do not extend to the position of the party having the right to dispose of, or that of the recipient of, the shares or property.

Subsection 3(5) makes provision for corporations having one or more small individual shareholders. The Minister is required to accept as evidence of the eligibility of such shareholders a statement signed by an authorized officer of the corporation indicating that according to the corporate records, the individuals who hold the shares are individuals having addresses in Canada, and that the person executing the statement has no knowledge or reason to believe that the shares are not owned by eligible individuals. This provision is circumscribed by the fact that the Minister is required to accept this statement only in the absence of evidence to the contrary.

Subsection 4(1) permits a person to apply to the Minister for a ruling as to his eligibility status. This application provision, which also concerns unrelated business, is dealt with subsequently in this article.

(b) *Acquisition of Control*

The second major topic within the take-over provisions of the Act is the concept of the "acquisition of control". Subsection 3(3) provides in paragraph (a) that control of a Canadian business enterprise may only be acquired,

- (i) with respect to a corporation,
 - (A) by the acquisition of voting shares, or
 - (B) by the acquisition of all or substantially all of the property used to carry on the business in Canada; and,
- (ii) in the case of an unincorporated business or Canadian branch business, by the acquisition of all or substantially all of the business property.

The effect of this provision would appear to be that other methods of acquiring control over a business, such as management or administrative agreements, would not be included within the ambit of this phrase.

As in the case of the definition of "non-eligible person", the Act creates a series of presumptions with respect to the acquisition of control. Subparagraph 3(3)(b)(i) provides that control of an incorporated Canadian business enterprise is not acquired by reason only of the acquisition, with respect to a publicly traded corporation, of less than five per cent of the voting shares, and with respect to non-publicly traded corporation, of less than twenty per cent of the voting shares. Conversely, paragraph 3(3)(c) provides that the acquisition of five per cent or more of the voting shares of a publicly traded corporation, or twenty per cent or more of the voting shares of a non-publicly traded corporation, shall, unless the contrary is established, be

deemed to constitute the acquisition of control. In our view, the most usual way of establishing the contrary, would be to identify another shareholder holding a larger block of voting shares with whom the acquirer does not act in concert and who can be said actually to control the company.

Paragraph 3(3)(d) provides that where more than fifty per cent of the voting shares of a corporation are acquired, such transaction shall be deemed to constitute the acquisition of control unless at the time of acquisition the person or group of persons acquiring the shares in fact had control of the company. Such acquisition does not extend to a business carried on by the acquired company jointly or in concert with one or more persons for purposes unrelated to the provisions of the Act.

The Act provides in paragraph 3(3)(e) that an amalgamation of two or more corporations which results in a continuing amalgamated corporation is deemed to constitute the acquisition of control by the continuing amalgamated corporation of the businesses carried on by the amalgamating corporations other than businesses carried on by them jointly or in concert with other persons for purposes unrelated to the Act. The paragraph contains an exemption from this deeming provision for an amalgamation which is part of a corporate reorganization carried out for purposes unrelated to the Act and which results in the amalgamated corporation being controlled by the same persons that controlled each of the amalgamating corporations. The exemptions in paragraphs 3(3)(d) and (e) for certain corporate reorganizations are extremely limited and were the subject matter of some debate before the Commons and Senate Committees. The difficulties resulting from the limited reorganization exemptions are discussed subsequently in this article.³⁸

Paragraph 3(6)(e) provides, with respect to the acquisition of all or substantially all of the assets of a Canadian business enterprise, that the acquisition of a leasehold interest in business property is deemed to constitute the acquisition of that property.

Subsection 3(3), and particularly paragraph (b) thereof, contains a number of exemptions from the concept of the acquisition of control. These exemptions are dealt with in detail later in this article.³⁹

The Act contains in subsection 3(8) a specific provision intended to prevent avoidance of the legislative scheme through a series of transactions. That subsection states that the acquisition

³⁸ *Infra.*

³⁹ *Infra.*

occurs whether it occurs in one transaction or as part of a series of related transactions or events.

As referred to above, subparagraph 3(3)(a)(i) provides that control of a Canadian business may only be obtained by the acquisition of all or substantially all of the business property or by the acquisition of voting shares. While it is not specifically stated, the usual interpretation of this provision has been that it linked together the acquisition of the shares and the acquisition of control. In the hypothetical instance of an incorporated Canadian business having outstanding 200 voting shares of which 101 are owned by Canadian citizen and resident A, 60 are owned by non-eligible person B, and 39 by Canadian citizen and resident C, it is clear that the company is controlled by A. However, if A disposes of his shares to the corporation, suddenly B owns sixty per cent of the company and has "acquired" control. It is unlikely that the wording of subparagraph 3(3)(a)(i)(A) is intended to apply to this situation. However, in our view it is arguable that control has been "acquired" by B as a result of the acquisition of voting shares by the corporation, so as to bring this transaction within the ambit of the subparagraph.⁴⁰

(c) *Canadian Business Enterprise*

This term is composed of three factors, each of which is itself a defined term. A "Canadian business enterprise" is a "business" that is either carried on by a "Canadian business" or a "Canadian branch business". The term "business" is defined in subsection 3(1) as including "any undertaking or enterprise carried on in anticipation of profit". This is a very broad definition, and is none the less so because of its inclusive rather than exhaustive nature. It is clear that it is intended to be exceedingly broad; in fact, the Minister in testimony before the Commons Committee stated that it was intended to be as broad as possible.⁴¹ We are not assisted in attempting to determine its bounds by the terms "undertaking" and "enterprise", both of which have themselves been given very wide judicial interpretation, particularly in taxation cases. We understand that there was some attempt given to

⁴⁰ A variation of this problem was dealt with by the Minister and Mr. R. G. Gualtieri, Special Adviser, in testimony before the Commons Committee in response to questions concerning preference shares to which are attached voting rights arising on non-payment of dividends. They expressed the view that in most cases this would not constitute an acquisition of control. See *op. cit.*, footnote 28, Issue No. 26, June 5th, 1973, p. 26:43 *et seq.*

⁴¹ *Ibid.*, Issue No. 26, June 5th, 1973, p. 26:9.

differentiating between active and passive forms of investment,⁴² but we must admit that we have been unable to secure such a distinction. In our view any activity conducted with a view to profit will be within the definition.

The term "Canadian business" is defined as meaning a business carried on in Canada by:

- (i) an individual who is a Canadian citizen or ordinarily resident in Canada,
- (ii) a corporation incorporated in Canada maintaining an establishment in Canada to which its employees report for work in connection with the business,
- (iii) any number or combination of individuals and/or corporations, where any one of them is described in (i) or (ii) and is, alone or in concert with others so described, in control of or in a position to control the conduct of the business.

It is interesting to note that a business is carried on by a corporation in this context only if it has an establishment to which one or more employees report for work. Thus a corporation having neither employees nor premises constituting an "establishment" would appear to fall outside the definition of the term "Canadian business".

The third facet of the term "Canadian business enterprise" is the term "Canadian branch business", which is defined as a business conducted in Canada by a corporation not incorporated in Canada. The foreign corporation must maintain an establishment in Canada to which its employees report for work in connection with the business. Further, the definition appears to be deficient in that it applies solely to corporations. Thus businesses conducted in Canada by non-resident unincorporated entities or individuals fall without the term "Canadian branch business", and hence are not Canadian business enterprises. Accordingly, their acquisition is not subject to the screening process.

As with the other key concepts in the legislation, the Act contains a number of additional provisions, some of which were

⁴² For instance, in several of the appearances of the Minister and his senior staff before the Commons and Senate Committees the matter of "portfolio investment" was raised. It was the view of the Minister that such passive investment was not caught and was not intended to be caught by the Act. See *ibid.*, Issue No. 26, June 5th, 1973, p. 26:39, and Issue No. 27, June 7th, 1973, p. 27:18. Further, see Issue No. 34, June 21st, 1973, containing the testimony of officials of the Investment Dealers' Association of Canada, and Issue No. 36, June 28th, 1973, containing the testimony of officials of The Toronto Stock Exchange. Also see The Senate of Canada; Minutes of Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, 1st Sess., 29th Parl. 1973, Issue No. 17, June 28th, 1973, containing the testimony of officials of The Toronto Stock Exchange.

apparently intended to extend its application to transactions indirectly affecting corporations that would not normally be regarded as Canadian business enterprises.

Paragraph 3(6)(f) provides that a Canadian business is deemed to be carried on in Canada notwithstanding that it is carried on partly in Canada and partly elsewhere. This would appear to be somewhat of a circular provision, in that a "Canadian business" is by definition "a business carried on in Canada". It would appear that the intention of the paragraph is to provide that, for the purposes of the definition of the term "Canadian business", a business is deemed to be carried on in Canada notwithstanding that it is carried on partly within and partly without.

Paragraph 3(6)(g) is a particularly difficult provision to interpret. It states 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, . . .

The apparent intent of the paragraph is to deem severable portions of a business to be Canadian business enterprises if the whole business falls within that term. This would have the effect of preventing a corporation from isolating a part of its operations and taking the position that that portion was not a Canadian business enterprise because there was no establishment to which its employees ordinarily reported for work in connection with the business. It might also have the effect of causing a subsidiary of a corporation which merely held property utilized by the parent company in its business to be a Canadian business enterprise because the parent fell within that term. In our view this is a potentially dangerous provision for the unwary, and its total effects should be carefully considered before coming to the conclusion that the target operation is not a Canadian business enterprise.

Another provision which has potentially far reaching effects is paragraph 3(6)(h), which deems the business carried on by a controlled corporation to be carried on by the controlling corporation. This is discussed subsequently in this article.⁴³

The Act contains one further provision dealing with the matter of what constitutes a "business". During the discussion of Bills C-201 and C-132 in both the Commons and Senate Committees, substantial concern was expressed as to the application

⁴³ *Infra.*

of the proposed legislation to the acquisition of land.⁴⁴ Immediately prior to the passage of the legislation,⁴⁵ subsection 3(9) was added, apparently with a view to relieving the concerns of those who felt that the holding of land constituted a "business" as that term is defined. Later in this article we deal with the application of the Act to land.⁴⁶

2. *Regarding Phase II.*

The direct investment provisions of the Act, yet to be proclaimed in force, function around three basic concepts, which are:

- (i) the "establishment" of a business;
- (ii) a "new business";
- (iii) an "unrelated business".

The operation of the review process is triggered by a transaction which constitutes the establishment by a non-eligible person of a new or an unrelated business.

We have previously considered the definitions of the terms "business" and "non-eligible person", which are used in the context of Phase II in a manner consistent with that in Phase I.

(a) *Establishment*

The "establishment" of a business is dealt with in subsection 3(4), which creates the following conditions:

- (i) there must be an establishment in Canada;
- (ii) employees of the person establishing the business must report there for work; and,
- (iii) such work must be in connection with the business being established.

The business is established at the time the first employees report there for such work. A business could not be said to have been established if any of these elements were omitted. Thus a business which was conducted by a sole individual proprietor might never be established if he never hired any employees, but did all the work himself, in that there would not be "employees of the

⁴⁴ See, for example: *op. cit.*, footnote 28, Issue No. 30, June 14th, 1973, recording the testimony of officials of the Urban Development Institute, George Wimpey Canada Limited, and the Canadian Institute of Public Real Estate Companies; and, The Senate of Canada; Minutes of Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, 1st Sess., 29th Parl., 1973, Issue No. 23, Dec. 11th, 1973 containing the Final Report of that Committee.

⁴⁵ *Infra.*

⁴⁶ *Op. cit.*, footnote 28, Issue No. 42, July 19th, 1973, Vol. I, p. 42:7, adding s.3(9).

person . . . establishing the business". The word "establishment" is defined in *A New English Dictionary on Historical Principles*⁴⁷ as,

10. An organized staff of employees or servants, often including, and sometimes limited to, the building in which they are located: *a.* A public institution, a school, factory, house of business, etc. . . . *b.* A household; a family residence.

and in our view it is this meaning involving premises which the legislation intends. Thus it is likely that there must be some physical facilities to which the enterprise has some right, title or interest before there can be said to be an "establishment".

(b) *New Business*

The term "new business" is defined in subsection 3(1) as "a business not previously carried on in Canada" by the party in question. The effect of this definition is to bring under review all direct investment by persons not carrying on business in Canada at the time Phase II is proclaimed. Accordingly, we would anticipate that, prior to the time of proclamation, there may well be a substantial number of foreign investors attempting to achieve "grandfather" status. In our view it will be essential that such parties actually engage in their chosen activity on a serious basis; we doubt that the mere incorporation of a company having in its charter the requisite objects will suffice. The concept of "carrying on business" in our view is intended to convey an active engagement in the business, and we submit that this is particularly the case when achievement of that status will avoid the review provisions of the legislation.

While we very much doubt that it was intended, we would point out that paragraph 3(6)(h) may have an effect on the concept of a "new business". In a situation where a corporate non-eligible person controlled a Canadian business enterprise through the use of management, licensing and market sharing agreements, it is likely that the provisions of this paragraph would mean that the controlling corporation was deemed to carry on the business conducted by the Canadian business enterprise. This being the case, it would appear that immediately prior to the termination of those agreements the controlling corporation could establish the same business in Canada as was carried on by the controlled corporation without running afoul of the review provisions respecting new business. A similar result would obtain in regard to the business carried on by a subsidiary.

⁴⁷ (Oxford, 1897), Vol. III, p. E-298.

One further, and perhaps unintended, result of these provisions is that an established business being carried on by one corporate entity cannot be transferred to a newly-incorporated company. The new company will not have carried on any business, and accordingly *any* business will be a new business to it.

(c) *Unrelated Business*

The term "unrelated business" is undefined in the Act, and in fact does not constitute a concept entirely distinct from that of "new business". The term is used in juxtaposition to the situation in which the non-eligible person does not carry on any business in Canada to refer to a business which is "new" because it has no relation to that currently conducted by the non-eligible person.

As referred to above,⁴⁸ the Minister has tabled "Related Business" Guidelines on the basis that they would be revised in accordance with commentary received and would be re-issued at the time of proclamation of Phase II. The Guidelines are expressed to be of a general nature, and would consider two businesses to be related if:

- (i) the new product or service is directly substitutable for the old;
- (ii) the new product is an input for an existing business;
- (iii) the old product is an input for the new business;
- (iv) the new business is complementary to an existing service business;
- (v) the new business uses a similar technical process to that of an existing business to produce a different product.

These are qualified by a warning against a substantial reorientation of the activities of the non-eligible investor. Further, the Guidelines indicate that the production of a different product mix with substantially the same plant and equipment would not be considered to be a new business.

These Guidelines are exceedingly vague and in our experience are somewhat difficult to apply. While it is of assistance to obtain some insight into the Agency's view of the matter, we believe the Preliminary Guidelines are of little aid when attempting to advise a client as to what he may be restricted from doing subsequent to the second proclamation. We hope that the final set of Related Business Guidelines will be of more assistance.

(d) *Implementation of Phase II*

Pursuant to section 6 of the Act, Phase II is to come into effect on a day to be named in the proclamation made under subsection 31(2). As set out above, this proclamation has been delayed until the Agency has obtained familiarity and experience

⁴⁸ *Supra*, footnote 25.

with the operations of Phase I, until more permanent Related Business Guidelines have been prepared, and until the provinces have been consulted. The Minister has suggested that it is the intention of the government to proclaim the legislation as quickly as is feasible. We have no knowledge as to the reason for the substantial delay, but it is well known that at least two and very likely several more of the provinces are strongly opposed to the screening and potential refusal of new direct investment. Undoubtedly this has been exacerbated by current economic conditions.⁴⁹ In addition, it is likely that the government is more aware now than it might have been earlier of the substantial flow of applications which will undoubtedly arise as a result of the implementation of Phase II. Accordingly, while we doubt the accuracy of the suggestion that it may never occur, we will not be surprised if the second proclamation is delayed further.

(e) *Removal of the "Small Business" Exemption*

Paragraph 5(1)(c) provides that the take-over provisions of the Act do not apply to the acquisition of control of a Canadian business enterprise having gross assets of not more than \$250,000.00 and gross annual revenues of not more than \$3,000,000.00. The Act does not create a review process respecting expansions of existing investment in Canada by non-eligible persons into related businesses. Accordingly, subsequent to the implementation of Phase II it would be possible for a non-eligible person to acquire in an exempted transaction a small business which conducted a business unrelated to that of the acquirer, or for a non-eligible person to make its initial investment in Canada through such an exempted acquisition. For this reason, subsection 31(3) provides that on proclamation of Phase II, the "small business" exemption ceases to apply in respect of acquisitions where the non-eligible person does not carry on any business in Canada, or does not carry on any business in Canada to which the small business can be said to be related.

IV. *The Operation of the Act.*

The procedures under the Act are primarily founded upon honesty and self-directed compliance. Due to the very broad application of the legislation and the nature of the activity involved, it is questionable, at least at the outset, as to whether the Agency could administer the statute at all if this was not the case. While as the chart on page 179 indicates, the Agency does have a

⁴⁹ *Ibid.* Also, see the review of the status of the Act and Phase II in *The Financial Times of Canada*, Feb. 17th, 1975, p. 1.

separate Surveillance and Enforcement division, we doubt that initially it will be able to vigilantly police the Act.

The Act provides for a notification system. A non-eligible person who proposes to acquire control of a Canadian business or to establish a new business is required by subsections 8(1) and (2) respectively to give written notice to the Agency in the prescribed form and manner.⁵⁰ Where the Minister believes that a non-eligible person is about to or has made a reviewable transaction without giving notice he may formally demand that written notice be given in the prescribed form and manner. Forthwith after the receipt of such notice under any of the foregoing provisions, the Agency is required⁵¹ to forward to the applicant a certificate of the date of receipt of the notice. This date is a most significant one under the time limitations provisions of the Act.

The review procedure activated by the notice is contained in sections 9 to 13 of the Act. It provides that the review and recommendations shall be made by the Minister, with the final decision resting with the Governor in Council. However, subsection 7(1), which establishes the Agency, provides that it shall "advise and assist the Minister in connection with the administration of this Act". In fact it is clear to those who have dealt with the Agency regarding take-over applications that it plays a substantially larger role in the review process than the legislation might indicate. Members of the Agency staff examine the notice contents, resolve deficiencies, investigate and examine the background, negotiate changes and undertakings, and prepare a recommendation for the Minister. While this recommendation may be amended or even ignored, we doubt that this occurs on a frequent basis.

Section 9 requires the Minister to review a number of matters to determine whether the aspects of "significant benefit" as outlined in subsection 2(2) have been met. The material is to include the information provided in the notice, any information provided by any party to the transaction, any written undertakings relating to the transaction given by any party thereto,

⁵⁰ The information to be contained in the notice is set out in the Schedules contained in the Regulations, *supra*, footnote 1, pp. 1037-1052. The Schedules have been translated into forms provided by the Agency, with FIR-P-1 relating to Schedule I, FIR-P-2 to II, FIR-P-3 to III and FIR-P-4 to IV.

⁵¹ *Supra*, footnote 1, s.8(4). The Agency is of the view that this certificate is not to be sent until it is satisfied that the notice is "in such form and manner and containing such information as is prescribed by the regulations" as is required by s.8(1).

and any representations of any province likely to be "significantly affected" by the transactions.

As mentioned above, the time of receipt of the notice marks the commencement of a significant time period. The initial formulation of the legislation illustrates the desire of the government to avoid charges that legitimate business transactions would become so embroiled in government bureaucracy that unjustifiable delays and uncertainty would result. Initially, Bill C-201 contained a provision⁵² stating that a transaction was deemed to be approved if there had not been either any response or a negative decision within ninety days of receipt of the notice by the Agency. This period was sharply criticized as being unconscionably lengthy in numerous submissions to and discussions in the Senate and Commons Committees, and it was subsequently reduced to sixty days in the Act. This is still a substantial period of time to delay a transaction, but we recognize that it is of necessity a compromise between legitimate commercial desires for ease and rapidity of transactions and the lengthy examinations required of a meaningful review process. The time-frame difficulties become exacerbated by the detailed consultations and co-ordinations required with other departments and agencies of the federal government and with the designated liaison functionaries and the appropriate departments and agencies of those provinces which are involved in and have an interest in the proposed transaction.

Section 13 provides that after sixty days have elapsed from the date of receipt by the Agency of the required notice, if the Governor in Council has not made an order allowing or denying the transaction, and if the Agency has not requested further information from the parties, the Governor in Council is deemed to have allowed the investment.⁵³ In such case the Agency shall notify the applicant and the Clerk of the Privy Council shall register a copy of such notice.

There are two procedures whereby the sixty day period can be extended or abrogated. The first of these arises as a result of the certificate of date of receipt to be provided by the

⁵² *Ibid.*, s.13(1)(a). This and all other references to the ninety day period were replaced by references to sixty days in the Second Report of the Commons Committee, *op. cit.*, footnote 28, Issue No. 42, July 19th, 1973, Vol. I, p. 42:8 *et seq.*

⁵³ We are aware of only one instance in which an acquisition has been deemed to have been allowed by the expiry of the time period. This was the application of Powers Regulator Company Ltd. to acquire control of Conspec Controls Ltd., News Release, Foreign Investment Review Agency, Ottawa, Oct. 31st, 1974.

Agency under subsection 8(4). The Agency has taken the position that it can delay issuing the certificate until it is satisfied that the form and contents of the notice comply with the Regulations, in that the "notice" referred to in subsection 8(4) is one which is "in such form and manner and containing such information as is prescribed by the regulations." The view is thus that a notice is not a "notice" until it is complete. Accordingly, some time may elapse before the certificate is dated and issued. Further, as between a delay respecting the certificate of date of receipt and use of subsection 11(1) to obtain the information, it is likely better for the applicant that the former procedure is used. Subsection 11(1) permits the Minister to notify the Agency if he is unable to complete his assessment or make a recommendation to the Governor in Council. The Agency is then required to notify the applicant, provided that the sixty day period has elapsed, and the applicant is permitted to make further representations or disclosure. However, the effect of the wording of paragraph 13(1)(c) would appear to be that the giving of such notice of deficiency of information prevents the deemed acceptance provision from applying. Thus the delivery of such notice near the end of the period effectively permits the Agency to prolong the review period without any further limitation.

We understand that the Agency takes the position that neither of these methods of delaying the determination of an application is intended as an administrative amendment to the political intent to reduce the time period. In fact, it is unlikely that the delay arises from sources other than the failure of applicants to provide the disclosure required by the Regulations. It has been suggested that this deficiency is in part attributable to the fact that some aspects of the forms constructed and circulated by the Agency do not include all the details and information required by the Regulations. In any event, we doubt that the Agency is abusing these time provisions so as to defeat the intention of the legislation.

It should be noted that another disadvantageous result of the review procedure is that the applicant purchaser who has included in his agreement a closing condition such as that permitted in paragraph 3(6)(c) is able to tie up both the vendor and, to some extent, the Agency without either of them having any mechanism to expedite the matter.

Section 10 deals with the situation in which the Minister is of the view that the investment is or is likely to be of significant benefit to Canada and the sixty day period has not elapsed. He is to recommend to the Governor in Council that it is to be

allowed, and provide him with a summary of relevant information and written undertakings.

Section 11 provides for the circumstances where the Minister lacks sufficient information to complete the assessment or make a recommendation to the Governor in Council, or where after completion of the assessment he is unable to recommend to the Governor that it be allowed. In these instances, provided that the sixty day period has not expired, he is required to notify the Agency, which in turn is required to give notice of such opinion to the applicant. If the applicant then advises the Agency that it wishes to make further disclosures, representations or undertakings, the Agency is to notify the Minister who shall afford the applicant the opportunity to do so. Subsequent thereto the Minister is to re-examine his earlier opinion regarding the sufficiency of information. Subsection 11(4) then assumes that he will either recommend that the investment be allowed or refused, and provide a summary of the relevant information, undertakings and provincial representations to the Governor in Council. It is perhaps possible that a second notice under subsection 11(1) could be given.

If the applicant fails to respond to the subsection 11(1) notice within thirty days or such longer period as the Minister permits, the Minister is required to submit the matter to the Governor in Council with a summary of the relevant information, undertakings and provincial representations.

Upon receipt by the Governor in Council of the recommendation or submission of the Minister, he is to consider the recommendation or the submission and the summary in conjunction with the aspects of significant benefit to Canada as provided in subsection 2(2), and either to allow or refuse the investment. Subsection 12(2) provides that where the Governor in Council is unable to determine whether to allow or refuse the investment, he may by order direct the Minister to proceed under section 11 as though the Minister himself was unable to reach a conclusion. At that point the provisions of section 11 apply as though it was the Minister who was unable to make a determination.

The result of this process is that the final decision on each investment is clearly intended to rest with the Cabinet. This reflects the recognition that the matter of review of foreign investment is, and is intended to be, a political decision. An interesting development in the structure of the review process occurred on December 23rd, 1974, when the Agency⁵⁴ disclosed that the

⁵⁴ The Canada Gazette, Vol. 109, Part I., No. 1, P.C. 1974-2854, Dec. 20th, 1974.

Cabinet had allowed the acquisition of J. H. Corbeil Ltd. by Canadian Blue Bird International Inc. This transaction is of particular note since on November 11th, 1974,⁵⁵ the Agency announced that the Cabinet had refused to permit the same transaction. It appears that the change from absence to presence of significant benefit arose principally from the change on the part of the Quebec government from opposition to political support and financial participation. We understand that this was the result of a second application by the purchaser. This action may give renewed hope to those unsuccessful applicants whose proposals have been rejected.

V. Administration of the Act.

1. Disclosure of Information.

Section 14 makes detailed provision for the situations in which disclosure of information received pursuant to the review process may be made. It provides that, except as set out in that section, all information disclosed in the course of the administration of the Act is privileged and shall not knowingly be communicated.

Subsection 2 provides that, on request of the person furnishing the information, and under terms, conditions and circumstances approved by the Minister, the information may be communicated to any person or authority named in the request. Further, under terms, conditions and circumstances approved by the Minister, the information may be communicated to a Minister, officer or employee of Her Majesty in right of any province for purposes relating to the administration of the Act.

Subsection 14(3) provides that, "notwithstanding any other Act or law", no Minister, officer or employee of Her Majesty can be required to give evidence relating to such privileged information.

Subsection 14(4) provides that the privileged and non-compellability provisions do not operate in respect of,

- (i) legal proceedings respecting the administration or enforcement of the Act,
- (ii) consultations with any party to a proposed transaction, or,
- (iii) information contained in any written undertaking respecting an investment that has been allowed.

However, the Minister may prevent the giving of evidence in respect of the undertakings referred to in (iii) above where in his view it is not necessary and would prejudicially effect the person giving it.

⁵⁵ *Ibid.*, Vol. 108, No. 47, P.C. 1974-2456, Nov. 8th, 1974.

The Agency has adopted the practice of issuing news releases announcing decisions respecting notices filed in connection with proposed take-overs and identifying in general terms the factors which indicated significant benefit.⁵⁶

2. *Investigations.*

The Act grants the Minister, and persons designated by him,⁵⁷ considerable scope as to the nature and extent of the investigations which may be conducted by them. The investigation provisions of the Act are not dissimilar to those contained in Part I of the Combines Investigation Act.⁵⁸ An investigation may be implemented pursuant to section 15 where the Minister has reasonable and probable grounds to believe that a non-eligible person has made or is about to make an investment,

- (i) without complying with a subsequent 8(3) demand;
- (ii) where the Governor in Council has not allowed and is not deemed to have allowed the investment; or,
- (iii) where an allowed investment has been made on terms and conditions materially different from those disclosed in the notice or other information submitted to the Agency.

Pursuant to section 16, the Minister may,

- (i) on written notice require the non-eligible person, or an officer thereof, who has made or is about to make an investment to provide under oath the information required by the Minister, including disclosure and production of contracts or agreements respecting the investment;
- (ii) authorize a designated person to enter premises where the Minister believes there may be relevant evidence, and remove documents therefrom;
- (iii) direct such designated person to inspect such documents;
- (iv) have copies made of such documents;
- (v) by written notice, require information on oath; and,
- (vi) obtain on an *ex parte* application an order from a judge requiring a person to attend to be examined by the Minister on oath or to produce relevant documents to the Commissioner.

In conjunction with the administration of these provisions, subsections 16(3) to (6) provide for the delivery and return of documents, an extension of time for retention thereof, and the requisite fees.

The notice to provide information on oath as described in (i) above may not be issued until permitted by a judge on an *ex parte* application. A designated person entering premises is required to produce a certificate authorizing such entry, which may be obtained on an *ex parte* application. Failure or anticipated

⁵⁶ News Releases, Foreign Investment Review Agency, Ottawa, March 3rd and 18th, 1974.

⁵⁷ *Supra*, footnote 1, s.15(2).

⁵⁸ R.S.C., 1970, c. C-23, ss 5-15.

failure of the occupant of such premises to permit entry, forms grounds for an *ex parte* application by the designated person to obtain an order directing a peace officer to take steps to obtain admission or access. The power to obtain information on oath referred to in (v) above may be exercised only after permission is granted on an *ex parte* application. Subsection 17(6) provides that the judge may act on the *ex parte* applications referred to in these paragraphs where he is satisfied that there are reasonable grounds for doing or believing the matter in question.

Section 18 of the Act provides that copies extracted from documents or productions are admissible in evidence for prosecutions or proceedings under the Act, subject to section 17 of the Statistics Act.⁵⁹

3. Remedies Under the Act.

The Act provides for three types of remedies: injunctions, orders rendering the transaction nugatory, and orders requiring fulfillment of undertakings.

(a) Injunctions

Where a superior court is satisfied on application by the Minister that a non-eligible person has made or is about to make an investment which the Governor in Council has not allowed and is not deemed to have allowed, or which is being made on terms and conditions materially different from those disclosed in the notice or information, it may make an order preventing any action or conduct which would prejudice the ability of a court to render the investment nugatory. Such order is to be made on forty-eight hours written notice to the non-eligible person except where the superior court is satisfied that such delay cannot reasonably be fulfilled or urgency justifies an earlier motion. In this instance, the court may make a temporary order expiring in not more than ten days.

On the application of an interested party the court may continue, modify or revoke the order. Where such order is granted and thereafter a notice is filed under subsections 8(1), (2) or (3), the Minister is required by subsection 19(6) to proceed as expeditiously as possible to make a determination under the review process.

(b) A Nugatory Order

Where a non-eligible person has made an investment,

- (i) without complying with a subsection 8(3) demand;

⁵⁹ S.C., 1970-71-72, c.15 .

- (ii) where the Governor in Council has by order refused to allow the investment; or,
- (iii) on terms and conditions which are materially different from those disclosed in the notice or other information provided;

the Minister may apply to a superior court for an order directed towards rendering the investment "nugatory". Such an order is to avoid or reduce, to the greatest possible degree, any undue hardship to anyone not involved in the investment with knowledge that it could be rendered nugatory. It may be that the intent of this provision is to attempt to prevent the order in question from having a very widespread effect throughout the economy. These orders may have serious potential effects on transactions consummated through a stock exchange. It is questionable whether this direction will be of much assistance with respect to this kind of transaction.

Subsection 20(2) describes two types of orders which may be in keeping with the desire to render a transaction nugatory. These are the revocation or suspension of voting rights attaching to shares, and the disposition of shares or of property. This provision is similarly limited by the restriction that no such order shall require that this revocation, suspension or disposition apply to a person who was not involved in the investment in question and was not involved in any subsequent transaction with knowledge that the investment could be rendered nugatory.

Subsection 20(3) creates a specific course of action in respect of persons holding shares or property in Canada while they themselves remain outside the country. Where they fail to comply with an order made under the foregoing provisions, the court may by order vest such shares or property in a trustee named by it. The trustee shall dispose of the property and shall apply the proceeds firstly towards the payment of its own fees and expenses, and then to the beneficial owners.

(c) Failure to Fulfil Undertakings

Where a person has given an undertaking and fails or refuses to comply with it, the Minister may obtain an order from a superior court judge directing compliance.

(d) Enforcement

A person who fails to comply with any of the orders referred to above may be cited and punished for contempt of the court making the order.

Section 23 provides that the normal rights of appeal from the superior court making any order remain in effect.

(e) *Offences*

Sections 24 to 27 create certain offences for conduct contrary to the Act. Section 24 makes it a summary conviction offence to make an investment without giving the required notice, or failing to give proper notice after receiving a subsection 8(3) demand from the Minister. Section 25 creates a summary conviction offence of improperly disclosing confidential information contrary to section 14. Section 26 creates an offence for impeding or obstructing an investigation under the Act, and section 27 creates an offence for directors or officers who were involved in the commission by their corporation of an offence under sections 24, 25 or 26.

VI. *Exemptions from the Legislation.*

Primarily as a result of representations made to the Commons and Senate Committees,⁶⁰ certain specific transactions which would have otherwise constituted an acquisition of control are exempted from the review process.

1. *General Exemptions.*

Corporations (a) which are agents of the federal or provincial Crown or are named in Schedule D of the Financial Administration Act⁶¹ or (b) which are owned as to not less than ninety per cent by the federal, a provincial or a municipal government or which are the wholly-owned subsidiary of such a government-owned corporation, are in effect excluded from the definition of a Canadian business enterprise.⁶² The Act also contains what has been termed a "small business" exemption so that the legislation will not, at least prior to the proclamation of Phase II, apply to a business enterprise if its gross assets are valued at \$250,000.00 or less and annual gross revenues do not exceed \$3,000,000.00.⁶³ The business enterprise must meet the dual test and, in arriving at gross assets and annual gross revenues, the assets and revenues of any other Canadian business enterprise that is by reason of inter-relationship of management, ownership or financial affairs, associated with that enterprise must be included unless the Minister is satisfied as to their separate existences.⁶⁴ As well, where control

⁶⁰ The Submission of the Investment Dealers' Association of Canada and The Toronto Stock Exchange, *op. cit.*, footnote 28, Vol. III, Appendices "2B" and "2D", contained recommendations which are now embodied in subsections 3(3)(b)(ii) and (iii) of the Act and are known as the "investment dealer" and "venture capital" exemptions.

⁶¹ R.S.C., 1970, c.F-10.

⁶² *Supra*, footnote 1, s.5(1)(a) and (b).

⁶³ *Ibid.*, s.5(1)(c).

⁶⁴ *Ibid.*, s.5(2) and Regulations, *supra*, footnote 1, s.4.

of a Canadian business enterprise is acquired for a consideration that exceeds the gross assets of the business enterprise and the applicant has not satisfied the Minister that the part of the consideration exceeding those gross assets is given for anything that was not owned directly or beneficially by the business enterprise as of the end of its latest completed fiscal period, the gross assets of the business enterprise as at the end of its latest completed fiscal period are equal to the amount of that consideration.⁶⁵

The small business exemption, in light of the foregoing, is of limited effect in that very few business enterprises will be able to escape the broad net cast by the Act and Regulations. The very extensive nature of the material required to be prepared and included in a notice to be filed pursuant to the Act and Regulations would seem to warrant an amendment providing for either a more concise form of notice for small businesses or an increase in the value of gross assets and annual gross revenues in subparagraphs 5(1)(c)(i) and (ii) if the exemption is to be at all meaningful.

After the proclamation of Phase II, the small business exemption will cease to be available except with respect to an acquisition by a non-eligible person already carrying on business in Canada of a Canadian business enterprise in a related field.

2. Specific Exemptions.

The legislation also contains "venture capital", "franchise" and "investment dealer" exemptions. Very limited reorganization exemptions are also provided for amalgamations and certain share transfers within a group of controlled corporations.

(a) *The Venture Capital Exemption*

As a result of representations made in briefs presented to the Commons Committee⁶⁶ certain amendments to Bill C-201 were introduced, one of which concerned venture capital firms. Subparagraph 3(3)(b)(iii) of the Act provides an exemption for persons engaged, as part of their ordinary business, in providing venture capital upon terms and conditions established for the venture capital exemption. These were tabled on April 9th, 1974, and are referred to herein as the "Venture Capital Conditions".⁶⁷

A non-eligible venture capitalist will first want to determine whether or not he is acquiring control of a Canadian business enterprise. If he is not, then no notice need be filed. If he is, then he will want to establish that he qualifies as a venture capitalist.

⁶⁵ Regulations, *ibid.*, s.4(1)(b).

⁶⁶ *Supra*, footnote 60.

⁶⁷ House of Commons Debates, Vol. II, 2nd Sess., 29th Parl., April 9th, 1974, p. 1269.

The Venture Capital Conditions require *inter alia* that the non-eligible person: in the ordinary course of his business makes available in Canada what is commonly known as venture capital;⁶⁸ provides venture capital through purchases of common stock or other unsecured investments; does not normally acquire a majority of the shares of the corporation in which he invests; does not invest more than ten million dollars in any single corporation carrying on a Canadian business; does not make any single venture capital investment at original cost normally constituting more than twenty per cent of his total venture capital portfolio; and normally sells the shares of any corporation within five or ten years of their acquisition.⁶⁹

A venture capitalist may not, in availing himself of the exemption, invest in the shares of a corporation that is principally engaged in the real estate business.⁷⁰

The venture capitalist must, within fifteen days of the investment, file with the Minister the information required to be supplied pursuant to the Annex to the Venture Capital Conditions and provide the Minister with a letter of undertaking, including evidence of authority, that he will (a) comply with the Venture Capital Conditions, (b) provide the Minister, from time to time, with appropriate proof that he has in fact complied therewith⁷¹ and (c) pending divestment advise the Minister of any significant change in the affairs of the Canadian business enterprise.⁷²

The venture capitalist must, over specified periods of time, divest himself of certain securities acquired by him so that (a) the investor's interest in the equity securities of the Canadian business enterprise will be reduced to specified levels and (b) ultimately the investor will cease to control the Canadian business enterprise in any manner that results in control in fact. The divestiture provisions are contained in section 3 of the Venture Capital Conditions.

In the event that the venture capitalist does not reduce his proportion of holdings as required, then he must transfer that proportion of his shares and voting rights attached thereto that are in excess of the specified percentage levels to a trustee appointed by the Minister. At the direction of the investor or upon the second anniversary of the expiration of the applicable

⁶⁸ See P. McQuillan and H. Taylor, *Sources of Venture Capital*, A Canadian Guide, Information Canada (1973).

⁶⁹ Foreign Investment Review Act, *supra*, footnote 1, "Terms and Conditions for the Venture Capital Exemption", s.2(f).

⁷⁰ *Ibid.*, s.3.

⁷¹ *Ibid.*, s.5.

⁷² *Ibid.*, s.5(b)(ii).

time period, whichever is sooner, the trustee must sell the shares, and the investor is required to pay all related fees and expenses of the trustee.

In view of the foregoing conditions and particularly in view of the few notices being filed pursuant to subparagraph 3(3) (b) (iii) of the Act, it is apparent that the venture capital exemption is not as broad or useful as its proponents expected it might be. In the first place, the material required to be supplied by the investor to the Agency is not substantially dissimilar to that required to be filed by a non-eligible person pursuant to subsection 8(1) of the Act and section 5 of the Regulations. Accordingly, it may be more beneficial for an investor to file the form of notice normally required under subsection 8(1). In so doing, providing he can establish that the investment is or is likely to be of significant benefit to Canada, the investor may be able to free himself of the rather inflexible requirements to divest. Secondly, while the Venture Capital Conditions are apparently not hindering venture capital financing, venture capitalists are looking for more liquid, conservative and mature investments due to the inflexible and stringent divestment provisions.

The rules have discouraged participation in equity investments, (a) in the development of a completely new and unproven idea, product, process or service to the prototype stage or to a point where the market is defined, (b) in a new enterprise selling a promising product or a new service in a well researched market, or (c) in a company experiencing difficulties, but which can be re-established on a profitable basis by the injection of new capital and other internal change.

It is perhaps for this reason that at least two non-eligible venture capital corporations are attempting to Canadianize themselves. It may well be that the legislation is having its desired effect.⁷³

(b) *The Franchise Exemption*

The franchise exemption⁷⁴ was included as a result of representations made to the Commons Committee subsequent to

⁷³ See the Financial Times, Feb. 17th, 1975, pp. 2 and 7, which indicates that Slater, Walker of Canada Ltd. has obtained informal Review Agency approval of a proposed reorganization which will have the effect of ultimately establishing its Canadian eligibility status. At p. 2 of that issue, the president of Charterhouse Canada Ltd., a wholly-owned subsidiary of The Charterhouse Group Ltd., of England indicated that although he "seems to be obsessed with the Foreign Investment Review Act", plans are being undertaken for a "new start for Charterhouse as a Canadian investment company".

⁷⁴ *Supra*, footnote 1, s.3(3)(b)(iv).

the introduction of Bill C-201 by certain car manufacturers who are non-eligible persons and who have provided capital to assist Canadians who wished to establish or acquire a car dealership, by taking shares as security and therefore, technically acquiring control of the dealership. Gradually, ownership is repatriated to the new Canadian owner who pays for the repatriated shares out of profits.⁷⁵ Most of these arrangements last five to seven years. The exemption provides that control of such enterprises is not acquired by reason only that such relationship is entered into. Unfortunately, the exemption relates only to an acquisition of shares and does not deal with the situations where assets are taken as security. The non-resident financing operation will face a further hurdle however in the event that it is forced to reacquire the shares or assets in the Canadian business after control has been repatriated to a Canadian.

The exemption was necessary as subparagraph 3(6)(c), (d) and (d.1) would not protect a non-eligible person in the case of arrangements entered into after April 9th, 1974.

(c) *The Investment Dealer Exemption*

The acquisition of shares of a corporation by any person in the ordinary course of that person's business as a trader or dealer in securities will not, for that reason only, be deemed to be an acquisition of control. This provision⁷⁶ was also introduced during the proceedings of the Commons Committee on Bill C-201 because investment dealers as part of their day-to-day function as financial intermediaries acquire as principals a broad range of corporate securities for the purpose of resale. This could technically be said to effect a temporary "acquisition of control" of a company. Without the exemption, a number of Canadian investment dealers would be effectively precluded from engaging in normal underwriting or secondary market transactions.

3. *Reorganization Exemptions.*

There are two rather limited reorganization exemptions. As a result of representations made to the Commons Committee⁷⁷ an

⁷⁵ The explanation for members of the Commons Committee of amendments suggested during Committee hearings on the Foreign Takeovers Review Act stated that franchise arrangements finance Canadians to become independent businessmen and end with shares being owned by the new business. Thus, it was felt that they do not have a significant impact on the objectives of the takeover policy and that an amendment to exempt them would be in order.

⁷⁶ *Supra*, footnote 1, s.3(3)(b)(ii).

⁷⁷ See paragraph 6 of the Brief submitted by the Canadian Bar Association, *op. cit.*, footnote 28, Vol. II, Appendix "R", p. 42:469.

amendment was introduced to paragraph 3(3)(e) so that amalgamations of two or more corporations would not constitute the acquisition of control under certain circumstances. The amalgamation must be part of a corporate reorganization that is carried out for a purpose not related to the provisions of the Act and must result in the amalgamated corporation being controlled by the same person or group of persons that control each of the amalgamating corporations.⁷⁸

Unfortunately, the amalgamation exemption only serves to exempt one particular method of corporate reorganization, the statutory amalgamation of two or more corporations into one corporation. A great deal of criticism was directed at the government for not extending the reorganization exemptions to other transactions where there would be no ultimate change of control.⁷⁹ Unfortunately, no further amendments were introduced to extend an exempt status to other types of internal corporate reorganizations. Some types of reorganizations are now being dealt with by the Agency on the basis of the issuance of "non-reviewable" or "no action" letters.

Another and perhaps unintended reorganization exemption is provided for in paragraph 3(3)(d). It would permit an upward (not downward) or horizontal transfer of shares (not assets) of corporations controlled within a corporate group to other members of the same group. Reorganizations are discussed at greater length later in this article.⁸⁰

VII. *Dealing with the Agency.*

1. *Significant Benefit.*

If a notice filed with the Agency is to receive Cabinet approval, the information concerning the applicant's plans for the Canadian business enterprise⁸¹ must indicate that the transaction is or is likely to be of significant benefit to Canada. The factors to be taken into account originated from the *Gray Report*⁸² and are embodied in subsection 2(2) of the legislation.

⁷⁸ *Supra*, footnote 1, s.3(3)(e).

⁷⁹ The Senate of Canada; Minutes of Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, 29th Parl., 1973, Issue No. 23, Dec. 11th, 1973.

⁸⁰ *Infra*.

⁸¹ In filing a notice pursuant to s.8(1) or (2) the applicant must, among other things, prepare material containing detailed information concerning the applicant's plans for the Canadian business enterprise as specified in Schedule IV. See Regulations, *supra*, footnote 1, s.9(4).

⁸² The Gray Report, *op. cit.*, footnote 23, p. 456, is a blueprint of Schedule IV. It lists the factors to be taken into account by the Review Agency. The factors are described as the areas to which the review author-

The criteria are of a very general and flexible nature—no categorical judgments are possible—and give to the government through the Agency, a potentially very powerful instrument which could significantly alter the pattern of further foreign investment in Canada. In a sense, a bias exists against certain categories of foreign investment in cases where the applicant will, because of the nature of the acquisition, be unable to indicate any “significant benefit” to Canada even though no evidence of detriment exists. Most important, however, is the fact that the mere existence of the legislation will mean that the government need no longer formulate policy on an *ad hoc* basis such as was the case in dealing with the Denison Mines Limited and Home Oil Company Limited take-over bids. The definition of “significant benefit to Canada” will ultimately depend on how the government chooses to use its mandate.

The Agency has not had an opportunity to consider a large number of notices, and to date has passed upon approximately sixty-three applications, only eleven of which have been turned down. These figures are misleading as a substantial number of applications have been withdrawn before receiving Cabinet consideration on the basis that Cabinet approval was doubtful.⁸³

In discussing the significant benefit criteria, the Minister of Industry, Trade and Commerce, indicated before the Commons Committee⁸⁴ that the characteristics are,

. . . performance oriented; they are general since they are meant to cover, in a general way, all manufacturing, resource and service industries; they are aimed at long-term restructuring to make Canadian

ities would look to improve net benefits to Canada. The Report indicates that “these factors are not all of equal importance. Their significance for Canadian economic development will vary from industry to industry and from case to case”. The Report states that: “. . . the Review Agency should be directed to follow certain criteria or guidelines in considering industrial foreign investment proposals. Such criteria could be spelled out in legislation or in regulations established under the legislating authority establishing the review mechanism. These guidelines could include some or all of the points following: . . .”

The following points were then listed and discussed: contribution to productivity and industrial efficiency; compatibility with the government's industrial strategy; contribution to the level of economic activity and employment; geographic location in Canada; competitive impact of foreign direct investment; and other economic benefits.

⁸³ In a statement made in the House of Commons on Oct. 10th, 1974, the Minister of Industry, Trade and Commerce indicated that the Agency had received “certifiable applications for approximately 70 screenable transactions”; House of Commons Debates, Vol. 119, No. 9, 1st Sess., 30th Parl., Oct. 10th, 1974.

⁸⁴ *Op. cit.*, footnote 28, Issue No. 26, June 5th, 1973, p. 26:7.

industry more rationalized and specialized, more efficient and competitive; they are exclusive. The review process, although it will have much scope under the many elements in the five factors, will be bound to the range of the five factors and only those five.

The Department of Industry, Trade and Commerce and the Agency have issued a number of news and press releases indicating the Cabinet's decision, with respect to a number of applications. In some instances the reasons for the decisions have been published providing some insight as to how the Agency is interpreting the legislative criteria.⁸⁵

The decisions indicate that the Cabinet is primarily concerned in obtaining commitments or undertakings regarding:

- (a) capital expenditures for plant expansion, new product development and capital equipment based upon a "buy Canadian" policy;
- (b) the active development of export markets and the encouragement of sales in foreign countries through foreign affiliates of the applicant;
- (c) the constitution of the board of directors and management of the applicant and the Canadian business enterprise to ensure that a majority of the directors are Canadian citizens ordinarily resident in Canada. This is often coupled with a recommendation that independent Canadians be appointed to the board of directors of the applicant and the Canadian business enterprise;
- (d) equity participation. The phrase "the degree and significance of participation by Canadians in the Canadian business enterprise" in paragraph 2(2)(b) of the Act is being interpreted in part by requesting that the applicant agree to make its shares or those of the Canadian business enterprise available to Canadians. Sometimes this may take the form of an undertaking by the applicant to list its shares or those of the Canadian business enterprise on a Canadian stock exchange;
- (e) research and development to ensure that a larger proportion of expenditures in this area are incurred in Canada; and,
- (f) the reinvestment of earnings of the Canadian business enterprise in Canada.

Members of the Agency have repeatedly indicated that it is not their function to compel the applicant to provide undertakings of the nature described above. However, the applicant is left with the clear impression that it must satisfy the Agency that the acquisition or new investment is or is likely to be of significant benefit to Canada as a precondition of Cabinet approval.

In two of the most recent press releases issued by the Department of Industry, Trade and Commerce on March 3rd and 18th, 1975, the Department, in considering twenty-seven applications summarized the principal factors of assessment of significant

⁸⁵ News Releases, Foreign Investment Review Agency, Ottawa, Aug. 9th, 1974; Sept. 11th, 1974; Oct. 31st, 1974; Nov. 11th, 1974; Dec. 23rd, 1974; and March 3rd, 6th and 18th, 1975.

benefit to Canada which resulted in twenty-four approvals. The enumerated factors were increased employment; new investment; increased resource processing or use of Canadian parts and services; additional exports; Canadian participation (as shareholders, directors or managers); improved productivity and industrial efficiency; enhanced technological development; improved product variety and innovation; beneficial impact on competition; and compatibility with industrial and economic policies.

The decisions which have been made to date do not indicate the development of any particular pattern. In many of the reported decisions, the target corporation has been a wholly-owned subsidiary of a foreign corporation.

The only major decisions involving shares of corporations having Canadian public shareholders resulted in the government's refusal to permit Celanese Canada Ltd. to acquire Westmills Carpets Ltd. and its refusal to permit Bowaters Newfoundland Limited, a wholly-owned subsidiary of Bowater Corporation, London, England, to acquire Lacroix Inc. of Quebec. The shares of Westmills are essentially all Canadian owned and as well a block of thirty-three and one half per cent are owned by a Canadian venture capital company. The government concluded that the target company, founded by Canadian venture capital with Canadian government financial assistance, should be able to continue and develop as a successful independent Canadian business enterprise in an industry already substantially foreign controlled. Lacroix Inc. is a publicly traded company engaged in the wholesaling and retailing of hardware and plumbing supplies. In refusing to permit the application the government stated that the record of Lacroix Inc. to date "has been one of steady growth in sales and profits". The government concluded that Lacroix "should be able to continue and develop as a publicly owned Canadian business enterprise and that the proposed acquisition was not a necessary condition of that continued development".

2. Applications.

Non-eligible persons are required to file a notice in writing with the Agency of their intention to acquire control of a Canadian business enterprise or to establish a new or unrelated business in Canada. The notice must be prepared in accordance with the Regulations,⁸⁶ must be signed by an authorized officer of the applicant with initials on each page and on any alterations, and must be accompanied by a certified copy of an authorizing resolution of the board of directors of the applicant or other evidence of authority and a certificate of incumbency.

⁸⁶ Regulations, *supra*, footnote 1, ss 5-9.

When a notice is received by the Agency it is reviewed by the Compliance Branch for the purpose of determining the existence of any patent defects. If there are, then the notice is returned forthwith and the sixty-day period does not commence until the notice is filed in a form acceptable to the Agency. At that time the Commissioner will issue a registered letter as a certificate of receipt to the applicant identifying the day upon which the sixty-day period commenced. The Assessment Branch of the Agency will then scrutinize the notice. They will normally contact other branches of the government to obtain further background material and information concerning both the applicant, the Canadian business enterprise and the business carried on by it. The Agency is particularly sensitive to the employment position in the area where the Canadian business enterprise is located. It is also interested in knowing whether the Canadian business enterprise has received any government grants or has participated in any government assistance programmes.

The information required is so specific and complex as to require the concentrated assistance of senior officers of the applicant and the Canadian business enterprise. As well, information concerning the applicant will not always be readily available because a rather detailed breakdown of industrial product markets, not otherwise available for normal financial reporting purposes, is required. The Regulations provide that information may be deleted if the applicant is unable to obtain it, providing the notice explains the inability to obtain such information and the Minister is satisfied with the reasons. As well, the Regulations⁸⁷ permit an applicant to omit information that is not relevant if the Minister is satisfied with the reasons given for the irrelevance.

Forms of notice have been prepared by the Department. It will, however, not be sufficient to answer the questions set forth in the government's forms as the information raised in the Regulations requires much more detail.

We understand that a short form of notice is being considered where the Canadian business enterprise is relatively small. As well, we believe that the Regulations and Schedules are being amended to abbreviate the material and information required to be included in a notice.

3. *Undertakings.*

In discussing guidelines for the review process, the *Gray*

⁸⁷ *Ibid.*, s.5(3).

*Report*⁸⁸ suggested that the review agency bargain with the applicant to obtain more benefits for Canada.⁸⁹

Recent experience with the Agency indicates that members of the Assessment Branch are normally in a position to discuss the applicant's notice within two weeks after the subsection 9(4) certificate has been issued by the Commissioner. At this point it will normally be beneficial for the applicant along with its advisers to meet with the Agency to discuss the extent to which significant benefit has been demonstrated, and those areas of FIR-P-4 of the notice where it feels that further commitments will be required by the applicant if the Minister is to be in a position to recommend the approval of the proposed transaction to Cabinet. The Agency attempts to obtain firm commitments or undertakings, or both, which until recently took the form of an amended FIR-P-4. The Agency is now requiring all undertakings to be formally executed under the corporate seal of the applicant addressed to Her Majesty the Queen in Right of Canada.

In view of the broad powers vested in the Agency, *inter alia* to render the acquisition or investment nugatory, applicants are understandably and quite justifiably having difficulty in giving firm commitments or undertakings which they themselves know may possibly not be met. Consequently, notwithstanding statements made by the Minister of Industry, Trade and Commerce to the Commons Committee⁹⁰ applicants on the advice of counsel are completing the notice on a prospectus level of full, true and plain disclosure.

In a number of cases it is being suggested that applicants undertake to make their shares, or those of the Canadian business enterprise, available to the Canadian public. As well, it is being suggested that a commitment be given by the applicant that

⁸⁸ *Op. cit.*, footnote 23.

⁸⁹ "A review process could concern itself with bargaining for more exports, more procurement and more research and development without regard for their impact on efficient industrial development in Canada." Gray Report, *ibid.*, p. 456.

⁹⁰ On June 5th, 1973, the Minister stated that he had previously suggested that some undertakings would be based on the medium term plans of the applicant. In addition he stated: "These plans would, to some extent, be based on the conjecture about the future and therefore would simply reflect the company's [the applicant's] anticipation concerning its future development. They would not be guaranteed in their entirety. Thus flexibility and good sense must be exercised by the Minister."

The Minister further stated: "If, however, the failure to comply with an undertaking is clearly the result of changed market conditions—for example, the undertaking to export frisbees is followed by the collapse of the frisbee market—the person would not be held accountable." *Op. cit.*, footnote 28, Issue No. 26, June 5th, 1973.

dividends not be paid from the earnings of the Canadian business enterprise being acquired and sometimes that the applicant itself, if it is a Canadian corporation, will not pay dividends or that the applicant or the Canadian business enterprise, or both, undertake to reinvest all earnings in Canada. From a practical standpoint, and having regard to current economic conditions, many applicants are justifiably not prepared to give such undertakings. In other cases, legal impediments prevent the giving of undertakings of this nature.⁹¹

The Agency is also attempting to extract undertakings from corporations not party to the proposed acquisition. Their jurisdiction in this regard is questionable as the references in subsections 9(c), 11(1), 11(2) and 11(3) contemplate undertakings from the parties to the transaction as opposed to third parties.

4. *Dealing with the Provinces.*

In assessing significant benefit the Agency is required, as one of the criteria, to consider provincial industrial and economic policy objectives.⁹²

The provinces are very keenly interested in the position being taken by the Agency with respect to proposed acquisitions or new investment in their respective jurisdiction particularly having regard to the present economic climate in Canada.⁹³ In some cases, applicants have made direct representations to the provin-

⁹¹ For example, The Exchange Control Act, 1947 (U.K.), 10 & 11 Geo. 6, c.14, s.24, provides that: "No person resident in the United Kingdom who has a right . . . to receive any specified currency . . . shall do, or refrain from doing, any act with the intent to secure

(a) that the receipt by him of the whole or part of that currency . . . is delayed; or

(b) that the currency . . . ceases, in whole or in part, to be receivable by him."

The provisions of s.17 might well permit the Treasury of the United Kingdom to make the legislation applicable to dividends and other rights which may attach to shares. It may be impossible for a U.K. parent to give undertakings respecting either a distribution of securities or dividends.

⁹² Para. 2(2)(e) of the Act provides that one of the factors to be taken into account is, "the compatibility of the acquisition or establishment with national, industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment." *Supra*, footnote 1.

⁹³ The front page article in the Feb. 17th, 1974, issue of *The Financial Times of Canada*, Vol. 63, No. 37, entitled *Foreign Investment Restrictions—Provinces Gang Up on Ottawa*, reads: "Canada's Foreign Investment Review Act passed by Parliament fifteen months ago, is in trouble. All ten provinces are urging that proposals for the screening of new foreign investments not be brought into force. . . . The move is being led by the Atlantic

cial governments concerned. Evidence indicates that provincial interests may be a significant factor in obtaining Agency approval.⁹⁴ Accordingly, it will be important in each case that the applicant either contemporaneously file a copy of the notice with the appropriate provincial department or make representations, or do both, to ensure that the provincial position, if favourable, is communicated to the Agency.

5. *Ruling Applications.*

As a result of representations to the Commons Committee, the Act was amended to provide that rulings regarding both eligibility status and unrelated business be binding upon the Minister,

... for so long as the material facts so disclosed remain substantially unchanged or for two years from the time when the statement was so submitted if, throughout that period, the material facts so disclosed remain substantially unchanged.⁹⁵

(a) *Eligibility*

In the case of small shareholdings the Act⁹⁶ establishes a method pursuant to which a corporation can determine whether or not shareholders holding not more than one per cent of a corporation's outstanding shares are eligible or not.

Ruling applications under subsection 4(1) are still very much an *ad hoc* procedure. Applications may be instituted by the applicant or its solicitor. The Agency is requesting that the applicant initially provide it with a draft application subsequent to which the Agency will meet with the applicant to determine what additional documentation, if any, is necessary.

provinces which say that they do not want fresh restrictions put on foreign companies at a time when unemployment is 11% and rising . . . they are supported by the wealthier provinces which worry about the wide powers being given to the federal government to control existing as well as new investment by foreign firms."

⁹⁴ For example, in the case of the acquisition by Babcock & Wilcox Refractories Limited of Holmes Insulations Limited, provincial representations were apparently made in that concern was expressed over the possible detrimental effects which a rejection would have on employment. In the case of the acquisition by Canadian Blue Bird International Inc. of J. H. Corbeil Ltée announced on Dec. 23rd, 1974, it was apparent that the Quebec government was primarily responsible for the reversal of an earlier decision of the Cabinet not to allow the proposed acquisition.

⁹⁵ *Supra*, footnote 1, s.4(1). This was the result of the submissions of the Canadian Bar Association, *op. cit.*, footnote 28, Vol. II, Appendix "R", p. 42:472, the Brief of The Toronto Stock Exchange, Vol. III, Appendix "2D", p. 42:469, *ibid.*, and the Brief of The Investment Dealers' Association, Vol. III, Appendix "2B", p. 42:390, *ibid.*

⁹⁶ *Ibid.*, s.3(5).

In the case of an eligibility application the Agency will want to be furnished with a detailed outline of the corporate applicant's capital structure, including all securities having a contingent right to vote at any meeting of shareholders. If the applicant is attempting to indicate that control lies with either one or a group of its shareholders who are eligible persons, it must provide the Agency with proof that the individuals in question are eligible persons. For this purpose, it could rely on the presumptions contained in subsection 3(5) with respect to individuals with small shareholdings. However, where any shareholder holds more than one per cent of the issued shares of the applicant, the following information must be provided to the Agency respecting such shareholdings:

1. the relevant information concerning the registered owner;
2. where registration is in the name of a nominee, the relevant information regarding the beneficial owner; (This may be difficult if not impossible to obtain.)
3. whether or not the shares are subject to a voting trust, shareholders or other such agreement, and if so, the terms of such an agreement.

If the applicant wishes to establish that control in fact lies with the board of directors of the applicant⁹⁷ then it will have to prove that its directors are eligible persons pursuant to paragraph 3(7)(c). To this end, the Agency will require the names, addresses, citizenships and residences of all of the directors.

Where the board of directors does not directly exercise control where, for example, outside directors form a majority and only attend periodic meetings and do not take part in the day-to-day administration of the applicant, the Agency will want to review the composition of the "other governing body of the corporation" which in fact does exercise control. If the board of directors has an executive committee, the Agency will want evidence or information as to how it operates and whether or not it controls the applicant's proxy machinery. It would be useful if the applicant could establish that a majority of the corporation's shareholders have been in the habit of providing management with their proxies or in the alternative that resolutions passed by management for shareholder approval are always confirmed.

In the event that the applicant wishes to establish that control lies with management it will be important to provide the following

⁹⁷ S.3(7)(a) provides that if no one person or group of persons controls the corporation it is, in the absence of any evidence that the corporation is in fact controlled by some other person or group of persons, presumed to be controlled by its board of directors. *Ibid.*

information relating to shareholders' meetings over the last five years:

1. their dates;
2. the number of shares outstanding at the date of each meeting;
3. the number of shares represented in person and by proxy at each such meeting;
4. the number of shares represented by proxies held by management at each meeting;
5. details of proxy battles, if any, over that period; and,
6. a copy of material forwarded to shareholders during that time.

It will be useful to provide the Agency with the names, addresses and citizenship of senior management.

The Agency will also require information as to whether nominee directors, if any, of any shareholder of the applicant can control its board of directors either directly or indirectly through their ability to breach the quorum requirements of the board.

The Agency is not, at least initially, requesting opinions of counsel as to the eligibility status of their clients.

In some cases non-eligible persons have prepared elaborate trust documents or have made other arrangements for the purpose of attempting to establish that control lies with a number of Canadian trustees or directors. To the best of our knowledge no application of this nature has received approval. If the Canadian business that is currently foreign controlled could obviate review of all future transactions by some alteration to its voting share structure which neither changed the management group nor increased Canadian participation in the business, we believe the whole statute would have been circumvented. We understand that a number of arrangements have attempted to separate certain "shareholder rights" pertinent to such shares from the beneficial ownership thereof. The Agency has indicated that it will not approve any arrangement the effect of which would negate the whole purpose of the statute. Any arrangement of this nature must result in some transfer of real control to Canadians. For that to happen the Canadians must be completely independent of the controlling non-eligible corporation.⁹⁸

⁹⁸ The Agency does not wish to find itself in the invidious position of having to sit in judgment on the true and total independence of Canadians appointed as either trustees or nominee directors. The Nov. 30th, 1974 issue of *The Globe and Mail* reported an arrangement proposed to be entered into by Bovis Corporation Ltd. of Toronto pursuant to which its parent, a non-eligible corporation, would retain beneficial ownership of all shares in the capital of the Canadian subsidiary therefore entitling it to dividends and all other rights of a shareholder except voting rights which were being transferred to three outside Canadian directors who were not part of the full-time management. The three directors would exercise, under the

(b) *Related Business*

Once Phase II is proclaimed, the small business exemption will cease to be available to acquisitions of control by a person or group of persons not already carrying on business in Canada.⁹⁹ Thereafter, non-eligible persons who did not "get their foot in the door" will be subject to review for any size of investment. Accordingly, prior to the second proclamation any non-eligible person may expand into unrelated businesses in Canada through the acquisition of small corporations which may be built into larger ones. After the second proclamation, acquisitions will only be free of the review process based upon the small business exemption if the non-eligible person is already established in Canada and if the acquisition is of a related business.

As the second proclamation has not yet taken place, there have been no applications for binding rulings with respect to whether one business or activity is unrelated to another. As the preliminary guidelines¹⁰⁰ are extremely broad, it can be expected that a number of applications will be made for binding rulings with respect to the related business issue, particularly where major expenditures are proposed by foreign investors. Counsel are not likely to recommend that their clients proceed without obtaining such a ruling in view of the powers vested in the courts to render a transaction nugatory or to transfer the shares or assets to a Canadian trustee.

arrangement, the majority voting rights plus voting rights belonging to other Bovis directors, "in their own discretion" according to a company statement. Counsel for the corporation indicated to *The Globe and Mail* that "Under the [Act], control is a question of fact. We think that this arrangement also clearly falls within the intent and spirit of the legislation". The voting agreement was irrevocable for five years and after that time there could be a joint move to alter it, but neither side could revoke it unilaterally. The Foreign Investment Review Agency issued a press release involving the Bovis transaction. Mr. Richard Murray, the Commissioner, stated: "It is the view of the Agency and of our legal advisers that the transfer of voting rights by non-Canadians, without the corresponding transfer of equity ownership, is not by itself sufficient to change the ultimate control of the corporation,—this is patently so in cases where the voting rights may revert to non-Canadians at some time in the future—such stripping away of one of the properties of a common share just does not achieve what these companies would like it to do. Lawyers have come in and talked to us in depth about their proposals, and it has become clear that retention of the beneficial ownership of equity by foreign parents is sufficient to bring the Canadian company within the scope of the review requirements."

⁹⁹ *Supra*, footnote 1, s.31(3).

¹⁰⁰ *Supra*, footnote 25.

We believe that the Agency will replace the preliminary guidelines on related business with a more extensive set of guidelines to provide a greater degree of certainty and precision.

VIII. *The Legislation—Scope and Problems.*

1. *Extra-Territoriality.*

Many witnesses appearing before the Commons and Senate Committees expressed concern over the extension of the Act to (a) transactions involving internal corporate reorganizations, outside Canada, that may affect the control of Canadian business assets, but where there is no change of ultimate or *de facto* control, and (b) foreign transactions, where there is a Canadian element but where it is only a small and incidental part of a much larger transaction, that are primarily concerned with business outside Canada.¹⁰¹

The legislation will clearly apply to the transfer of control of a Canadian business enterprise from one non-eligible person to another. No one questions Canada's legitimate interest in such circumstances. However, it has been said that the extension of the Act to the types of transactions referred to in (a) and (b) above is an overreaching which is unfair; is unnecessary in terms of the objectives of the Act; is unlikely to be productive of any significant benefits to Canada; and is entirely likely to constitute an unproductive administrative burden for the Agency.

(a) *Internal Corporate Reorganizations—Outside Canada*

There are many transactions which take place in foreign jurisdictions involving internal corporate mergers or reorganizations which may result in an acquisition of control of a Canadian business enterprise by a non-eligible person and for which no exemption is available in the Act, Regulations or any of the guidelines.

Transactions of this nature are normally implemented for the purpose of consolidating the operating assets of a corporate group of companies for efficiency, administrative or other business purposes. In other cases, corporate reorganizations are consummated for legitimate tax purposes. The filing of a notice in these cases, particularly where there exists a large number of companies in the corporate group, is both time consuming and expensive. As well, it will normally be difficult to demonstrate any significant benefit to Canada in terms of the criteria set forth in paragraphs 2(2)(a) to (e) of the Act.

¹⁰¹ *Op. cit.*, footnote 79. See also the Brief of the Canadian Bar Association, *op. cit.*, footnote 28, Vol. II, Appendix "R", p. 42:472.

In our view the Act should be amended to exempt internal corporate reorganizations consummated outside Canada which do not involve any change in ultimate or *de facto* control of shares or assets of a Canadian business enterprise, provided they are undertaken for a purpose unrelated to the provisions of the Act.

Some corporate reorganizations outside Canada are being dealt with by the Agency on the basis of the issuance of "non-reviewable" letters discussed later in this article.¹⁰²

(b) *The Far Reaching Effects of Paragraph 3(6)(h)*

Paragraph 3(6)(h) will be of significant concern to companies that are incorporated outside Canada and have no establishment in Canada to which employees report for work, if they are entering into share purchase or asset acquisitions. It will affect any transactions between corporations operating wholly without Canada if the target corporation controls in fact, whether directly through the ownership of shares or indirectly through a trust, a contract, the ownership of shares of any other corporation *or otherwise*, a Canadian corporation carrying on business in Canada. Assuming the target company and its associates have in excess of \$250,000.00 of gross assets or \$3,000,000.00 in annual gross revenues, the section will apply regardless of the size of the Canadian subsidiary. This is because the business of a controlled subsidiary is deemed to be carried on by the controlling corporation. Accordingly, an Australian corporation proposing to acquire a United Kingdom corporation having a Canadian subsidiary which is a "Canadian business enterprise" must file a notice with the Agency.

We understand that the intended effect of this paragraph is to "flow through" the business and presumably the status of a Canadian business enterprise of the controlled to the controlling corporation.

A number of technical arguments could be advanced which, if acceptable, would nullify the intended effect of paragraph 3(6)(h). Firstly, even though paragraph 3(6)(h) has the effect of imputing the business of a Canadian business enterprise, the controlled corporation, to its foreign controller, it could be argued that the foreign controller is not a Canadian business enterprise as defined if it does not itself maintain an establishment in Canada to which its employees ordinarily report for work.

We would also point out that, as is provided in subparagraph 3(3)(a)(i), control of a Canadian business carried on by a corporation can only be acquired by acquisition of shares, or of

¹⁰² *Infra*.

all or substantially all of the property used in carrying on the business in Canada, in either case of *that* corporation. Further, subparagraph 3(3)(a)(i) provides that control of a Canadian branch business may only be acquired by acquisition of the property used in carrying on the business in Canada. While it is arguable that the acquisition of the shares of a controlling corporation constitutes in effect the acquisition of the shares of the controlled corporation, or that the acquisition of the shares of a controlling corporation constitutes in effect the acquisition of the business property of the controlled corporation, we are of the view that this is not the intent of the legislation and is inconsistent with general corporate law. The acquirer of a corporation does not acquire the property of the corporation, but merely acquires the bundle of rights and obligations attaching to the shares which he owns. To hold otherwise would be to accelerate what we perceive to be an already distressing disregard for the separate existence of the corporate entity.

Although the Agency recognizes these technical arguments, it takes the position that the acquisition of the controlling corporations is a reviewable transaction. While we question whether the ambit of the legislation extends to that degree, applicants and counsel will be reluctant to proceed in view of the broad powers which the courts have to render transactions nugatory. Furthermore, our views must be tempered in view of section 11 of the Interpretation Act, which states:¹⁰³

Every enactment shall be deemed remedial, and shall be given such fair, legal and liberal construction and interpretation as best ensures that attainment of its objects.

Subparagraph 3(3)(a)(i) and paragraph 3(6)(h) could also be used to support an argument that corporate reorganizations involving foreign corporations need not involve the filing of a notice pursuant to subsection 8(1). Subparagraph 3(3)(a)(i) provides that control *may* be acquired only in certain ways. The provision does not state that control is necessarily acquired. Accordingly, if ultimate control rests at the pinnacle of a corporation group, and if the legislation is directed at changes in ultimate or *de facto* control, it may be possible to argue that there is never an acquisition of control during a reorganization. This line of reasoning can be pursued having regard to the provisions of paragraph 3(6)(h). A controlling corporation is deemed to carry on the business of its controlled corporation. Accordingly, if a Canadian subsidiary at the bottom of a corporate pyramid carries on business in Canada, paragraph 3(6)(h) has the effect that

¹⁰³ R.S.C., 1970, c.I-23.

each corporation that controls that subsidiary is deemed to carry on its business in Canada. It is questionable therefore whether there can be an acquisition of control of a business carried on in Canada within a corporate group where the ultimate controller of that group is deemed to carry on and therefore control that business in Canada. It is difficult to conceive how a corporation can acquire control either of something it already controls, or of something which is already controlled by a person that controls it.

If the foreign target company operated only a branch in Canada and was being acquired through a share purchase by another non-eligible person, then a stronger argument could be made that a notice need not be filed as paragraph 3(6)(h) only deals with corporate entities.

2. *Involuntary Dispositions.*

The legislation clearly applies to a number of transactions which may be classified as involuntary dispositions. Acquisitions of control may take place through death or as a result of an execution or judgment by a court or other tribunal. Except in the case of buy-sell arrangements enforceable on death, the effect of transfers of control through involuntary transactions will mean that, in the event control is transferred to a non-eligible person, such non-eligible person will automatically be in default of the legislation under subsection 8(1). Nevertheless, the Act empowers a court, on petition by the Minister, to render the disposition nugatory and to vest the shares in a court appointed trustee for subsequent sale to eligible buyers.¹⁰⁴

3. *Real Estate Transactions.*

A number of legal opinions were expressed to officials of the Department of Industry, Trade and Commerce and to the Commons and Senate Committees¹⁰⁵ during discussions and debate

¹⁰⁴ The Brief of the Canadian Bar Association, *op. cit.*, footnote 28, Vol. II, Appendix "R", pp. 42:468 and 42:469, states: "Control of a Canadian business enterprise may be acquired by a non-eligible person involuntarily by inheritance under a will or other testamentary disposition or as next-of-kin on an intestacy. The Bill does not deal with the position in these circumstances of a non-eligible beneficiary or next-of-kin or with the position of the executor or administrator who is under a legal obligation in respect of the distribution of the estate. It is not clear whether it was intended that the review procedure be applicable in this type of situation. The consequences of this legislation on the administration of estates could be considerable. The passing of an interest in, for example, a family business could bring such a testamentary disposition within the ambit of this legislation."

¹⁰⁵ See for example the Briefs of The Canadian Real Estate Association, and the Housing and Urban Development Association of Canada, *op. cit.*, footnote 28, Vol. III, Appendices "V" and "U", pp. 42:19 and 42:110 respectively.

on both Bill C-201 and the Act to the effect that the legislation was broad enough to cover transactions in real estate for development or redevelopment or for investment as distinct from the acquisition of control of a corporation engaged in the real estate business. The opinions expressed were primarily based on the very broad definition of the term "business" as including "any undertaking or enterprise carried on in anticipation of profit".

In determining whether an acquisition of real estate will require Cabinet approval, the non-eligible investor must first determine whether the property constitutes a Canadian business enterprise. If no business activity is being carried on in association with the land then presumably no problem will arise. This, however, is not normally the case as usually some form of business activity is conducted in association with real estate. While the opening provisions of the Guidelines Concerning Real Estate Businesses¹⁰⁶ indicate that no account will be taken of the definition of "business" in other laws or precedents established pursuant thereto, we are concerned that a court might attempt to apply principles involved in an area such as income tax law to deal with this amorphous concept. The investor must then determine whether he will be acquiring all or substantially all of the property used in carrying on the business, or whether the property to be acquired constitutes part of a business that is capable of being carried on as a separate business. Lastly, the investor must consider the effect of subsection 3(9).

Subsequent to the hearings of the Commons Committee, the Chairman tabled a number of proposed amendments to the legislation, although these did not initially include subsection 3(9). We assume this subsection was subsequently introduced into the legislation to satisfy those concerned with the application of the legislation to the acquisition of real estate as an investment. The expressed purpose of the amendment was to:

. . . clarify the fact that if you hold land only for the purpose of improving it or for the purpose of maintaining it for your personal use and enjoyment, that is not, by itself carrying on business.¹⁰⁷

We are concerned that the legislation insofar as it purports to apply to real estate transactions is very difficult to interpret and that even the most liberal interpretation still casts doubts on the legality of several kinds of transactions. Our concern is shared and has been reinforced not only by other non-eligible develop-

¹⁰⁶ The Canada Gazette, Vol. 108, Part I, No. 14, April 6th, 1974, p. 1201.

¹⁰⁷ Statement of Mr. Breau, M.P., *op. cit.*, footnote 28, Issue No. 42, July 19th, 1974, Vol. I, p. 42:111.

ment companies but also by various associations representing eligible as well as non-eligible corporations, which have submitted briefs to and appeared before the Commons and Senate Committee.¹⁰⁸ Reports of the Commons and Senate Committees hearings indicate that the Committees members, departmental officials and the Minister were uncertain and confused with respect to the effect that the Act would have or even was intended to have on real estate transactions.

The Real Estate Guidelines were designed to serve as a guide as to the manner in which certain provisions of the Act were to be interpreted and administered. The problem is that the criteria and factors to be considered are of such a general, conflicting and inconclusive nature that in practice they provide little assistance to counsel in determining whether or not the types of real estate transactions which are entered into should be submitted to the Agency. This will become apparent when they are examined in view of:

- (1) the number of factors which must be considered;
- (2) the use throughout the Guidelines of qualified phrases such as "not necessarily", "may indicate", "may be significant", "may be associated", "may tend to be associated", "normally associated", "may tend not to be associated", "may include", "usually involves", and "may be inferred"; and,
- (3) the conflicts which arise in applying the criteria required to be considered in the application of the Guidelines to transactions in real estate.

We understand that this area is currently under review by the Agency.

4. Joint Ventures and Partnerships.

Subsections 8(1) and (2) of the Act present serious problems for Canadian joint ventures, partnerships and other similar unincorporated organizations where one of the members is a non-eligible person. These provisions require every group of persons a member of which is a non-eligible person to file a notice of a proposed takeover or of the establishment of a new business with the Agency regardless of the size or interest of the non-eligible person in the organization. The basic test to be applied in determining whether or not a corporation is a non-eligible person, that is the control-in-fact test, is not applicable in the case of partnerships or joint ventures. The effect of this inconsistency is to deem joint ventures or partnerships controlled in fact by eligible persons to be non-eligible if only one partner or joint venturer is a non-eligible person. This will have the

¹⁰⁸ *Op. cit.*, footnote 105.

effect of limiting business arrangements between eligible and non-eligible Canadian corporations although the interest of the non-eligible corporation is insignificant. This effect is rather disturbing in view of the recent position taken by the Prime Minister in encouraging joint ventures in the natural resource field to have a fifty to sixty per cent Canadian content.¹⁰⁹

5. *Pension Funds, Estates and Trusts.*

Before the Act was considered and subsequently amended by the Commons and Senate Committees, concern was expressed as to the rules to be applied to determine the "eligibility" of certain trusts such as pension funds, other trusts contemplated by section 205 of the Income Tax Act¹¹⁰ or estates. The problem was that a corporate pension fund, having regard to the Interpretation Act¹¹¹ is neither a person or a group of persons. It is not an individual nor does it have citizenship. Paragraph 3(3)(f) was added to the Act by the Commons Committee.¹¹² It assimilates the persons who have a beneficial interest in the trust to the shareholders of a corporation and the trustees to the board of directors for the purpose of determining whether a trust or similar entity is a non-eligible person.

Another problem with pension funds relates to the acquisition of control. Pension funds are quite often associated with corporations. In determining whether a non-eligible person is acquiring

¹⁰⁹ The Prime Minister as recently as three months after first proclamation indicated that consideration was being given to amendments to the legislation. On June 28th, 1974, during an election campaign speech in Sault Ste. Marie, he suggested that the Party sets as an objective, "that new major projects in the natural resource field should have least 50%, preferably 60%, Canadian equity ownership". Prior to the speech, at a briefing in Kitchener, Ontario, Industry Minister Alastair Gillespie said natural resources would be defined as fisheries, forestry, mining, gas, oil and pipelines. The Minister reiterated the Prime Minister's views in the House of Commons on Oct. 10th, 1974, stating: "Such a policy objective recognizes that the natural resources of Canada are part of the patrimony, the birth-right of Canadians. It recognizes that many of the natural resources of Canada are non-renewable and are being depleted . . . but the policy objective is not retroactive, instead it looks to the future. It recognizes that by insisting upon 50% and preferably 60% equity ownership in major new projects over a period of time we can achieve a repatriation of majority ownership and control of the resource companies in Canada. Quite clearly, if each new, major project in a non-renewable resource development requires 50%, and preferably 60%, equity ownership by Canadians, and the existing properties continue to deplete, sooner or later there will be significantly greater Canadian participation." House of Commons Debates, Vol. 119, No. 9, 1st Sess., 30th Parl., p. 309.

¹¹⁰ *Supra*, footnote 14.

¹¹¹ *Supra*, footnote 103.

¹¹² *Op. cit.*, footnote 28, Issue No. 42, July 19th, 1973, Vol. I, p. 42:5.

control of a Canadian business enterprise must it include the shares of the Canadian business enterprise owned by the pension fund for its employees? Presumably not.

Pension funds form one of the largest pools of investment capital in Canada. The nature of the investments undertaken by them is generally regarded as being "passive", for growth or yield, rather than "active", to exercise control or management over the affairs of the company. It is the stated position of the Minister and the Agency that the Act is not intended to screen passive investment. Thus, to the extent that pension funds can be regarded as passive or portfolio investors, they may well escape the purview of the Act.¹¹³

6. Reorganizations.

One of the more common problems being experienced in the application of the legislation relates to the effect which the legislation is having on internal corporate reorganizations (a) inside Canada, where there is no change of ultimate, actual or *de facto* control or (b) outside Canada, that may affect a change of control of Canadian business assets, but again where there is no change of ultimate, *de facto* or actual control. Earlier in this article we touched briefly on the types of reorganization referred to in (b) above¹¹⁴ and to the limited reorganization exemption contained in paragraphs 3(3)(d) and 3(3)(e).¹¹⁵

The types of reorganizations we are speaking of are those which do not result in any actual or *de facto* change of control of business assets or property within a corporate group of companies and which are carried out for a purpose unrelated to the provisions of the Act. Ultimate control of the Canadian business enterprise remains with the same non-eligible person both before and after the reorganization.

By way of illustration, the following examples will indicate the types of internal corporate reorganization to which we refer:

1. a Canadian operating subsidiary of a non-eligible parent proposes to transfer its Canadian business to its own Canadian subsidiary;
2. a Canadian operating subsidiary of a non-eligible parent proposes to acquire all or part of its parent's Canadian branch business or in the alternative, the Canadian operating subsidiary proposes to transfer all or part of its assets to a Canadian branch of its non-eligible parent;
3. a non-eligible parent proposes to transfer the shares of one of its Canadian subsidiaries to another of its Canadian subsidiaries further down the corporate chain;

¹¹³ See footnote 42, *supra*.

¹¹⁴ *Infra*.

¹¹⁵ *Infra*.

4. a Canadian subsidiary of a non-eligible parent proposes to buy the assets of a sister Canadian subsidiary;
5. a horizontal change of control of a Canadian subsidiary within a non-eligible controlled group no matter how far removed from the Canadian subsidiary; and
6. the proposed dissolution or winding up of a Canadian subsidiary where its assets and business are proposed to be distributed to its non-eligible parent, even without change in the nature, location or extent of the Canadian business.

In each of the examples cited above, the Act requires that a notice be filed with the Agency pursuant to subsection 8(1). In most cases, particularly where there exists a large number of corporations in the group of companies involved, it would be extremely time consuming and costly to prepare a notice in the form required by the Regulations. As well, in most instances, it is difficult to demonstrate significant benefit in terms of the criteria set forth in paragraphs 2(2)(a) to (e) of the Act although it would normally not be difficult to establish that there is "no detriment" to Canada. The practical result for those who are not familiar with the procedure currently being followed by the Agency is that corporate reorganizations have been either aborted or substantially redesigned. In our view this is an unnecessary and unintended result of the provisions of the Act.

The Agency is handling a large majority of corporate reorganizations to which the legislation applies by merely requiring the applicant to prepare on a skeleton basis forms FIR-P-1, FIR-P-2 and FIR-P-3, and demonstrating that the proposed reorganization will not result in any detriment to Canada having regard to the matters required to be considered in FIR-P-4. Experience with the Agency indicates that although the Agency has stated that reorganization applications are being dealt with on an *ad hoc* basis, it has issued "no action" or "non-reviewable" letters in almost all of the situations described in the examples enumerated above. Although there may be some justification for issuing letters of this nature based upon an interpretation of the "control in fact" concept or the "enterprise entity" doctrine, there is no direct statutory or regulatory authority for these types of letters. In view of the current practice, it seems to us that it would be advisable to either amend the legislation or issue guidelines for the purpose of confirming and establishing a statutory or regulatory basis for the practice being currently adopted by the Agency.

In reviewing the legislative history of the Act and in particular the proceedings of the Commons and Senate Committees, we have concluded that the legislation was primarily designed to apply to changes in ultimate *de facto* control of Canadian

business enterprises and not with reorganizations of the nature described above where there is no change in the underlying control of the Canadian business enterprise.

A number of briefs were submitted to the Commons Committee and the Senate Committee dealing with the problems which the legislation would raise for internal corporate reorganizations of the nature described above. The brief of The Canadian Bar Association¹¹⁶ dealt specifically with one form of corporate reorganization: statutory amalgamations.

The government introduced the requested amendment in the Commons Committee on July 12th, 1973. In explaining the amendment before the Commons Committee, a representative of the Department of Industry, Trade and Commerce stated:¹¹⁷

The purpose of this amendment, gentlemen, is to alleviate a problem which was created by the present clause 3(3)(e) where an amalgamation is deemed to be an acquisition of control, and this paragraph is necessary of course to plug a loop-hole which otherwise would exist in this Bill. It was subsequently determined that the amalgamating provisions would hinder corporate reorganizations where in fact there was no transfer of control of the amalgamating corporations, and since this is a Bill which is concerned with *de facto* control, it did not make sense to subject that sort of transaction to screening because there is no ultimate change in the direction of the management of financial affairs of the amalgamated businesses.

We find it inconsistent that the Commons Committee accepted the views of the Canadian Bar Association but failed to exempt the many other types of reorganizations of the nature described earlier. In all cases, there is no real change of control or, *de facto* control of the Canadian business enterprise, nor any ". . . ultimate change in the direction of the management of financial affairs of the . . . business", to use the words of the

¹¹⁶ *Op. cit.*, footnote 28, Vol. II, Appendix "R", p. 42:472. At para.6, the problem was described as follows: "Often a non-eligible parent corporation may, for internal or tax reasons, seek to reorganize the corporate structure of its Canadian operations. Often the reorganization will involve an amalgamation. The end result is often that the non-eligible parent corporation will, instead of having, say, three separate subsidiary corporations operating businesses in Canada, have three autonomous divisions of a single subsidiary corporation operating the same business in Canada. There is no change in the effective control or in the business operations of the Canadian business with the result that, if this Bill were to be applicable to the transaction it would be impossible to establish that the amalgamation would be of significant benefit to Canada, and the Bill would, therefore, effectively prohibit such a reorganization. Assuming that such a prohibition is not consistent with the intent of the legislation, we recommend that section 3(3)(e) be amended to include an exemption for such a reorganization by way of amalgamation."

¹¹⁷ *Op. cit.*, footnote 28, Issue No. 40, July 12th, 1973, p. 40:61.

departmental official. If the Canadian Bar Association had made representations in more general terms rather than dealing specifically with the provisions concerning statutory amalgamations, we believe that the problems respecting corporate reorganizations may never have arisen.

The Senate Committee *Report* recognized the limitations of the amalgamation exemption in the Bill and it recommended that:¹¹⁸

. . . intra-corporate amalgamations (*i.e.* the amalgamation of corporations having the same ultimate control) should be exempted from the provisions of subclause 3(3)(e).

It also recommended that:

. . . appropriate amendments be made to the Bill to exempt from the review process all non-arm's length transactions which do not involve a change in control.

It is unfortunate that the Commons Committee did not give effect to the recommendation of the Senate Committee.

If the government had not intended that at least certain statutory reorganizations undertaken for purposes not related to the provisions of the Act not be exempted from the application of the Act, they would not have amended section 3(3)(e). There is other evidence in the legislation that the government did not intend to extend the application of the Act to certain other types of reorganizations. The exempting language in section 3(3)(d) would clearly permit share transfers directly up a vertical corporate chain. This interpretation has since been confirmed by the Agency. However, a transfer of shares down a vertical corporate chain would appear to be caught by the legislation and require the filing of a notice under subsection 8(1). Although opinions have been expressed that certain other provisions of the Act (for instance, paragraphs 3(3)(a) and 3(6)(h))¹¹⁹ would appear to permit certain other types of corporate reorganizations, we appreciate that the statutory basis for these opinions is rather weak. Furthermore, the Agency apparently does not agree with them. Consequently, counsel are rather hesitant to recommend that certain types of corporate reorganizations be entered into on the basis that the Agency may subsequently commence proceedings to declare the "acquisition of control" nugatory. Cogent arguments were again presented to the Senate Committee as to the many reasons for exempting corporate reorganizations from the legislation. The Senate Committee accepted the arguments and recommendations as did the Minister of Industry, Trade and

¹¹⁸ Senate Debates, Vol. II, 1st Sess., 29th Parl., July 12th, 1973, Appendix, p. 873, at p. 878.

¹¹⁹ See *infra*.

Commerce as indicated by his testimony to the Senate Committee at that time.¹²⁰ Respecting amalgamations, he stated that:

It may be that the particular question raised [regarding corporate reorganizations] will surface and will create difficulties. I am not yet prepared to say that it will or that it won't, but I can tell you that if it does, I will be prepared to recommend to my colleagues amendments to deal with that question.

The legislation should now be amended to exempt internal corporate reorganizations consummated within or without Canada where there is no change in ultimate control of the Canadian business enterprise and where the acquisition is not for a purpose related to the provisions of the legislation.

To ameliorate the present situation, the government may choose to either amend the Act or alternatively consider issuing guidelines with respect to the application of the legislation pursuant to the power provided for in subsection 4(2). We have also considered the issuance of regulations; however, section 28 of the Act would appear to preclude the use of regulations for these purposes. As guidelines issued by the Minister may not have the force or permanence of law, nor the requisite element of certainty, we would strongly recommend that the legislation be amended.

Provisions of the nature recommended are common to many federal and provincial statutes.¹²¹

7. Conflict with Provincial Securities Legislation.

In the event that a non-eligible corporation wishes to acquire control of a Canadian business enterprise by means of a public takeover bid, a conflict may arise between applicable provincial securities legislation and the provisions of the Act.

The problem is two-fold. The Agency has at least sixty days to consider a notice and may, pursuant to subsection 11(1) of the Act, extend this period indefinitely. Generally speaking, under existing securities legislation in Ontario and other "Uniform Act" provinces, the non-eligible corporation as offeror must take up and pay for all shares deposited with it within forty-nine days

¹²⁰ He indicated in his remarks that it had always been implicit in the Bill that a person already in control of a business cannot make an acquisition of control of that business.

¹²¹ Refer to the recent amendments to s.1(d)(viii) of The Land Transfer Tax Act, 1974 (Ontario), *supra*, footnote 22. Unlike the limited amalgamation exemption in s.3(3)(e) of the Foreign Investment Review Act, *supra*, footnote 1, this subsection makes reference to all amalgamations, mergers, consolidations or any other like arrangements that have the effect of making control exercisable, in fact, by the same person or group of persons.

of the date of the takeover bid.¹²² A further difficulty is that while applicable securities legislation, at least in Ontario, would permit a non-eligible corporation to withdraw the offer if a specified minimum number of shares were not deposited or where the action of the board of directors subsequent to the date of the offer materially changed the undertaking, asset or capital of the Canadian business enterprise, the offeror may not include as a condition of an offer, Agency approval.

To alleviate problems of this nature, securities commissions or similar authorities in some provincial jurisdictions are, upon application, permitting the inclusion in public take-over bids of a condition enabling the offeror to withdraw if it fails to obtain the requisite approval of the applicable regulatory authority.

Current experience indicates that very few notices have been dealt with within the sixty day period and in fact in a large number of cases, notices have issued extending the time period indefinitely.

An attempt to rectify this problem was made in Bill 75 of the Ontario Legislature.¹²³ Paragraph 11 of section 88 thereof contains a provision which would enable an offeror to include as a condition precedent, approval of any applicable regulatory authority. The proposed amendment is deficient in that it failed to provide sufficient time to ensure that the regulatory authority will have time to consider and determine the matter. Bill 75 died on the order paper of the last session of the Legislature. A redraft of the legislation has now been prepared to give effect to certain recommendations made in a number of briefs submitted on the Bill. The revised Bill, which has not as yet received first reading, provides in paragraph 14 of section 91 that:

14. Where the takeover bid is subject to the approval of a governmental or regulatory authority, the time within which the offeree is bound to take up and make payment for the securities under clauses 8 and 13 may be extended for a period not exceeding an additional 60 days.

Accordingly, the problem will be somewhat alleviated, if section 91 is passed in its present form, in that Bill 75 will provide for a ninety-five day period. There is, of course, no assurance that the Agency will deal with a notice within that time period.

8. *Effect on Financial Institutions and Financing Transactions.*

(a) *Conflict with Governing Legislation*

Earlier¹²⁴ we indicated that the first major attempt to arrest the foreign domination of the Canadian economy involved the

¹²² See for example The Securities Act (Ontario), *supra*, footnote 21.

¹²³ Bill 75, The Securities Act, 1974, 4th Sess., 29th Legis., 23 Eliz. II.

¹²⁴ *Infra*.

passage of key sector legislation principally directed at certain financial intermediaries such as banks and insurance, loan and trust companies. It is clear that compliance with the Act will not exempt non-eligible persons from legislation directly applicable to them.¹²⁵ The fact that the composition of shareholders of a financial institution is such to satisfy any applicable ten to twenty-five per cent rule in that governing legislation will not necessarily mean that it is not a non-eligible person under the Act.

(b) Application to Financing Transactions

In addition to problems associated with eligibility status, the legislation may also directly or indirectly affect other normal business relationships entered into by financial institutions as part of their day-to-day operations. This is particularly true if these relationships involve the provision of credit and the taking of security therefor.

In taking security in the form of a pledge of assets or shares of a Canadian business enterprise, non-eligible financial institutions will normally also obtain a right to acquire such assets or shares upon the occurrence of an event of default. Generally speaking, the acquisition of such a right will not constitute the acquisition of the shares or property to which the right relates if it can be established that:

... the right was acquired for the purpose of safeguarding the interests of the person by whom it was acquired in respect of a loan made by him or in respect of an amount paid or payable by him as consideration for the sale or assignment to him of any right or rights in respect of a loan made by another person.¹²⁶

We are concerned that this exemption in paragraph 3(6)(d) is rather limited in that there are a myriad of other transactions pursuant to which such rights are acquired—a trap for the unwary. Essentially, it would not protect a non-eligible person obtaining a right to property or shares in any transaction not directly involving a loan between the party owning the shares or assets and the institution. For example, if a non-eligible financial institution were to assume a position as guarantor of the indebtedness of a Canadian business enterprise and received as collateral security a pledge of the shares of the Canadian business enterprise, the transaction would fall within paragraph 3(6)(c) and the pledge would require Cabinet approval. Paragraph 3(6)(d) is also limited in that it would not permit the holder of the property or shares acquired as a result of the exercise of a paragraph 3(6)(c) right to freely dispose of such property or shares

¹²⁵ *Supra*, footnote 1, s.5(3).

¹²⁶ *Ibid.*, s.3(6)(d).

to a non-eligible person, unless it could be argued that the "exercise of the right" in paragraph 3(6)(d.1) includes, by virtue of the security agreement or paragraph 3(6)(c), the right to both acquire and dispose of the property or shares.

The security taken by an eligible financial institution or the business assumptions upon which a loan was extended might also be impaired or rendered invalid in cases where a loan is made to a non-eligible person to enable it to acquire control of a Canadian business enterprise.

Money loaned by a lending institution, or the security taken by it, can presumably only be put at risk by the Act after the money has actually been loaned or the security taken. Subsection 19(1) provides that, where an investment is one which the Minister believes may contravene or has contravened the legislation, he may apply to a court for an order enjoining the non-eligible person,¹²⁷

. . . from taking any particular action specified in the [court] order in relation to the . . . investment that in the opinion of the court would prejudice or be likely to prejudice the ability of . . .

a court to make an order under subsection 20(1) of the Act, which empowers it to:

. . . make such order as, in its opinion, is required in the circumstances, to the end that the investment shall be rendered nugatory not later than the expiry of such period of time as the court considers necessary to allow in order to avoid or reduce, to the greatest possible extent consistent with the attainment of that end, any undue hardships, to *any person who was not involved in the investment knowing it to be subject to be rendered nugatory*.

Accordingly, sections 19 and 20 empower a court to make an order which, in some circumstances, might invalidate the business premises upon which the credit-granting decision of a financial institution was based, and possibly impair the security taken by it as well.

We have been unable to find a legal interpretation of the word nugatory or its use in any other statute. *Black's Law Dictionary*,¹²⁸ defines the word as including the meaning "invalid" without citing any authority. In view of the concluding words of subsections 19(1) and 20(1) and in view of the discretion given the court in subsection 20(1) to render the investment "nugatory not later than the expiry of such period of time as the court considers necessary", the words "rendered nugatory" must, we believe, be read prospectively, referring to "neutralization" of

¹²⁷ *Ibid.*, s.20(1). Emphasis added.

¹²⁸ (4th rev. ed., 1968)

the investment, rather than retrospectively, referring to rendering the investment "void *ab initio*". If "nugatory" meant "void *ab initio*", it would be difficult for a court to exercise its discretion to render the investment nugatory "not later than the expiry of such period of time" as the court considers necessary in the circumstances.

Subsection 20(1) also describes the class of persons whose interests may be considered by a court making a section 20 nugatory order. If a financial institution is to "qualify" for consideration by a court it must be a person,

. . . who was not involved in the investment knowing it to be subject to be rendered nugatory under the Act.¹²⁹

While it is unclear, we believe that the intention of this provision is directed toward persons who were involved in the transaction without knowledge of the potential application of subsection 20(1). If this is the correct reading of the phrase, then it has the effect of including for consideration by a court making a section 20 order, the interests of all those innocently "involved" and all those "not involved".

We would have thought that the lending institution would always be "involved", and accordingly, it will have to demonstrate that it did not know that the investment was "subject to" being rendered nugatory, that is, it did not know that its customer was a non-eligible person so as to be subject to the requirements of the Act.

A lending institution could reduce any undue hardship which the legislation may impose upon it by:

- (a) ascertaining the status of a customer borrowing funds to acquire a Canadian business enterprise. Most lending institutions will have a good idea of the extent to which its customers are foreign controlled;
- (b) raising with customers the possibility that the Act may apply to the transaction to be entered into with the borrowed funds;
- (c) including, in the case of term loans, as an event of default, failure to comply with the Act; and
- (d) requiring, in marginal cases, a borrower to obtain a subsection 4(1) ruling as to its eligibility status.

IX. Conclusion.

Because of the widely publicized concerns about the degree of non-resident ownership of Canadian industry, we doubt whether any Canadian seriously questioned the need in Canada for legislation to enable Canadians to exercise a greater degree of control over their domestic environment, to derive a greater share of

¹²⁹ *Supra*, footnote 1, s.20(1).

benefits from foreign investment and to achieve a greater degree of participation in Canadian business. Accordingly, these desires, when coupled with concern about the extent of foreign ownership and control, which at the date of the publication of the *Gray Report* was "substantially higher in Canada than in any other industrialized country and [was] continuing to increase",¹³⁰ resulted in the federal government establishing the Task Force on Foreign Ownership. This working group was given the responsibility of bringing forward proposals on foreign investment policy for the consideration of the government.

Of the various policy alternatives presented, including mandatory Canadian ownership, a continuation of the "key sector" approach and foreign exchange controls, the government elected to implement a review process. This approach, embodying the establishment of a review agency and the use of very general and flexible criteria for the purpose of determining the existence of significant benefit, was certain to have important implications for federal-provincial relations, to raise concern in the business community about the degree of governmental intervention in the private sector, to add a degree of uncertainty in our economic environment, and to raise concern about the problems in arriving at correct decisions on complex issues amid the presence of pressure groups. Lastly, a review process was bound to raise questions as to whether it would significantly further Canadian ownership.

We are not sufficiently competent or experienced in economic policy to question the course which the government has taken, nor have we attempted to do so. We have, however, had an opportunity to observe the review process during its first year of operation and to consider the legislation in its application to many differing situations.

We believe that the Act does require amendment in certain areas to eliminate uncertainty and to limit its application to transactions which involve what we described as an "overreaching". We strongly advocate amendments to exempt certain corporate reorganizations. We are told that the Venture Capital Conditions are so restrictive that the intent of the exemption has been thwarted.

The guidelines that have been issued to date may in certain circumstances be of assistance to non-eligible persons required to consider them. In our experience, the Real Estate Guidelines are simply too general and inconclusive and serve only to cause greater confusion regarding the application of the Act to trans-

¹³⁰ *Op. cit.*, footnote 23, p. 5.

actions in real estate. They urgently require revision. We understand that the Preliminary Guidelines on Related Business are being amended for the purpose of providing a greater degree of certainty. We also believe that, as promised, guidelines will be shortly published on oil and gas rights.

After the enactment of any legislation, and particularly in respect of a statute as fundamental and broad-reaching to our economic environment as is the Act, there are three critical processes which occur. The first of these involves the administration of the legislation. The Agency has, in our view, done a great deal to ease the drastic effects the Act could have had in its initial application. Officials of the Agency have provided assistance to investors in many areas, and have adopted flexible and reasonable approaches to deal with administrative problems. While not all of our experiences with the Agency have been happy ones, we have been impressed with the attempts made to implement the Act fairly and thoughtfully.

The second process is the judicial one. To date we know of no litigation involving the Act, and this will certainly be an area of substantial interest.

The third process is the amendment of the legislation. This is an activity in which we submit that the profession has both a great interest and a substantial responsibility. Laws will be amended and improved only when governments are informed of the need for change. In dealing with the legislation we anticipate that lawyers will find areas which require clarification or improvement, and we trust that the appropriate recommendations will be made to the Agency and to the Minister.

In introducing Bill C-132 to the Commons Committee on June 5th, 1973 the Honourable Alastair Gillespie, Minister of Industry, Trade and Commerce indicated that he regarded the legislation as:

... a necessary supplement to measures that encourage strong Canadian-controlled business enterprise ... to ensure that future foreign take-overs and the establishment of new foreign-controlled businesses will be of significant benefit to Canada by encouraging such enterprises to exercise greater scope in: exporting and innovating; processing raw materials in Canada; procuring supplies in Canada; developing Canadian managerial and technical talent; decision-making and risk-taking generally—to help arrest and reverse, therefore, the increasing degree of foreign control of our economy.¹³¹

The Minister acknowledged that the achievement of these goals will take time. The legislation will not provide an instant solution,

¹³¹ *Op. cit.*, footnote 28, Issue No. 26, June 5th, 1973, p. 26:6.

but "the operation of the screening agency, over a period of time, should bring about that kind of result".¹³²

We hope that the government through the establishment of the Agency and the proper use of its mandate will achieve these objectives at a minimum expense and amount of bureaucracy and without unnecessary interference with normal commercial transactions.

X. *Postscript.*

Subsequent to the completion of this article but immediately prior to its publication, two changes were announced which affect the application of the review scheme.

New Regulations were made by the Governor in Council substantially amending certain parts of the existing Regulations. The primary change concerns the introduction of a short form of notice for the purchase of a Canadian business enterprise having a value of less than \$2,000,000.00 and less than 100 employees. In addition, the Agency has issued new forms for use in the preparation of notices.

As well, the Minister has issued Guidelines Concerning Corporate Reorganizations which purport to exempt from review certain transactions so long as the corporation receiving the shares or property was incorporated in Canada. The Guidelines will be of some assistance, but there are many reorganization-type transactions which will still require the filing of a notice or a request for a non-reviewable letter.

¹³² *Ibid.*