Legal Aspects of Foreign Investment in and Acquisition of Canadian Real Estate

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Abstract

Recent years have witnessed a growing concern among Canadians about the necessity and desirability of keeping Canadian land, resources and industry in Canadian hands for the enjoyment of and exploitation by Canadians. This thesis focuses on the investment in and the acquisition of Canada's prime resource - her land - by non-Canadians.

This particular research has been undertaken because there has been no comprehensive study of this subject made to date. The main purpose of this paper is to examine the legislation which has been put into effect as a result of the concern mentioned above; it proceeds along the following lines.

The introduction deals with the history of the law concerning foreign land ownership in Canada. Section two analyses the constitutional issue (the division of legislative powers in Canada) with respect to its affect on real estate. Thereafter, the legislative provisions enacted by the federal and the various provincial governments are set out together with the policies behind such legislation. A survey of a number of foreign jurisdictions and their methods of controlling land ownership and use by non-residents follows, primarily as a source of comparison. Finally, the conclusion attempts to offer an alternative to the solutions arrived at by the federal and provincial governments.

Resumé

On a pu constater dans les dernières anneés un intérêt croissant des canadiens pour le problème de la nécéssité et de la désirabilité de la préservation des terres, ressources et industries canadiennes entre les mains des canadiens, afin qu'ils en profitent et les exploitent eux-mêmes. Cette thesè porte en particulier sur les investissements dans et l'acquisition de, notre ressource primaire - la terre - par les non-canadiens.

Cette recherche a été entreprise parcequ'aucune étude détaillée de ce sujet n'a été faite jusqu'à présent. L'objectif principal de cet article est d'étudier la législation promulguée dans ce domaine; l'article est construit de la façon suivante:

- l'introduction fait l'historique de la législation concernant la propriété étrangère des terres au Canada;
- la 2^{e} partie analyse les problèmes constitutionnels (la division des pouvoirs législatifs au Canada) quant à leurs effets sur la propriété immobilière;
- ensuite, les dispositions législatives promulguées par le Parlement fédéral et les Assemblées Législatives provinciales, et les politiques qui les sous-tendent, sont reprises et analysées.

- une étude comparative des methodes employées par des juridictions étrangère pour contrôler la propriété et l'utilisation des terres par des non-résidents, puis
- une conclusion, où l'auteur propose des alternatives aux solutions offertes par les gouvernements fédéral et provinciaux, viennent enfin.

Legal Aspects of Foreign Investment in and Acquisition of Canadian Real Estate

Introduction

Canada's land area comprises some 3,851,809 square miles. Of this, only 411,276 square miles or 10% of the total land mass is privately owned. The rest is Crown land. Thus almost 90% of Canada is owned by the Crown by virtue of either the Federal or Provincial governments.[1]

As the provinces and governments of the various provinces have placed restrictions on the sale of Crown Land, interested land purchasers in Canada - both foreign and Canadian find themselves in competition for the available 411,276 square miles. It has been an often raised complaint among Canadians that foreign investors (or buyers) are driving up the price of Canadian land causing housing and cottages for example to be placed beyond their reach. The 1972 Gray Report pointed out that "(t)he degree of foreign ownership and control of economic activity is already substantially higher in Canada than in any other industrialized country and is continuing to increase."[2]

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1. Cutler, M. Foreign Use and Canadian Control of Our Land and Resources. April 1975, Can. Geog. J. p.16.
2. Foreign Direct Investment in Canada (Gray Report) 1972 Govt. of Canada at p.5. The report points out (p.5) that "Nearly 60% of manufacturing in Canada is foreign controlled and in some manufacturing industries such as petroleum and rubber products foreign control exceeds 90%. Sixty five percent of Canadian mining and smelting is controlled from abroad. Approximately 80% of foreign control over Canadian manufacturing and natural resource industries rests in the United States."

Although foreign investment tends to be very high in every area of Canadian life, Canadians are more directly affected by the purchase of Canadian real estate by foreigners than by foreign investment in, for example, Canadian businesses or resources, because it touches their daily lives.

That the fact of foreign ownership of real estate has recently become important to Canadians is evidenced by a number of studies that have been undertaken by the provinces resulting in legislative action.[3] The concern for this foreign 'invasion' of Canada was increased by a rising feeling of Canadian nationalism. Canadians began to feel that their vast resource-rich land should be enjoyed and exploited by Canadians. Together with this arose a concern for the environment and heritage. Citizens seeking country houses for example began to find such land was beyond their means or that prime areas had been bought up by foreigners.

United States citizens see Canadian real estate as a cheap close alternative to a hectic urban life. When one looks at the overall picture one sees that the proportion of Canada which is foreign owned is small,[3a] but that it consists of prime real estate. Harsh conditions that result from the Canadian climate serve to further reduce the amount of recreational and residential land.

One of the interesting facts to come out of the provincial

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3. These are discussed in detail below, see p.43 et seq.
3a. See p.43 et seq. infra.

investigations on this subject is that very few statistics exist as to the amount of foreign-owned land. This shows that Canadians were either unconcerned or did not consider this a problem. The only figures which have been made available deal in broad estimates.[4]

It has been said that not only have foreign owners and developers pushed up property values but that they have "altered the character of Canadian cities, introduced new ways of life."[5] If this is true, and with all deference to the author, I do not think it is, then the fault does not lie with the foreign developers but rather with the federal, provincial and local zoning laws.[6] Though foreigners may buy and develop areas of land in the cities they remain subject to local legislation. Admittedly the pressures that large corporations can exert on various legislative bodies as well as City Hall are great. If, however, it amounted to changing our "ways of life", surely the population would not stand by idely unless they approved of the new lifestyle.

In many areas foreign land purchases have forced up the value of certain land. This means that not only will Canadians have to buy up land left over by wealthy foreigners but that taxes will rise in proportion to the newly assessed values of

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4. Cutler op. cit. 17.
5. Ibid.
6. The 'new ways of life' are a source of pride to many Canadians who are proud of the way in which Canadian cities have developed.

the land. This has a snowball effect and results in higher prices and in reducing the viability of farmland. Not only will certain areas be too expensive to use as farmland but absentee owners who use the property for a few weeks each year will be changing the character of this once productive land. Once again this is not a problem solely of foreign land ownership and it can be rectified by means of stricter zoning regulations.

It appears that one of the reasons for the large number of foreign investors in Canadian real estate is related to the conditions of life in large American cities. Foreigners such as Europeans and Japanese seek the stability of North America to invest in but are not happy with the disintegration of urban centres in the U.S. In addition Canadian self-sufficiency in many types of energy has been a drawing factor.[6a]

There is a definite gap in the capital availability in Canada to build sufficient housing.[6b] In the long run foreign developers have sold housing back to Canadians and so have filled a gap in the local economies. There is therefore much to be said for allowing certain foreign developers who are not simply land speculators.

An often heard criticism of foreign developers is that they wield power beyond the simple development of land. Certain corporations have built huge shopping malls and control not only the rents but everything that is sold to some degree. This is realized by percentage leases on top

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6a. Cutler, op. cit., June 1975, 35.
6b. Ibid., p.43.

of rents, thereby pushing up prices as retailers pass on the higher prices to the consumer.

Until recently non-Canadians discovered that investing in or acquiring land in Canada was unproblematical. Few restrictions if any existed. Foreign rights were even protected.[7] Canadians were making money selling their land to foreigners and governments were not going to put a stop to this practice.

Even if a government wished to act it was debatable which level of government had jurisdiction in this matter. Many argued that Canada benefitted from allowing foreigners to own country houses here. Many local districts thrive on American tourists and seasonal dwellers. It was also felt that Canadians owned land in the sunshine states and they might be affected by some retaliatory move from the U.S. government.

These are some of the reasons for the recent concern of many Canadians and Canadian legislators for stricter regulations on foreign ownership of Canadian land. I propose in this thesis to set out the history of the law affecting foreigners acquiring land in Canada. Thereafter we will look at the particular constitutional problems and the manner in which parliament and the various provincial legislatives have attempted to deal with the foreigner. A comparative look at the way certain other

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7. See the old Canadian Citizenship Act. S.C., 1946, c.15, s.24.

jurisdictions have approached foreign land acquisitions in their countries will aid us in arriving at a decision as to whether the Canadian legislative response is the best one for Canadian circumstances.

We now turn to an historical look at the development of the laws affecting foreign land owners.

History of the Law concerning Foreign land owners

At common law the foreign land owner was in a rather unenviable position. He was permitted to purchase or inherit land and his title to that land was good against all but the Crown, which could take proceedings to confiscate this land.[1] A foreigner (i.e. a non-British subject) could not obtain land by inheritance or intestacy, dower or courtesy. If land was due to him via one of these means it would automatically escheat to the Crown.[2]

In pre conquest Quebec the foreigner was slightly better off in that his real right over land was good during his lifetime. On his death all would go to the Crown by virtue of the droit d'aubaine.[3]

The British Colonial Office in Canada during the 19th century followed the common law tradition by preventing new American settlers from buying land causing them to forfeit existing landholdings. The British government felt that these new arrivals from south of the border were not loyalists and it was felt that these settlers would encourage union with the U.S. Thus the government succeeded in depriving them of the vote.[4] (The right to vote was based on land ownership.)

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1. Blackstone, Commentaries on the Laws of England, (1776), vol. I, p.372. (Oxford). (2nd ed.).
2. Blackstone, ibid., vol. II, chap. 15, p.249.
3. Pothier, Traité des Personnes et des Choses, 1re partie, tit. II, Traité des Successions, ch.I, s.I.
4. See Spencer, J., The Alien Landowner in Canada. (1973) 51 Can. Bar Rev. 389 at 391.

Taking away the rights of these settlers meant the simultaneous wiping out of the duties of the settlers to the Crown. Thus the British government soon found that it was unable to conscript U.S. seamen in Canada. A policy change took place after 1827. In 1849 the Legislative Assembly and Council of the Province of Canada (as it then was) abolished the old common law rules and granted foreigners the same rights as British subjects to hold land.[5]

In 1881 the Parliament of Canada passed the Naturalization Act[6] which was a copy of the British Naturalization Act of 1870.[7] This provision which gave British subjects and later non-Canadians the same right to hold real and personal property as Canadians, now appears in the Canadian Citizenship Act.[8] This section has now been amended and will be discussed below.

Five provinces have duplicated this federal legislation. The Quebec and Ontario legislation dates from the Act of 1849. The Ontario Act consists of two provisions, one granting aliens the same capacity and rights as British subjects and one allowing the real estate of a deceased intestate alien to devolve as if it had been the land of a British subject.[9]

The old laws of British Columbia[10] and Vancouver Island[11]

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5. An Act to Repeal 9 Vic. c.109 and to Make Better Provision for the Naturalization of Aliens, Stat. Prov. Can., 1849, c.197, s.12.
6. S.C., 1881, c.13, s.4.
7. 1870, 33 Vic., c.14 (U.K.), s.2.
8. S.C., 1974-75-76, c.108.
9. The Alien's Real Property Act R.S.O., 1970, c.19, s.1 & 2.
10. Proclamation of 14th May 1859.
11. An Act to Enable Aliens to hold and transmit Real Estate 28th Oct. 1861.

were replaced by a law dating from confederation.[12] Similarly the law in Manitoba[13] dating from 1873[14] has the same effect. The law of New Brunswick today[15] was first enacted in 1891 following the 1881 federal law.

Alberta law has a history involving the alienation of land to the Hutterites, a religious group of communal farmers. The legislation is relatively new, no statute having been in existence before 1942. Section 2 of the Land Sales Prohibition Act of 1942[16] prohibited the sale of land or an agreement to sell land to any enemy alien or Hutterite. Sanctions for contravening this prohibition were fines up to $2,000 and a year in prison. It appears that the Hutterites were very economical farmers, sharing expenses and living a somewhat frugal life. As a result they could market their produce at a lower price than other farmers in Alberta. The year after it was enacted the Act was disallowed by the Governor General in Council,[17] apparently because of the alien clause. In 1944 the same law was re-enacted omitting the restriction of sales to aliens but retaining the prohibition against sales to Hutterites.[18] The demise of this law came with the 1972 Alberta Bill of Rights which led to the repeal of the anti-Hutterite law. In 1973 a

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12. An ordinance to assimilate the Law regarding Aliens in all parts of the Colony of B.C., 2nd April 1867. B.C. Laws, 1871, no. 93, followed by The Aliens Act R.S.B.C., 1897, c.6.
13. The Law of Property Act. R.S.M., 1970, c.138, ss.2 & 3.
14. An Act respecting Aliens, S.M., 1873, c.43.
15. The Law of Property Act. R.S.N.B., 1952, c.177, s.9.
16. S.A., 1942, c.16.
17. P.C. No. 2820, 1943 Canada Gazette, No. 17, p.1694.
18. S.A., 1944, c.15 becoming the Communal Property Act, S.A., 1947, c.16.

law to control the sale of Crown lands to aliens was promulgated.[19]

Saskatchewan has a Bill of Rights dating from 1947,[20] section 10 of which provides that anyone is entitled to hold land without discrimination because of, inter alia, national origin. One wonders what the real effect of this is when one considers that there is authority for the view that 'national origin' does not include 'nationality' in the case of a law protecting one from discrimination.[21]

Originating in 1854, the 1967 Real Property Act of Nova Scotia[22] follows the federal laws permitting aliens to hold land in that province. Nova Scotia was the first province to pass legislation compelling non-residents to disclose their holdings of land in a special register.[23]

Prince Edward Island, because of its unique circumstances, is the province with the earliest and greatest restrictions on the acquisition of land by non-islanders. The restrictions date from 1859 when legislation was passed abolishing the old common law disabilities pertaining to aliens holding land. Aliens were permitted to hold up to 200 acres.[24] In 1939 a statute was passed forbidding aliens from holding more than 200 acres

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19. The Public Lands Amendment Act, R.S.A., 1973, c.297
20. Bill of Rights. S.S., 1947, c.35, now The Saskatchewan Bill of Rights, R.S.S., 1965, c.378, s.9.
21. London Borough of Ealing v. Race Relations Bd. [1972] A.C. 342.
22. R.S.N.S., 1967, c.261, ss.1 & 2.
23. The Land Holdings Disclosure Act, S.N.S., 1969, c.13.
24. An Act to enable aliens to hold real estate, P.E.I., 1859, 22 vic., c.4.

without the consent of the Lt. Governor in Council.[25] In 1964 this was reduced to a holding of 10 acres and 5 chains of shore frontage.[26] (Prince Edward Island will be discussed below as a special case).

The province of Newfoundland gave foreigners equal rights to hold land in 1900.[27] No legislation covering privately held land exists today after the above legislation was repealed in 1952.[28] From 1941 no grants of Crown land may be made to non-residents.[29]

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25. Real Property Act, S.P.E.I., 1934, c.44, s.4.; R.S.P.E.I., 1951, c.138, s.3.
26. S.P.E.I., 1964, c.27, s.1.
27. An Act to confer certain rights on Aliens, S. Nfld., 1900 (2nd sess.)., c.7.
28. The Revised Statutes Act, S. Nfld., 1952, No. 72, s.8(2).
29. Crown Lands (Amendment) Act, S. Nfld., 1971, No. 46.

The Constitutional Problem

There is a constitutional problem related to the issue of foreign ownership of Canadian land. The problem is one of legislative jurisdiction - that is, which arm of the legislature, provincial or federal has jurisdiction over this issue. At first glance, because property and civil rights are within the provincial domain, it would appear as though the question would fall under provincial jurisdiction.[1] The complicating factor, however, is that the constitution gives the federal government exclusive legislative authority over naturalization and aliens and thus conceivably over foreign investment.[2]

A variety of legal opinion exists. The federal government is said to derive its powers from certain parts of the British North America (B.N.A.) Act namely s.91 (1A) - "public debt and property", s.91 (2) - "regulation of trade and commerce", s.91 (25) - "naturalization and aliens", s.95 - "immigration" and lastly parliament's general power to make laws for "peace, order and good government of Canada" - s.91. Provincial powers, on the other hand, derive from s.92 (5) - "management and sale of public land", s.92 (13) - "property and civil rights in the province", s.92 (16) - "matters of a merely local or private nature", s.95 - gives concurrent power over immigration into the province and lastly s.109 - natural resources.

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1. British North America Act, 1867, 30-31 Vict., c.3 (U.K.), s.92 (13). See also Walter v. A.G. for Alberta. /1969/ S.C.R. 383, 66 W.W.R. 513, 3 D.L.R. (3d) 1.
2. Ibid., s.91 (25).

It could be argued that because parliament has exclusive authority to allow or refuse an alien to enter Canada or to place conditions on his entry, that the Federal authorities' power precludes any provincial government from having jurisdiction to regulate foreign investment.[3] The Oriental discrimination cases at the turn of the century are authority for parliament having exclusive jurisdiction to legislate as to the rights and disabilities of aliens and naturalized persons.[4] This view has further support from the case of A.G. for Ontario v. Reciprocal Insurers[5] which held that if federal legislation touched the rights and disabilities of aliens and conflicted with provincial legislation then the latter would, to the extent of such conflict, be legally ineffective.

Mr. Justice Rand in the case of Winner v. S.M.T. and A.G. for New Brunswick,[6] discussed the oriental discrimination cases (supra) and attempted to reconcile an apparent contradiction between Bryden's case[4] and the Tommy Homma case.[4] The latter case involved the question of a province's right to deny the provincial franchise to Japanese persons, whether naturalized or not. The court held in that case that such

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3. A. G. For Canada v. Cain [1906] A.C. 542.
4. Union Colliery Co. v. Bryden [1899] A.C. 580, Cunningham and A.G. for P.O. v. Tommy Homma and A.G. for Canada. [1903] A.C. 151, Re the Coal Mines Regulation Act and Amendment Act (1904) 10 B.C.R. 408, Quong-Ving v. The King. (1914) 49 S.C.R. 440. See below the distinction between the Bryden and Tommy Homma cases p.14.
5. [1924] A.C. 328, (1924) 1 D.L.R. 789.
6. [1951] S.C.R. 887, (1951) 4 D.L.R. 529.

legislation was intra vires the provincial government. Bryden's case involved the right of Chinese, naturalized or not to work in B.C. coal mines. The law was held to be ultra vires.

Rand J. stated that "the incidents of status must be distinguished from elements or attributes necessarily involved in status itself."[7] The learned judge held that Tommy Homma involved the incidents of status while Bryden involved status itself. In Bryden the legislation touched on one of his "essential rights" and thus the legislation was ultra vires. Alienage is a status and so within parliament's jurisdiction. Tommy Homma, because it touched only the incidents of status was intra vires the provincial legislature.

It has been suggested by one learned writer that if the above analysis is correct, one must decide what class acquiring property falls into in order to decide if provincial legislation depriving an alien of the right to acquire land is ultra vires.[8] In the light of Morgan's[9] case we know now that provincial legislatures may vary the capacity of Canadian citizens to acquire property and therefore it is possible to assume that the right to acquire property is not "as essential

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7. Winner v. S.M.T. and A.G. for New Brunswick [1951] S.C.R. 887 at p.919.
8. Spencer, J., The Alien Landowner in Canada, (1973) 51 Can. Bar Rev. 380 at 402.
9. Morgan and Jacobson v. A.G. for Prince Edward Island. [1976] S.C.R. 349.

right forming part of status itself." Thus provinces arguably have jurisdiction over the acquisition of land.

A counter argument can be attempted by drawing an analogy between an alien and a federally incorporated corporation. It has been held by the Privy Council that the provinces have no power to directly limit the capacity of such a dominion corporation.[10] If provinces could not forbid a dominion corporation to hold land, similarly they could not prevent an alien from doing so either. A dominion corporation's rights are thus, arguably, similar to a non-resident Canadian or an alien who has been given rights by parliament.[11]

The Supreme Court of Canada held in 1969 that provincial legislation concerning the ownership of land within the province is valid by virtue of s.92 (13) of the B.N.A. Act (property and civil rights in the province).[12] The court further held that such legislation is valid unless it can be placed within a subject specifically enumerated in s.91 of the B.N.A. Act which is within the exclusive jurisdiction of parliament.

Walter's case[12] concerned the constitutional validity of

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10. John Deer Plow Co. v. Wharton. /1915/ A.C. 330.
11. It has been held however that it is within the competency of provinces to preclude a Dominion corporation from acquiring and holding land in a province by e.g. a Mortmain Act - see Great West Saddlery Co. Ltd. v. The King and A. G. for Canada. /1912/ 2 A.C. 91 at p.119. See however Morgan's case infra p.26.
12. Walter v. A.G. Alberta. /1969/ S.C.R. 383 at p.389.

The Communal Property Act of Alberta.[13] The Act was designed to prevent the growth of Hutterite communities within the province. The Appellants argued that the legislation concerned religion and was therefore beyond the legislative powers of a province. The province argued that the legislation concerned property within Alberta and was nothing more than a means of controlling the way land was held. The Supreme Court upheld both the trial judge and the appeal court[14] using a restrictive interpretation. It held that the purpose of the legislation was economic, related to property and civil rights and was not an interference with freedom of religion. One wonders why, if the aim of the legislature was to restrict certain types of land holdings, it was necessary to expressly refer to Hutterites in the definition section.[15] For our purposes, however, this is further reinforcement for the view that the provinces have extensive powers over land acquisition by virtue of s.92 (13) of the B.N.A. Act.

Under the sections of the B.N.A. Act which allocate power to the provinces, certain measures could be taken by the provinces which would not raise constitutional problems. The provinces are quite within their rights to pass laws assuring public access to prime recreational areas - beaches for example by means of public easements. Provinces could purchase or

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13. R.S.A., 1955, c.42.
14. /1960/ S.C.R. 383 at p.
15. The Communal Property Act, R.S.A., 1955, c.42, s.2 (a and b).

expropriate land for public use as well as introduce differential tax structures so that local landowners using their land for specific purposes (usually agriculture) would not have to bear the burden of increased property assessments resulting from non-resident purchases.

It would also be conceivable to restrict possible corporate land holdings or for the provinces to establish non-discriminatory minimum maintenance standards for landowners with the levying of compensation payments on those not meeting the standards.

Perhaps the most effective step a province could take would be to draw up land use and zoning control laws.[15A] These laws would ensure that prime agricultural land would not end up as the playground for wealthy foreigners. It would also ensure that foreigners could not determine how and where Canadian urban centres would spread. Provinces could also insist on foreign purchasers disclosing their citizenship and residence, thereby monitoring land acquisitions.

In discussing the constitutional issues involved in foreigners acquiring land in Canada we should study the Canadian Citizenship Act[16] which was passed by Parliament by virtue of s.91 (25) of the B.N.A. Act. Section 24 of this Act has now been amended but in its original form it was derived from the British Naturalization Act.[17] The original

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15a. For example the B.C. Land Commission Act, S.B.C., 1973, c.46.
16. Now S.C., 1974-75-76, c.108.
17. 1870, 33 Vic., c.14 (U.K.)

form of s.24 was to the effect that -

> (1) Real and Personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a naturalborn Canadian citizen; and a title to real and personal property of every description may be derived through, for or in succession to an alien in the same manner in all respects as though, for or in succession to a natural-born Canadian citizen.

This section, which gave aliens the same rights as Canadians with regard to property and thus removed the common law disabilities of foreigners, was amended by the new Citizenship Act.[18] Section 33 (1) of the latter Act repeats s.24 (supra) but goes on in further subsections to acknowledge the jurisdiction of the provinces to legislate over foreign investment in land as part of "real property and civil rights." The federal Parliament has no power to delegate legislative authorities to provincial legislatures[19] and so the new sections confirm existing powers and remove any contradiction from the statute books. These sub-sections were asked for by almost all the provincial premiers at the 1973 Federal-Provincial Meeting of First Ministers.[20]

Section 33 (2) gives the Lieutenant Governor in Council

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18. The Canadian Citizenship Act. S.C.,1974-75-76. c.108, s.33.
19. The A.G. of Nova Scotia v. A. G. of Canada. [1951] S.C.R. 31, [1950] 4 D.L.R. 369.
20. e.g. B.C., P.E.I. and Saskatchewan, see Federal-Provincial Conference of First Ministers, Ottawa, May 23-25, 1973.

of a province the power to -

> prohibit and annul or in any manner restrict the taking or acquisition directly or indirectly of, or in the succession to, any interest in real property located in the province by persons who are not Canadian citizens or by corporations or associations that, in the opinion of the Lieutenant Governor in Council...are effectively controlled by persons who are not Canadian citizens.

Subsection 3 gives the Lieutenant Governor in Council of a province the power to make regulations (not statutes) which would apply to that province for the purposes of determining what constitutes - a direct or indirect taking or acquisition of any interest in real property, effective control of a corporation or association that is not Canadian, as well as what constitutes an association. Sanctions for persons not complying with the provincial laws made under power of s.33 (2) are provided under s.33 (4).

It appears, therefore, that provinces are able to pass laws restricting the sale of real property to foreigners. The provincial legislatures are still limited to the extent that they cannot pass laws which conflict with Canada's international legal obligations or which hinder foreign states wishing to acquire land for the purpose of consulates and embassies. Aliens cannot be discriminated against on the basis of their different nationalities and provinces may not discriminate against bona fide landed immigrants who intend becoming citizens.

With regard to Canada's international obligations one

can cite as an example The Spanish Treaty Act[21] which extends to the citizens of Canada and Spain the same rights in commerce as enjoyed by each other's citizens. Another example is Canada's treaty with Japan.[22]

In treaties providing for "most favoured nation" treatment with regard to the rights of the citizens of the other state, within Canada, a restrictive measure could give rise to a breach of a treaty of this nature if a law discriminates against such citizens. If the legislation discriminates against all foreigners, no breach will occur.

A further consideration is that of general international law. It has been held that if a country admits foreign investment it is bound to extend the protection of law to such investors.[23] Similarly with regard to past and present foreign investments the O.E.C.D. Draft Convention on the Protection of Foreign Property deems it to be a breach of obligation if the exercise of an alien's right to use and enjoy property is impaired by a discriminatory measure.[24] The Convention lays down that a state is permitted to expropriate the property of foreigners if "the measures are taken in the public interest

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21. S.C., 1928, 18-19 Geo. V, c.49.
22. Japanese Treaty Act. S.C., 1913, c.27.
23. The Barcelona Traction, Light and Power Co. Ltd. I.C.J. Rep. 1970 p.3., para. 33.
24. Organization for Economic Co-operation and Development Draft Convention of 1967 on the Protection of Foreign Property, Paris, 1967. A draft convention while not legally binding does nevertheless have persuasive force over the development of Canadian policy.

and under due process of law...."[25] Such measures must also be taken in good faith and in a non-discriminatory manner.

As has been pointed out, this Draft Convention seems to rule out "any kind of 'Canadianization' of foreign enterprises already established in Canada."[26] Under customary international law it has long been an accepted principle that all expropriations must be compensated for fully, promptly and effectively. Presumably any expropriation as part of 'Canadianization' would be lawful if it was in the public interest, not discriminatory and full compensation was paid.[26a]

In 1974 the General Assembly of the United Nations adopted a resolution on the Declaration on the Establishment of a New International Economic Order.[27] A Charter of Economic Rights and Duties of States[27a] was adopted thereunder, article 2 of

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25. O.E.C.D. op. cit., art.3.
26. Arnett, E.J. Canadian Regulation of Foreign Investment: The Legal Parameters. (1972) 50 Can. Bar Rev., 213 at 236.
26a. White, G., Nationalization in International Law, London, Stevens 1961.
27. U.N. Doc. A/Res/3201 (s-VI) 9 May 1974.
27a. U.N. Doc. A/Res/3281 (XXIX) Dec. 12, 1974. In the case of General Assembly resolutions preceding the Declaration of the Establishment of a New International Economic Order, e.g. Res/3171 (XXVIII) 5 Feb. 1974, the right of a state to nationalize foreign owned property was recognized. In these resolutions the duty of the nationalizing state to make compensation was reiterated. Under the New International Economic Order declaration not only was this duty repeated, it was stipulated that in the case of Third World states the nationalized party owed the state a duty to compensate it. In this context the Charter (supra) seems to be more conservative in that it omits this reverse compensation while repeating the standard compensation clause.

which reiterated the right of every state -

> to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.[28]

The section continues to provide for the use of domestic law of the nationalizing State in the case of a controversy over the question of compensation. Other means of settlement will only be used if it is "freely and mutually agreed by all states concerned."[29]

Most capital exporting states voted against the Charter.[30] Its provisions are now the latest view of the majority of United Nations Members and while not having the force of law lend support to Canada's right to interfere with the rights which aliens already have in Canadian land.

The interesting question of whether a province is permitted to discriminate between Canadian citizens on the basis of their residence in a particular province was at issue in the Prince Edward Island (P.E.I.) case of Morgan and Jacobson v. A.G. for P.E.I. (hereinafter called Morgan's case).[31] In the discussion of this case we must keep in mind that judgment was delivered before the new Canadian Citizenship Act was passed.

As stated above, the laws of P.E.I. have gone further than those of any other province.[32] The section challenged in

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28. Article 2 (2)(c). Res/3281 (XXIX) Dec. 12, 1974.
29. Ibid.
30. For example The U.S.A., U.K., The Federal Republic of Germany, Belgium, Denmark and Luxembourg. Canada abstained.
31. [1976] 2 S.C.R. 350.
32. See p.9 (supra).

Morgan's case was section 3 of the Real Property Act.[33] This section is to the effect that a non-resident of P.E.I. cannot acquire, directly or indirectly, any real property in P.E.I. exceeding ten acres or having a shore frontage exceeding five chains without permission of the Lieutenant Governor in Council.[34]

The plaintiffs in Morgan's case were U.S. citizens and residents, who wished to purchase land in P.E.I. They sought to have section 3 of the Act declared ultra vires the provincial legislature.

The Supreme Court of P.E.I. (in banco) rejected the plaintiff's contentions which were threefold. The plaintiffs sought to show that the legislation was, in pith and substance, legislation in relation to aliens, that section 3 conflicted with the Canadian Citizenship Act[35] and finally that the section conflicted with a treaty between Canada and the United States.

The Court held that section 3 made residence and not alienage the criterion for the holding of land in P.E.I. and therefore did not encroach on federal powers. Section 24 of the Canadian Citizenship Act was declared to "merely purport(s) to confer on an alien the same rights as are enjoyed by a Canadian citizen." The matter of the international treaty was summarily disposed of by declaring that it only enabled aliens to inherit real estate or the gains therefrom.

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33. R.S.P.E.I., 1951, c.138 as amended by R.S.P.E.I. 1972, c.40, s.1. now R.S.P.E.I., 1974, c.R-4.
34. Originally the limit was 200 acres, R.S.P.E.I., 1964, c.27, s.1 reduced the limitation to 10 acres.
35. R.S.C., 1970, c. c-19, s.24 (as it then was).

In the Supreme Court of Canada,[36] Chief Justice Laskin confirmed the decision of the Supreme Court of P.E.I. In answer to the allegation that if some citizens or aliens are disadvantaged, compared to residents of the province, the legislation is in pith and substance in relation to citizenship and aliens and thus ultra vires, the Chief Justice said: "I do not agree with this characterization, and I do not think it is supportable either in principle or under any case law. No one is prevented by Prince Edward Island legislation from entering the province and from taking up residence there. Absentee ownership of land in a province is a matter of legitimate provincial concern and, in the case of Prince Edward Island, history adds force to this aspect of its authority over its territory."[37]

The plaintiffs argued, citing the cases of Bryden and Tommy Homma[38] as authority, that every Canadian citizen has the capacity to remain and work in any province, such capacity being derived from citizenship which no province may interfere with. Citing Walter v. Attorney General of Alberta[39] as a precedent giving the provinces the right to determine who can hold land and the extent to which such land can be held, if held communally, the learned Chief Justice stated that if a

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36. [1976] 2 S.C.R. 350.
37. Ibid., at p.358.
38. See footnote 4 - supra.
39. [1969] S.C.R. 383.

province had such power "it is difficult to see why the province could not equally determine the extent of permitted holdings on the basis of residence."[40]

To back up the provinces rights under s.92 (13) of the B.N.A. Act and in an attempt to reconcile the apparent contradiction between parliament's jurisdiction over aliens and the provinces jurisdiction over real property, Chief Justice Laskin stated that -

> (l)egislation of a province dealing with the capacity of a person, whether alien or infant or other, to hold land in the province is legislation in an aspect open to the province because it is directly concerned with a matter in relation to which the province has competence. Simply because it is for Parliament to legislate in relation to aliens does not mean that it alone can give an alien capacity to buy or hold land in a province or take it by devise or by descent. No doubt, Parliament alone may withhold or deny capacity of an alien to hold land or deny capacity to an alien in any other respect, but if it does not, I see no ground upon which provincial legislation recognizing capacity in respect of the holding of land can be held invalid.[41]

Section 24 of the Canadian Citizenship Act (as it then was) was an affirmative exercise of Parliament's power over aliens. Does this mean that a province must treat non-resident aliens

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40. Morgan and Jacobson v. A.G. for P.E.I., op. cit., at p.358.
41. Ibid., at p.359.

(and citizens) on the same basis as resident aliens (and citizens). The court held that the Canadian Citizenship Act does not give either aliens or citizens immunity from provincial legislation "simply because it may affect one class more than another."[42] Such provincial legislation would only be invalid if it struck at the general capacity of aliens or naturalized persons.

The learned Chief Justice concluded that the residence requirement of the statute in question did not destroy the general capacity of a non-resident alien or citizen. The statute was related to a competent provincial object (land holding) and no provincial borders were sealed off.

Before concluding, the court touched upon the analogy of aliens to federally-incorporated companies.[43] It was held that unless their capacity to establish themselves as viable corporate entities was prevented, such federally incorporated companies have no special advantages over provincial corporations simply because of their federal incorporation.[44]

The Supreme Court decision in Morgan's case is significant in that it affirms the right of provinces to legislate over non-resident land holdings under the head of property and civil rights. The conflict between s.92 (13) and s.91 (25) has been

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42. Morgan and Jacobson v. A.G. for P.E.I., op. cit., p.364.
43. See supra at p.16.
44. Morgan and Jacobson v. A.G. for P.E.I., op. cit., at p.364-5.

solved by adknowledging parliament's jurisdiction over the general capacity of aliens. Provinces may pass laws related to a competent provincial object as long as they do not interfere with this general capacity. An example of the latter would be the sealing off of borders so as not to allow an alien to become a resident. Provinces have the power, therefore, to pass legislation concerning land held by non-residents, both aliens and Canadian citizens.

The decision of the Morgan case lent added weight to the already heavy pressure being exerted on the Federal Government to amend the Canadian Citizenship Act. It could be argued now that s.33 of the new Act is a potential limitation on the "general capacity of aliens" and that any future provincial legislation barring aliens absolutely or within limits from acquiring land is constitutionally sound.

Federal Law

As stated above, the Canadian Citizenship Act[1A] has been amended to grant the Lieutenant Governor of each province the authority to make regulations concerning the rights of aliens over land within each province. Provinces also have legislative powers over this subject because of s.92 (13) of the B.N.A. Act. In addition to these legislative powers held by the provinces, the Federal Government still exercises some control over foreigners investing in Canadian real estate by means of the Foreign Investment Review Act.[1] (Hereinafter referred to as the Act). The discussion of the Act (below) will be limited to its application to real estate acquisitions.[1b]

Phase I of the Act, which is designed to provide the Canadian government with legal authority to review the acquisition of existing businesses by non-eligible persons came into effect on April 9, 1974. Phase II, relating to the creation of new businesses in Canada and the expansion of existing unrelated business by non-eligible persons took effect on October 15, 1975.

Section 3 (1) defines a non-eligible person as one who is neither a Canadian citizen nor a landed immigrant as defined in the Immigration Act. A Canadian citizen who is not ordinarily resident in Canada and a landed immigrant who

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1a. S.C., 1974-75-76, c.108, s.33.
1. S.C., 1973, c.46.
1b. See further R. Hobart, S. McFadyen, Federal Legislation on Foreign Ownership: Foreign Investment Controls and Real Estate, in Foreign Investment in Land-Alternative Controls (1976) p.41 at pp.49-51.

has been ordinarily resident in Canada for more than one year after the time at which he first became eligible to apply for Canadian citizenship are also non-eligible persons.

Aside from the above persons the following entities are also non-eligible persons - 1) a foreign government or agency thereof and 2) a corporation (wherever incorporated) that is controlled in any manner that results in control in fact by a non-eligible person(s).[2]

The Act also contains a number of rebuttable presumptions[3] in connection with corporations.[4] If 25% or more of the voting shares of a public company or 40% or more of the voting shares of a private company are owned by non-eligible persons, the company is presumed to be a non-eligible person. Section 3 (2) goes on to include a corporation where any one non-eligible person owns 5% or more of its voting shares, or where any one foreign government or one corporation incorporated outside Canada owns 5% or more of the voting shares. Finally, a company with more than 50% of its voting shares owned by non-eligible persons is irrebuttably deemed to be a non-eligible person.

The policy of the Foreign Investment Review Agency (the Agency) established under the Act,[5] is not to prohibit foreign

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2. s.3 (1).
3. s.3 (2).
4. see also s.4 (1).
5. s.7.

investment but to review it and thereafter to determine if the proposed investment will be of significant benefit to Canada. The Act is not designed to affect or control all foreign investment in Canada but applies only to the acquisition of Canadian business enterprises.

The Act defines a "business enterprise" as any undertaking or enterprise carried on in anticipation of profit.[6] This is a very broad definition, broad enough in fact to include practically all real estate transactions. Some parts of the Act, however are specifically drafted so as to exclude real estate. Section 5 (1)(c) exempts from review any business enterprise, the gross assets of which do not exceed $250,000 and the gross revenue of which do not exceed $3,000,000.

The acquisition of raw land is excluded from control under the Act. It is stated that if a person or corporation acquires and holds land, with the intention of disposing of it or not, he (it) does not by reason only of the holding of the land and the expenditure of funds to maintain the land in the condition in which it was acquired or to improve the land for the personal use and enjoyment of the person holding it 'carry on a business.'[7]

Section 3 (6)(g) of the Act states that any part of a

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6. s.3 (1).
7. s.3 (9).

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. Thus if a corporation owns two office buildings and each is capable of being owned and operated independently, the sale of either would amount to the sale of a Canadian business and thus would be subject to review before a non-eligible person may acquire it.

A non-eligible person must give notice in writing to the Agency, setting out inter alia, information about himself, the Canadian business and his plans for it.[8] The Agency then recommends either allowance or disallowance of the transaction to the Minister of Industry, Trade and Commerce who in turn makes a recommendation to the Canadian Cabinet which makes the final decision.[9]

If the real estate transaction is considered to be an acquisition of a business, it will be considered generally on the grounds of whether an acquisition of control of the Canadian business or the establishment of any new business is of significant benefit to Canada.[10]

The Agency, to help a non-eligible person decide whether he is acquiring real estate which will be considered to be a

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8. s.8, and Foreign Investment Review Regulations, P.C. 1977-606 of 10 March, 1977, SOR/77-225, Schedules I and II, Canada Gazette Part II, Vol. 111, no.6, p.1479, 10 March 1977.
9. s.10.
10. s.2 (2), see below p.41 et seq.

Canadian business enterprise, issued a set of guidelines.[11] As stated in the introduction to the guidelines, they do not have the force of law and are not necessarily conclusive. They are to serve as a guide and are subject to change.

The guideline outlines the factors which may indicate whether a non-eligible person who acquires control of real estate is or is not acquiring control of a Canadian business enterprise. These factors include the nature of the property, the circumstances relating to the transferor of the property, and the circumstances relating to the transferee. The scale of the property may also be an important factor.

The guidelines distinguish business property from circulating assets. The former may tend to be associated with the acquisition of a business while the latter may not tend to do so. Rental property is included under business property. It is stated that "(T)he activity of earning rents from real estate on an economically or commercially significant scale usually involves elements that are associated with the carrying on of a business, and the acquisition of such a property is the acquisition of a business." "For the purpose of these guidelines, the activity of earning rents from real estate is deemed to be on an economically or commercially significant scale if either the gross value of the property

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11. Canada Gazette Part 1, Vol. 108, no. 14, p.1701, April 6, 1974 issued by the Minister of Industry, Trade and Commerce under authority of s.4 (2) of the Act.

from which rents are derived, or the consideration given or to be given in respect of its acquisition, exceeds $10,000,000."[12]

The Agency has informed the writer that the acquisition of certain commercial properties such as apartment buildings, shopping centres and office buildings, when the tenants lease space under long term leases may not be Canadian business enterprises. To determine whether in fact they are or not the following unofficial guidelines are followed by the Agency. If the rentable area of the property to be purchased is under 250,000 square feet and if the total purchase price is less than $10,000,000, the property is not considered to be a Canadian business enterprise. If, however, the rentable area is over 250,000 square feet and/or the total sale price is over $10,000,000 the property will be considered to be a Canadian business enterprise.

With regard to raw land,[13] it is not usually considered to be a business enterprise, though such a purchase may be reviewable if the acquisition of such land and the subsequent development thereof was the initial stage of the non-eligible person starting a development business in Canada. In this case the acquisition would be considered to be the establishment of a new business in Canada and therefore reviewable. If,

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12. Guidelines, op. cit.
13. Foreign Investment Review Act, op. cit., p.3. (9).

however, this was the only development proposed by the non-eligible person in Canada he would be permitted to buy the land, develop it and subsequently sell it to an acceptable buyer without submitting the proposal for review. If the seller of raw land was in the business of trading in land, the acquisition of the land might be the acquisition of a business and thus reviewable if the land acquired constituted all or the greater part of the assets of the vendor.

Similarly in the case of the acquisition of commercial property the acquisition could be reviewable even if the rental area is under 250,000 square feet and the total price is less than $10,000,000, if the property constitutes all or most of the assets of the seller, and if such a seller was in the business of buying and leasing rental property.

The acquisition of a farm is generally considered to be the acquisition of a Canadian business enterprise. If the non-eligible person, however, intends to lease the farm back to the seller or to a Canadian and if under such lease the non-eligible person has no control over the business operation of the farm, such investment will be considered to be a passive investment and not the acquisition of control of a Canadian business enterprise as the business will be carried on by a Canadian. Farm land per se is treated as raw land.

Thus, generally speaking if the value of the consideration is less than $10,000,000 (a circulating asset under the real

estate guidelines) and commercially passive it will not be reviewable. As seen above the Agency may also review the intentions of both transferor and transferee with respect to the real estate before issuing a decision as to the permissability of the proposed transaction.

If the transferor is a corporation, a transaction may be associated with the transfer of a business. The Agency may also take into account the seller's undertaking to invest the proceeds of such a sale in new industrial and commercial projects in Canada.[14] The Guidelines also add that the use made of the property by the transferee is relevant. (See above). If no change is made as to the use of the property the transfer will tend not to be associated with the acquisition of a business. For example, the conversion of an apartment building to a condominium may tend to be regarded as the acquisition of a business. If however the apartments were continued to be used as rental accomodation it would not be reviewable.

If the proposed real estate transaction is construed as the acquisition of a business enterprise, the Agency will decide whether or not it is one which is likely to be of significant benefit to Canada.[15] The Act sets out five

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14. s.2 (2)(a) and s.11 of the Act.
15. s.2 (2).

factors to be looked at in determining whether or not the acquisition of such a business enterprise by a non-eligible person is likely to benefit Canada. It appears that the Cabinet has no general discretion and these five factors are the sole criteria.[16]

The first criterion concerns the effect of the acquisition on economic activity in Canada including, inter alia, the effect on employment, resource processing, utilization of parts, components and services produced in Canada and on goods exported from Canada.[17] It has long been recognized that most real estate transactions are neutral in their effects on the economy and thus if a seller undertook to use the proceeds from the sale so as to benefit Canada the Agency would normally accept this.[18] A non-eligible purchaser presumably would be required to demonstrate how this purchase would benefit Canada.

The second factor looked at is the degree and significance of participation by Canadians in the enterprise.[19] Thus a purchaser could show that he planned to construct a building or housing which was to be built by a Canadian construction firm.

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16. Golden, A.Z. Real Estate Acquisitions Under Foreign Investment Review Act of Canada. (1975) 10 Real Property, Probate and Trust Journal 395 at p.400.
17. Foreign Investment Review Act, op. cit., s.2 (2)(a).
18. Golden op. cit. at 400.
19. Foreign Investment Review Act, op. cit., s.2 (2)(b).

Thirdly the Agency will look at "the effect of the acquisition or establishment on competition within any industry or industries in Canada,"[20] as well as the technological development that will be made as a result of the acquisition of control of an existing business or the establishment of a new one.[21] Lastly "the compatability 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."[22]

This final criterion seems to be designed to ensure that foreign owners will cooperate in achieving policies laid down by the governments.[23] Thus with the shortage of reasonably

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20. Op. cit., s.2 (2)(d).
21. Ibid., s.2 (2)(c).
22. Ibid., s.2 (2)(e).
23. On May 6, 1975 the Honourable Alastair Gillespie, then Minister responsible for the administration of the Act said in answer to a question asked before the House of Commons Standing Committee on Finance, Trade and Economic Affairs that -

> (t)he criteria in the Act do not readily lend themselves to real estate transactions, except for one particular criterion the fifth criterion, which concerns itself with the compatability of a transaction with national economic objectives and provincial industrial and economic policies. Recognizing the importance of rental accomodation at a reasonable cost today, we have decided that the main thrust to those criteria will be on that last item that I have just mentioned. In the meantime, we will take a good look at the operation of the real estate industry, particularly as it applies to rental real estate.

priced apartments it is highly likely that an assurance by the purchaser that he will construct such apartments will be regarded as a significant benefit to Canada.

As stated above a non-eligible purchaser must file an application with the Agency.[24] It is possible for the Agency to negotiate with the applicant and if the latter should make an undertaking with regard to the land this would form terms of a contract between the purchaser and Her Majesty in right of Canada.[25] Should a buyer enter into such a contract and thereafter not comply with its provisions, sanctions contained in the Act could be applied.[26]

Sections 19-27 of the Act set out the sanctions which may be visited upon a non-eligible person in case of non-compliance with the Act. Where the Minister has reasonable and probably grounds to believe that a non-eligible person either proposes to acquire control of a Canadian business enterprise or establish a new one in Canada, or has actually done either of these two and no notice of the proposed investment was given to the Agency, the Minister may demand that the non-eligible person give notice in writing of the (proposed) investment.[27]

If a non-eligible person(s) has made an actual investment in circumstances in which 1) the Minister has made a demand

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24. Foreign Investment Review Act, op. cit., s.8 (1) and (2).
25. Ibid., s.11.
26. Ibid., ss.21 & 22.
27. Ibid., s.8 (3).

under section 8 (3) and such has not been complied with, or 2) the Cabinet has refused to allow the investment, or 3) although the Cabinet has allowed the investment or is deemed to have allowed it, the terms and conditions under which the investment has been made vary materially from those disclosed in the original application or in any other information given, the Minister may apply to a superior court which may make an order rendering the investment nugatory. The court can delay the effect of the order so as to avoid or reduce any undue hardship to any person who was not involved in the investment and who did not know that it was subject to being rendered nugatory under the Act.[28]

Section 20 (2) of the Act is designed to protect the rights of innocent third parties. The Minister may apply to a superior court to revoke or suspend the voting rights attached to any shares of a corporation, or order a person to dispose of any shares or any property acquired in violation of the Act. If such shares are held by a person outside Canada, the court has the power to appoint a trustee to give effect to any court order.[29]

As well as the above steps available to the Minister, the Act provides for criminal sanctions. These apply only to

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28. Op. cit., s.20 (1).
29. Ibid., s.20 (3).

non-eligible purchasers and involve fines of up to $10,000 and imprisonment for up to six months.[30]

It should be apparent by now that when a court order is handed down which renders a sale nugatory, the result may be chaotic. Section 20 (1) allows for such an order to be made retroactively and this could well create additional problems if any leases or mortgages have been entered into.

Certain real estate brokers feel that it is unfortunate that real estate transactions are often reviewable under the Act. North[31] gives three reasons for his regrets. Firstly, he feels that the extent of administration and management required for the effective operation of a property should be a relevant criterion for deciding whether the investment property amounts to a Canadian business enterprise. He feels that non-eligible persons taking over real estate development companies or large areas of land for speculation or development should be subject to review. Most foreigners, however, who wish to invest in Canadian real estate buy one or more investment properties as a long-term passive investment. The investor is therefore seeking a management-free property earning an assured rate of interest and not a business. We

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30. Op. cit., s.24 (1).
31. North, L.W. Foreign Investment in Canadian Real Estate, The Research and Development Fund, Appraisal Institute of Canada, February 1977 at p.7 et. seq.

feel, however, that this is an unwarranted criticism as such investments will be readily allowed by the Agency within limits.

North's second criticism is that the size of the investment is at present a criterion used to decide whether a property is a business. Large developments, e.g. shopping centres, he maintains, will benefit Canada in that they will provide employment. Foreign labour should be kept out by immigration laws. It appears that Mr. North is assuming that all such developments are in Canada's interests.

His final point is that all foreign investment brings in foreign currency which is reinvested by the seller in construction, thus providing more housing and jobs. Without wishing to go into the debate as to the pros and cons of foreign investment and what the pouring in of currency may do to the Canadian dollar and the effect on Canadian exports, we feel that it is safe to say that not all sellers will follow Mr. North's proposed spending plan.

Though there was talk of preparing a study to investigate the effects of the Act on Canadian real estate, no studies have actually been published (or in fact undertaken) by the Agency on this point. The Agency has however pointed out that the Minister's announcement[32] was drawn to the attention of

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32. P.37, no.23 (supra).

the Canadian Real Estate Association and others known to be actively engaged in transactions of this kind. The Agency is unaware of any concrete evidence that the Act has discouraged foreign investment in Canadian real estate.

Now that section 24 of the old Citizenship Act has been amended to become section 33 of the new Act, the Director of Research of the Agency has pointed out to the writer that the Federal Government plans to propose an amendment to the Act that would exempt from review investments in land, including agricultural lands, which are subject to provincial laws and regulations made pursuant to the new Citizenship Act.

The Provinces.

Policy Questions.

In 1975 the Federal-Provincial Committee on Foreign Ownership of Land met in Ottawa.[1] The Committee discussed, inter alia, the problems of alien land ownership in all areas of the country.

It was felt that the purchasing of land by foreigners was restricting access for resident citizens to prime recreational areas such as beaches and shorelines. As prices rose with the increased demand by foreigners for Canadian land the result was an increase in the subdivision of agricultural land as well as the removal of good farmland from production. A further consequence of such price hikes would mean rising property values with resultant higher tax assessments for local residents.

Besides the potential conflict which exists between the goals and priorities of foreign investors and Canadian economic goals, foreign ownership is believed (as has been pointed out)[1a] to bring about changes in the character of local communities. Certain areas become populated during the summer and for instance remain virtually deserted during the remainder of the year.

In order to discuss the problems that are particular to each province it is necessary to distinguish between the

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1. Report to the First Ministers. Canadian Intergovernmental Conference Secretariat, Ottawa 1975.

1a. P.3, (supra).

effects of foreign ownership on different types of land.

It has been estimated that in Ontario 90% of the available recreational land in some areas is held by U.S. citizens.[2] The Ontario Select Committee on Economic and Cultural Nationalism (1973)[3] reported that no accurate statistics exist for foreign ownership of land in the province. The Committee felt that, even without such statistics, it was accurate to say that foreign buyers with effective purchasing power meant that the fixed supply of land would be rationed at a higher price.[4] This would mean higher prices for Ontarians and could not be justified by the limited benefits resulting from direct foreign investment. Such investment was not associated with job creation, technology, market access or any other benefit to the Canadian economy.

It was felt in fact, that foreign investment in land would not only not bring benefits but would be damaging to Northern Ontario, hinder future development and have a negative effect on local residents.

With regard to agricultural land it was felt that the foreign food processing giants were buying up and affecting the farm economy. Available statistics showed a small amount

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2. Cutler, M. Foreign Use and Canadian Control of Our Land and Resources. Can. Geog. J., May 1975 at p.21.
3. At p.19.
4. Ibid.

of farm cash receipts were made up by such firms but it was deemed likely that they might expand.

Foreigners had over-invested and speculated in raw suburban land. This had resulted in the forcing up of prices and the blocking of commercial development with social objectives.[5]

Most provincial studies have reached similar conclusions. Both Manitoba and Saskatchewan were weary of the food processors taking over farmland. In 1975 it was estimated that 1.3 million acres of Manitoba's 19,000,000 farmland acres were owned by non-residents. Farm prices had risen 30% between 1972 and 1973.[6] A Saskatchewan legislative committee in 1973 found less than 1% of farmland was held by foreigners with U.S. citizens holding 3% in prime southern areas.[7] This percentage seems to be rather small and one wonders whether the legislative steps taken to halt foreign purchases were not simply a political move. It was concluded that the problems were those of land use and not ownership.

The Alberta Select Committee concluded that the province did not have a non-resident or non-Canadian land ownership problem.[8] Slightly more than 1% of farmland was

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5. Select Committee op. cit., p.29.
6. Cutler op. cit., p.31.
7. Ibid., p.32. See also Saskatchewan Select Committee on Foreign Investment 1974.
8. Final Report on Foreign Investment, Report of the Select Committee of the Legislative Assembly of Alberta on Foreign Investment, Dec. 1974 at p.44.

found to be foreign owned.[9] The provincial committee noted that many steps had already been taken to discourage such foreign investment. An example is the inability of non-Canadian citizens or landed immigrants to obtain mortgage loans from the Farm Credit Corporation. The Small Farm Development Program which was founded by the Canadian Department of Agriculture pays a seller a bonus if he sells to inter alia a Canadian citizen or landed immigrant.[10]

With regard to recreational land no problem exists in Alberta as this is mostly Crown land. The Committee recommended that all future land transactions should be monitered so that the province would be aware of any changing patterns. The sale of Crown land in all provinces is restricted.

Unlike other legislative committees,that of Nova Scotia reported that land use and not land ownership was the problem.[11] This is surprising when one considers that in 1964 40,000,000 Americans lived within one day's drive from Nova Scotia and owned 65% of the non-resident owned land.

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9. Report by Resource Economics Branch of the Alberta Department of Agriculture, October, 1973. The Alberta Select Committee on Foreign Ownership of Land 1972 estimated that former public land transfered to foreigners amounted to .0023% of the total land of the province. At the rate of this report (1972) 34.6% of Alberta was privately owned.
10. Alberta Final Report, op. cit., p.46. There is also a Tax Reduction Plan for Canadians.
11. Cutler op. cit., p.26. At the Federal-Provincial Conference op. cit. 1975 p.6, it was estimated that 5.5% of the total area of Nova Scotia was owned by non-residents of the province, 36% of them were Canadians.

More or less 1/3rd of the total recreational shoreline is foreign owned and in general 1,000,000 of Nova Scotia's 13,000,000 acres are foreign owned.

The affects of foreign ownership on farms and the fishing industry in Nova Scotia was the subject of a 1971 Dalhousie University study by that institution's Institute of Public Affairs. It was found that the best recreational land was being bought by non-residents who contributed little to the local communities. Most studies arrived at this same conclusion, some provinces however, felt that the summer migration of American citizens brought great economic benefit to such local communities, thereby compensating them for the loss of their control over the land. The Dalhousie study also found that the best farmland was becoming too overpriced for agricultural purposes and that woodlots were being withdrawn from the economy.

The Prince Edward Island report of 1973[12] proved to be the only one which could produce accurate statistics on the extent of foreign and non-resident land ownership. These figures are derived from a 1960 study. As mentioned in the introduction,[13] Prince Edward Island has had legislation controlling foreign land ownership for many years (dating from 1859).

The provincial committee of Prince Edward Island

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12. Prince Edward Island Royal Commission on Land, Charlottetown, 1973.
13. p.10 supra.

reported that its survey showed that, by 1970, 5.13% of the land mass was owned by non-residents and that the rate of acquisition was on the rise.[14]

The committee noted that in 1973 230 petitions were made under the Real Property Act[14A] for acquisitions of land parcels greater than that allowed. Of these 87 were for shoreline property. Of these the government approved 181 applications, was considering 17 at the time and turned down 38. The government felt obliged to purchase land it denied non-residents.[15] It seems that this was due to the reasons given by the government for such refusals. The government turned down the applications on the grounds that the land was necessary for farm consolidation schemes, wildlife preservation schemes, park development schemes and avoidance of speculation.[16]

In its survey the committee found that island residents felt more strongly about the use to which land was being put than those who actually owned it. They reported that people who used the land as weekend farmers usually permitted the land to go to weed and that the weed then spread to nearby cultivated land.[17] The result was that well cultivated areas were affected as well as leaving the

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14. P.E.I. Royal Commission, op. cit., p.15.
14A. Now R.S.P.E.I., 1974, c.R-4.
15. Ibid., P.E.I. Royal Commission, op. cit., p.70.
16. Ibid., p.87.
17. Ibid., p.34.

countryside with an undesirable appearance.

An often-heard public objection was that non-resident cottage owners had installed fencing which restricted public access to some beaches. These areas had always been privately owned but traditionally the public had been given access to the beaches.[18]

The Prince Edward Island Royal Commission concluded that two measures would cure the ills caused by non-resident land ownership. Firstly, a general land use scheme should be set up. Existing farms should be maintained and conservation encouraged. Within the overall scheme local communities should work out details. Recreation land should be arranged so as to allow for public access to beaches and the development of cottages should be controlled.[19]

The second step would be the idea of minimum maintenance. This meant that owners would carry out a designated amount of upkeep on their property each year, or alternatively, pay a substantial fee in lieu thereof.[20]

Finally the committee recommended that once the planning and minimum maintenance legislation was established the restrictions on size of individual land acquisitions by non-residents could be removed. The committee obviously felt sure that its solution would solve the majority of

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18. P.E.I. Royal Commission, op. cit., p.40.
19. Ibid., p.48 et seq.
20. Ibid., p.41 et seq.

problems.[21] It was recommended, however, that non-individual land acquisitions, i.e. corporations and partnerships should be required even after this time to obtain consent to acquire more than 200 acres.[22]

In 1975 at the Federal-Provincial Committee's Report to the First Ministers[23] it was announced that estimates showed that more or less 6.3% of all available land in Prince Edward Island and 11.5% of the total shore frontage was owned by non-residents. The report went on to warn that if land was sold at the existing rate and under existing restrictions the first figure (i.e. land surface) would jump to 25.7% by the year 2000. Without any restrictions this figure would be 50%. When one considers that Prince Edward Island has no Crown land and the smallest land surface of all the provinces these figures become even more significant.

Besides these estimated figures the common complaints about land purchases by non-residents were discussed. These included the loss of access to traditional areas, loss of farm land, the pushing up of land prices and the subsequent

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21. P.E.I. Royal Commission, op. cit., p.69.
22. Ibid., p.70.
23. Federal-Provincial Committee on Foreign Ownership of Land. Report to the First Ministers. Canadian Intergovernmental Conference Secretariat. Ottawa, 1975 at p.5.

effect on taxes, increased land subdivision and speculation and the general loss of environmental quality.

The current figures for non-resident land ownership in Prince Edward Island might seem small relatively speaking but a closer inspection of the type and situation of the land owned reveals much.[24] The island has a coastline that stretches 400 miles. Of this about 120 miles and more than 1/3rd of the 150 miles of prime recreational shore frontage is owned by non-residents.[25]

In Newfoundland the position is very different as more than 95% of the province consists of Crown land. At the Federal-Provincial meeting it was found that Newfoundland was more interested in land use and development than the nature of who actually owned the land.[26] Restrictions have been placed on the sale of Crown land to aliens since 1971.[27]

The province of New Brunswick has no restrictions on the sale of land to non-residents. Similarly there are no restrictions on the sale of Crown land which is only sold to foreigners in rare cases.[28] Between 1967 and 1972 77 parcels of Crown land were sold (a total of 3,435 acres).

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24. In 1975 non-residents owned more than 100,000 of 1.4 million acres making up the island (± 8% of the province).
25. See Cutler op. cit., May 1975, p.25.
26. Federal-Provincial Committee op. cit., p.4.
27. See p.12 supra.
28. Cutler op. cit., p.28.

Of this only 3 parcels (47 acres) were sold to Americans.

At the Report to First Ministers in 1975 it was estimated that 31% of the total land mass of New Brunswick was owned by non-residents of that province, while 4.1% was owned by American corporations or their subsidiaries.[29] 48% of non-resident owners (individuals) were Americans, the remainder were Canadian citizens. As in the case of the other Maritime provinces, it was felt that in New Brunswick all problems could be handled by land use legislation.

Ninety-three percent of the land making up the province of British Columbia consists of Crown land. No restrictions exist on foreigners purchasing privately held land but Crown land can only be disposed of to Canadian citizens or landed immigrants.[30] Since 1958 there have been no sales of waterfront Crown land and since 1974 any person applying to be registered as an owner of land must make a statutory declaration stating his citizenship.[31]

Quebec's Task force on foreign investment does not go into great detail about foreign investment in land.[32] Like other provinces Quebec has few statistics on foreign land

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29. Federal-Provincial Report op. cit., p.7.
30. Land Act, R.S., 1948, c.175 as amended.
31. Land Registry Act S.B.C., 1974, c.47, s.11A. If a corporation is a purchaser the declaration must include a statement as to the nationality of each director.
32. Quebec, Task Force on Foreign Investment, 1974, chapter 21.

ownership. The main concern expressed was that foreign speculators were affecting the future of viable agriculture land.[33]

We can sum up by saying that some provinces saw foreign land ownership as being the cause of certain real estate problems while others felt that land use was the real problem. These differences in finding made by provincial committees are reflected in the legislative changes which were subsequently made by the provinces.

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33. Premier Levesque announced in the National Assembly on March 6, 1979 the P.Q. government's intention to table legislation designed to restrict the purchase of speculation and farmland to residents of the province of Quebec. (Montreal Gazette, March 7, 1979)

Background and Law.*

Four provinces have extensive legislation governing the transfer of land to foreigners. Two different approaches have been taken with regard to this legislation. Saskatchewan and Prince Edward Island have placed restrictions on the sale of land to non-residents (as defined by each of these provinces) while Quebec and Ontario have imposed a land transfer tax to discourage foreign buyers.

One must keep in mind that these provincial laws act independently from the federal laws (Foreign Investment Review Act) (supra).

The other provinces while not going nearly as far as the above four provinces have sometimes placed a lesser obstacle in the way of foreign buyers. Nova Scotia has its 1969 Act which requires every non-resident buyer of land to disclose his nationality and amount of holdings.[1] Newfoundland has no legislation prohibiting foreigners from acquiring land within the province but there is a statute banning the granting of Crown Lands to non-residents.[2]

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* The Taxation of Rental Property of special interest to foreigners is not discussed in this thesis. For an in depth analysis of this subject see Gauthier, A. The Taxation of Rental Property. Corporate Management Tax Conference, 1977.

1. Land Tax Disclosure Act, S.N.S., 1969, c.13.
2. Crown Lands (Amendment) Act, S. Nfld., 1971, no.46.

No laws covering this area exist in Alberta since the Communal Property Act[3] was repealed in 1972. In Manitoba, like Nova Scotia, Crown lands cannot be granted to non-Canadian citizens or residents.[4] New Brunswick has no legislation.

These provincial laws as well as those of Quebec and Ontario appear to be intra vires by virtue of s.92(13) of the B.N.A. Act and the recent amendment to the Canadian Citizenship Act.[5] The Citizenship Act does however have one section which limits the power of the provinces.[6] Section 33(6) states that provinces may not take any action that discriminates against a landed immigrant ordinarily resident in Canada, conflicts with any legal obligation of Canada and discriminates against non-Canadian citizens on the basis of their nationality (except so far as more favourable treatment is required under international law). Provinces are also prohibited from taking any action which hinders a foreign state from acquiring real property for diplomatic or consular purposes.

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3. S.A., 1947, c.16.
4. Crown Land Act, R.S.M., c.57.
5. 1974-75-76, c.108, s.33.
6. I am assuming that this section is valid being part of parliament's right to legislate over the general capacity of aliens, see supra p.28.

As stated these laws act independently of the Foreign Investment Review Act and section 33(6)(e) of the Citizenship Act lays down that the Foreign Investment Review Act takes precendence over provincial legislation. The section states moreover that provincial laws may not prohibit or annul or restrict "the taking or acquisition directly or indirectly of any interest in real property located in a province by any person in the course or as a result of an investment considered and allowed by the Governor in Council under the Foreign Investment Review Act."

In most cases there will not be a clash between the decisions made by the Agency and provincial laws as one of the factors used by the Agency is the policy objectives of the province affected.[7]

Prince Edward Island.

This was the first province to pass laws restricting the amount of land a non-resident could purchase. These laws were discussed in detail above[8] and so will not be gone into here except to say that the recommendations of the province's Select Committee were not followed.[9]

Saskatchewan.

Saskatchewan is the other province restricting land

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7. s.2(2)(e) of the Foreign Investment Review Act. S.C., 1973, c.46.
8. p.10, 23 et seq. supra.
9. p.49 supra.

sales to non-residents of the province. In 1974 the Saskatchewan Farm Ownership Act (the Act) was passed.[10] The aim of this legislation was to protect family farms. The government felt that family operated farms function as the most efficient unit for food production. At the time the legislation was passed 75,000 family farms existed in Saskatchewan.[11]

The government spokesman told the legislative assembly that food was scarce the world over and thus there was an increase in the desire world wide to invest in agricultural land.[12] The reason given for the government view that one, two or three man farms were the most efficient was that other business organizations such as corporations formed monopolies thus causing a rise in food costs.[13] As well as this local small farmers spent money in local towns whereas foreign farmers and corporations would purchase in major centres. We must remember when considering these debates that Saskatchewan has and had a New Democratic Party government in 1974 and has no sympathy for the power of large corporations.

It was stated in the Saskatchewan Assembly that the Act

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10. 1973-74 S.S., ch.98.
11. Saskatchewan Debates, April 3, 1974, p.2030 per Mr. Messer.
12. Ibid., p.2028.
13. Ibid., p.2029.

was the result of a study undertaken to obtain the views of Saskatchewan residents.[14] The aim of the Act was stated to be to restrict the ownership of land by non-resident and non-agricultural corporations.

Section 7 of the Act is to the effect that no non-resident of Saskatchewan can own land with greater than an assessed aggregate value of $15,000 excluding the value of buildings. The limitation only applies to rural land.[15] The reason for the amount of $15,000 was given in the assembly where it was stated that the government felt that small land owners would be unlikely to negatively affect the agricultural industry or Saskatchewan in general.[16]

Land which has a value of $15,000 does not necessarily mean that a small parcel of real estate is involved. Land in some areas of Saskatchewan is evaluated from $1,000 - $3,000 a quarter section (160 acres).[17]

A resident of Saskatchewan is defined by the Act as an individual who resides in the province for a period exceeding 183 days in a year or a farmer who resides within 20 miles of the Saskatchewan border.[18] This definition was harshly attacked in the assembly by the opposition who felt that it was an attack on federalism.[19] The legislative

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14. Debates op. cit., p.2031.
15. s.2(d).
16. Debates op. cit., p.2032.
17. Ibid., p.2032.
18. s.2(h).
19. Debates op. cit., p.2034-2036.

committee had not recommended that ownership be restricted to Canadians and this Act in fact permits an American citizen living within 20 miles of the province to purchase as much farmland as he wishes anywhere in Saskatchewan while a Canadian living 30 miles away in Manitoba for example cannot.

Many local farmers have incorporated and these corporations are not affected by the Act.[20] An agricultural corporation is defined in the Act as a corporation whose primary business is farming and of which 60% of the capital and 60% of the voting shares are owned by residents within the meaning given to residents by the Act.[21]

Non-agricultural corporations are not permitted to acquire more than 160 acres or a quarter section.[22] The Act established a Board to administer its provisions,[23] and this Board may give consent to a non-agricultural corporation to hold or acquire land in excess of 160 acres for purposes other than farming subject to certain terms and conditions.[24] If such a non-agricultural corporation

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20. Debates op. cit., p.2032.
21. s.2(g).
22. s.11(1). It has been pointed out that a farm smaller than 160 acres is rarely considered to be a viable farm in Saskatchewan - see North op. cit., p.13.
23. s.3.
24. s.11(2).

does not have such consent it has 20 years to dispose of any excess land it held on March 31st 1974.[25] Individual non-residents are not affected by the Act if they held the excess before this date.[26]

Should an agricultural corporation become a non-agricultural corporation it has 5 years from the date it became one to reduce its land holding to the required maximum.[27]

It was argued by the opposition at the time the Bill was debated that the system of credit would be affected by the provisions preventing non-residents from holding land. Creditors would have no rights on foreclosure. Thus section 13 of the Act provides that creditors can hold such land for a period of up to 2 years and the Board may extend the 2 year period if it is advisable.[28]

The Board has the authority to ensure that the provisions of the Act are followed. It may order any person or non-agricultural corporation to reduce his (its) land holdings if the amount held is held in contravention of the Act.[29] If the person or corporation ordered to do so fails to act within 6 months the Board may apply to court to have its

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25. s.12(1).
26. s.8(1)(a).
27. s.12(2).
28. Debates op. cit., p.2033 and s.13(1) and (2).
29. s.17(2).

order enforced.[30] The Court has the power to render 1 of 7 orders to the recalcitrant landholder. It may make an order declaring any instrument or document by which the land holding is acquired in contravention of the Act null and void; it may order the sale of the land held in contravention of the Act and make an order as to who is entitled to the proceeds. The Court may order that the Certificate of Title be cancelled and re-issued to the persons entitled to the land, that any consideration received be returned, that possession of the land be given to the rightful holder, and any order regarding costs. Finally the court is given wide powers to make such "order as may be necessary to give effect to the provisions of this Act or as to (him) seems just."[31]

Penal sanctions are also provided for by the Act[32] with fines of up to $5,000 for individuals and up to $50,000 for corporations.[33]

If a resident landholder becomes a non-resident (as defined in the Act) he has 5 years to reduce his land-holdings to the legal maximum.[34] A non-resident inheriting

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30. s.17(4).
31. s.17(4)(g).
32. s.16.
33. s.8(2).
34. A non-resident who intends to become a resident of Saskatchewan within 3 years may apply to the Board for an exemption from section 7. If such a person fails to become a resident in the 3 year period the exemption terminates - s.15(2).

such land also has 5 years to reduce his holdings.[35] An exemption however exists if the land is left to a close member of the testator's family if the transferor during any 5 years before the transfer was a resident person and he or his spouse had personally farmed that land.[36]

The opposition levelled a number of criticisms at this Act.[37] The major deficiency was felt to be the fact that the Act did not talk of recreational land. The government, when introducing this piece of legislation, talked of Americans buying up large areas of recreational land but the Act only governs farmland. It was also felt that the Act was further increasing the power of the authorities to meddle in the affairs of the individual in that the Board has the power to conduct investigations to determine whether the Act has been contravened.[38]

The Board is entitled "at all reasonable time" to "demand the production of and inspect all or any of the books, documents, papers or records of the person in respect of whom the investigation or inquiry is being made."[39] Penal sanctions back up the Board's power.[40]

It seems that of the legislation created by the two

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35. s.9.
36. s.10(1).
37. Saskatchewan Debates, op. cit., p.2034 et seq.
38. s.19(1).
39. s.19(2).
40. s.19(3).

provinces (Prince Edward Island and Saskatchewan), both designed to keep non-residents of the particular province from acquiring large areas of land, that of Prince Edward Island appears to be more justified. The latter province is much smaller and faces a very real threat from non-residents. The Saskatchewan Act seems to be calculated to prevent any of these problems in the long run although statistics of foreign land holders show that no real problem or threat exists at present. Canadians who are non-residents of both these provinces feel that this type of legislation, which descriminates against foreigners and other Canadians equally, is unfortunate in that it is a further factor aiding in the break up of the federation.

Ontario.

Ontario has been referred to "the sector of Canada that has been sold in Europe as the most dynamic, most stable area for real estate."[41] It is the view of the real estate industry that this statement is no longer valid due to the recently passed legislation in Ontario[42] which is designed to help keep real estate in that province in Canadian hands.

The findings of the Select Committee on Economic and Cultural Nationalism of 1973 were described when we discussed policy questions above.[43] The Select Committee, after a full investigation, recommended that legislation should be passed restricting ownership of real property in Ontario to Canadian citizens and landed immigrants resident in Canada. It was suggested that non-eligible persons should be permitted to lease property for a maximum of one year without option of renewal.

It can be seen that unlike the solution arrived at in Prince Edward Island and in Saskatchewan, that recommended

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41. Lowden, J.A., Impact of Foreign Investments on Future Real Estate Value in Canada,- Impact of foreign investments on North American real estate markets - seminar of American Institute of Real Estate Appraisers and Appraisal Institute of Canada, March 14, 1975 at p.42.
42. The Land Transfer Tax Act, S.O., 1974, c.8.
43. Supra., p.44.

by the Select Committee in Ontario constituted an outright prohibition to purchase land if one was not a Canadian or a resident landed immigrant. At no time did the committee distinguish non-Ontario residents from residents of that province provided they were citizens of Canada or immigrants.

The Select Committee further recommended that individual municipalities should be given power to levy a surtax of 50% of the tax otherwise assessible on property which is owned by non-eligible persons. When it came to the question of corporations it was recommended that any corporation which was less than 75% Canadian owned should be treated as a non-eligible person. Certain foreign corporations bring substantial benefits to local economies and thus it was felt that such corporations should be entitled to acquire leasehold interests in land.[44]

Even though many members of the party in power at the time (Conservative) put their names to these recommendations, the government seems to have ignored the findings and recommendations of the Select Committee.

Before April 9th 1974 a minor land transfer tax existed in Ontario. With regard to this tax no distinction was made between foreigners and Canadians, nor between residents and non-residents. The tax was levied under the pre-1974 legislation on a person who tendered an instrument for

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44. Select Committee op. cit., p.53.

registration conveying land in Ontario. Such transfers of land included a lease exceeding 50 years. The rate of tax was 3/10ths of 1% of the value of the consideration up to the first $35,000 and 6/10ths of 1% for any amount in excess of $35,000.

The 1974 Act repeats these rates which apply to a conveyance of land to a resident.[45] A non-resident is defined as one not ordinarily resident in Canada or one who is ordinarily resident in Canada but is neither a Canadian citizen nor a lawfully admitted permanent resident of Canada.[46] In the case of a partnership, syndicate, association or other organization, if one half (50%) of the members are non-resident the organization is deemed to be a non-resident.[47]

The big change made by the 1974 Act was that where land is transferred to a non-resident person, the person tendering the conveyance for registration became liable for a tax of 20% of the value of the consideration.[48]

Because the government did not implement the recommendations of the Select Committee, it came under some harsh criticism in the Legislative Assembly. The opposition

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45. Land Transfer Tax Act, S.O. 1974, c.8, s.2.
46. s.1(g). Thus a visiting executive or teacher who is neither a Canadian citizen nor a landed immigrant but who lives and works in Canada would be treated as a non-resident. See s.1(3). A Canadian citizen who spends more than 366 days of the preceeding 24 months is also considered to be a non-resident.
47. s.1(g)(iii).
48. s.2(2).

felt that the only way to stop foreigners buying land in Ontario was by outright prohibition. It was argued that the way the law is now written foreigners will simply accept the 20% as a cost of doing business. Thus what will in fact have happened, so the opposition argued, was that the government will have added 20% to the price and that this 20% would eventually be passed on to the consumer - the Canadian home buyer.[49]

On the conceptual side it was stated by the opposition that taxation is a revenue gathering device which should be restricted to budgetary and fiscal matters and as a device for redistributing income. One number of the opposition said that what the Minister was saying in this Act was - "Ontario for purchase. It costs a little bit more today than it cost last week."[50]

The government did not speak in defence of the proposed Act to any significant degree. On the contrary, the opposition continued with one attack after the other. The NDP and other opposition members accused the government of

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49. Legislative of Ontario Debates, Official Report, The Queen's Printer, Toronto, April 19th, 1974 per. Mr. Breithaupt, p.1169.

50 Ibid., per. Mr. Lewis at p.1186.
References in this research to Debates in the Legislative Assemblies are made to help explain why certain legislative provisions were passed and do not reflect the manner in which the court will interpret any provisions.

being in league with large corporations. Some foreign countries, e.g. Germany, give tax deductions to their citizens who invest overseas. That deduction may amount to more than 20% and thus such investors could continue, quite profitably to invest in Ontario. The government would receive 20% and the ultimate buyer or tenant would be forced to pay a higher purchase price or rent.[51]

As the debate continued in the Assembly so the opposition continued its attack. There was a continued call for a total prohibition or a 100% tax.[52] The Minister countered these calls by saying that the Select Committee had acknowledged that it did not have all the facts concerning international money. He went on to say that a total ban on sales to foreigners would cause turmoil in investment circles and was not in Ontario's or Canada's best interests.[53]

In further defending the proposed legislation the Minister argued that the opposition's claim that the 20% tax would be passed on to Canadian buyers was not true because firstly non-resident builders who undertake to develop and re-sell to Canadians would obtain a tax deferral. Thus the tax would only be passed on if the land was sold

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51. Debates op. cit., - per. Mr. Lewis p.1187.
52. Debates April 22, 1974. per. Mr. Cassidy p.1223.
53. Ibid., p.1228.

to another non-resident. Secondly he argued, in a rather schoolmasterly fashion, that where demand for land exceeds supply the price is established not by the cost of the article but by the demand. On the contrary the Minister argued, the 20% tax would bring down the basic market value by detracting from the demand.

Despite the huge opposition to the bill before the Assembly the Province of Ontario on April 9th 1974 enacted the Land Transfer Tax Act[54] and the Land Speculation Act.[55] The former piece of legislation is of more concern to the foreigner and thus will be examined in detail.

Land is defined in the Land Transfer Tax Act (hereinafter referred to as the Act) as land and buildings thereon or any rights deriving therefrom.[56] Until April 20th 1977 all transfers of such land (which include rental properties) to non-residents attracted the 20% tax. As part of the 1977 Ontario Budget the government announced that "unrestricted" land would not be taxable at the rate of 20% when transferred to a non-resident. "Unrestricted" land was defined as land zoned for commercial or industrial use or land which is "assessed under the Assessment Act for residential assessment or is lawfully used and occupied for commercial, industrial

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54. S.O. 1974, ch.8 as amended.
55. S.O. 1974, ch.17 as amended.
56. Land Transfer Tax Act, op. cit., s.1(d).

or residential purposes."[57] Not included under "unrestricted" land is farm land, woodlands, recreational land and orchards.

As non-resident persons have been discussed above[58] we will not repeat ourselves here. The Act defines a non-resident corporation as a corporation, whether incorporated in Canada or not, where 50% or more of the voting control is ordinarily excerised by non-resident persons.[59] A corporation is also non-resident if 25% or more of the voting shares are held by one individual non-resident shareholder.

The liability for tax is activated by the act of tendering a conveyance for registration and not the act of conveying.[60] "Convey" is defined in the Act as granting, assigning, releasing, surrendering, disposing of or agreeing to sell land in Ontario as well as giving an option on any land in Ontario. It does not include a mortgage transfer.[61] "Conveyance" is defined as any instrument by which land is conveyed and includes a final order of foreclosure under a mortgage.[62]

Together these definitions make up a broad range of

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57. s.1(1a) Apparently the government was embarassed by the number of exemptions it was granting (almost $15,000,000 in the first 9 months after the tax existed) - See Cutler, op. cit., p.40.
58. p.65.
59. s.1(1)(b).
60. s.2(1) and (2).
61. s.1(1)(b).
62. s.1(1)(c).

taxable transactions. An agreement to sell (where a deed is tendered) is, for example, taxable but an agreement to lease or any oral agreement is not. Where the transfer of title to real estate is not followed by the registration of a deed, for example where the transaction involves the transfer of shares, the 20% tax is payable under the Land Speculation Tax Act.[63]

In practice this might not always work out as one author has shown.[64] The example cited is the case of two New Yorkers who have a holding company which has an interest in two Ontario corporations. The New York company does not hold 51% of the shares but still has effective factual control over both Ontario corporations in Canada. Next a transfer of shares in the holding company takes place in New York between New Yorkers. Because of the control factor the land held by the two Ontario corporations is deemed to be real estate of the New York company. The real estate increases in value until it becomes more than 50% of the holding company's assets and thus eligible for the tax. The two Ontario companies are now liable to pay the tax but the Ontario authorities will never hear of the behind the scenes transactions.

The above control is defined by the Act as effective factual control directly or indirectly by another corporation,

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63. S.O., 1974, 1974, c.17., see s.1(1)(d)(V).
64. Stapells, R.B., Trusts and Investments in Canada, (1975) 10 Real Property, Probate and Trust J. 710 at 718.

individual or trust. It includes the effective control by the holding of shares or by virtue of the outstanding debt of the corporation or by any other means.[65] Because of loans a corporation may be controlled by a bank, trust company or finance company. If a lender is a non-resident and gains control the tax will be exigible.

As pointed out by the Minister who introduced the Act, certain provisions exist for tax deferrals or remissions. Section 16 empowers the Minister (with the approval of the cabinet) to defer payment of the tax or remit the tax paid if certain conditions as to land use and development are agreed upon by the non-resident. Any such tax deferral or remission constitutes a first lien, in favour of Her Majesty, on the land in question, subject to the performance of any conditions imposed or undertaken.

The Minister only has power to grant such deferral or remission if the non-resident shows that the land is being acquired for the purpose of the development and resale for residential, commercial or industrial purposes.[66] Other purposes acceptable are the establishment, expansion or relocation of active commercial or industrial business carried on by a non-resident who undertakes to obtain a zoning permit.[67] If the non-resident is a Canadian citizen he must, in order to obtain a deferral or remission, undertake

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65. s.1(2).
66. s.16(a).
67. s.16(b).

to cease to be a non-resident within 5 years.[68] If he is not a Canadian citizen he must undertake to become a resident within 2 years.[69]

The tax is payable by the transferor when a conveyance is tendered for registration and the tax is 20% of the value of the consideration for the conveyance.[70] "Value of the consideration" is defined in the Act as including moneys paid in cash, the value of any property or security exchanged for the land, the value of any encumbrance, charge or other liability to which the land is subject at the time of registration; and in the case of a final order of foreclosure under any mortgage or charge affecting land, the value of consideration will be the lesser sum of the amount owed under the mortgage at the time of foreclosure including principal, interest and all other costs other than municipal taxes; or the fair market value of the land subject to the mortgage or charge.[71]

Land that is given away as a gift is not subject to the tax no matter what the relationship is between the parties.[72] It is required however that the affidavit to be filed must state the relationship of the parties concerned. If land is given as a gift and the consideration is the assumption of any

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68. s.16(c).
69. s.16(d).
70. s.2(2).
71. s.1(1)m and Bulletin LTT-7.
72. Bulletin LTT-8.1. Natural Love and Affection.

encumbrance on the land, tax is payable on that amount.[73]

The procedure for tax payment is as follows: the transferee is required to make an affidavit setting out the value of the consideration for the conveyance as well as an affidavit as to residence.[74] These affidavits are tendered at the time of registration with the conveyance if the land being transferred is not unrestricted.[75]

The collector to whom the affidavit is presented may refuse to register the conveyance if he is not satisfied that the affidavit sets out the true value of the consideration, unless the Minister himself is satisfied.[76] If no affidavit is filed at the time when a conveyance is tendered for registration, the 20% tax is payable and the collector will not register the conveyance until the tax is paid. "If it is subsequently established to the satisfaction of the Minister that, had the affidavit required (concerning residence) been furnished to the collector, tax would have been payable" at the resident rate, "the Minister may refund the amount paid" in excess of such resident rate.[77]

Section 18 of the Act gives the Lieutenant Governor in Council power to make regulations concerning inter alia exemptions from the tax.[78] An example of this is a 1974

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73. Bulletin, op. cit., para.2.
74. s.4.
75. s.4(3).
76. s.4(5).
77. s.4(6).
78. s.18(2)(a).

regulation stating that the Act does not apply to a conveyance of land from a corporation to its shareholders for the purpose of winding up or dissolving the corporation.[79] This section was revoked by a regulation in 1976 concerning corporation rollovers.[80]

An exemption has also been granted in the case of certain easements to oil or gas pipe lines. These grants are not taxable under the Act if the transferee is a pipe line company, i.e. its principal business is the construction or operation of pipe lines for the transportation of oil, gas or other liquid and gaseous hydrocarbons and products thereof. Lastly the purpose of the easement must be the transportation of oil, gas, gaseous hydrocarbons and the products thereof.[81] Another regulation of the same year gave the Minister the power to authorize an exemption (not mandatory) in certain cases where the transferee is an insurance company.[82]

If a person feels that he is not liable to pay the tax he may pay it under protest. This protest will thereafter be refered to the Minister who may order a refund.[83] The Supreme Court is given jurisdiction to decide disputes where a point of law is at issue.[84]

The Minister is given quite extensive powers of

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79. R.R.O., 1974, Reg. 504, s.2.
80. R.R.O., 1976, Reg. 625.
81. R.R.O., 1974, Reg. 749.
82. R.R.O., 1974, Reg. 773.
83. Land Transfer Tax Act, op. cit., s.5(1).
84. Ibid., s.5(2).

investigation to determine if the provisions of the Act are being complied with. He may authorize his representative to enter any business or premise or place where the books are records are kept "at all reasonable times."[85] No mention is made of giving notice of a proposed inspection nor does it seem to be required that the Minister have evidence of some reasonable suspicion of a possible infringement of the law. It is an offence for anyone to hinder the inspector or fail to cooperate with him, punishment being a fine of $25 for each day of default.[86]

The authorized representative of the Minister is empowered to "audit or examine the books and records and any account, voucher, letter, telegram or other document that relates or may relate to the information that is or should be in the books or records or to the amount of tax payable under this Act."[87] Furthermore he may examine any of the property described in the conveyance or any other property which might assist the investigation as well as require the transferee to assist with his audit and examination.[88] The representative is empowered to remove any records, books, accounts, vouchers, letters, telegrams and other documents and to retain them until producing them in court if "it appears to him that there has been a violation of this Act" or its regulations.[89]

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85. s.9(1).
86. s.9(4) and (5).
87. s.9(1)(a).
88. s.9(1)(b) and (c).
89. s.9(1)(d).

These powers which are far reaching do not require anything but the Minister's decision. The Minister also has the right to demand any information, in person or by letter, or the production of any books, letters, accounts, invoices, statements or other documents within a reasonable time. This power may be excercised if it is the opinion of the Minister or his representative that such information is necessary to determine tax liability under the Act.[90]

Lastly the Act lays down that it is an offence to contravene any provision of the Act or to make a false affidavit required by the Act. On summary conviction one is liable to a fine of "not less than the amount of tax that was not paid to the collector as provided for in this Act plus an amount of not less than $50 and not more than $1,000."[91]

The Land Speculation Tax Act.[92]

This Act as noted before, was passed on the same day as the Land Transfer Tax Act. It will be briefly described below as foreigners often purchase land in Canada for purely speculative purposes.

The Act imposes a tax on the transferor of designated land, irrespective of whether the transferor is a resident or non-resident of Canada. Designated land is defined in the Act as all land situated in Ontario as well as every right,

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90. s.9(2). Also see the Saskatchewan Act p.62 above, where similar powers may be excercised.
91. s.7.
92. S.O., 1974, ch.17.

estate, interest, tenement or hereditament existing at law or in equity in land or capable of being registered. This wide definition includes fixtures, buildings or structures attached to such land whether or not they are owned by the owner of the freehold of the land.[93]

This broad definition is narrowed down by excluding from the category "designated land", land which is given as a gift to a registered Canadian charitable organization or is disposed of by an organization such as a municipality or Ontario Hydro. Also excluded is land used predominantly for commercial or industrial purposes, other than apartment buildings or residential accommodation for use as the principal residence of the lessee, which contain buildings, structures or other capital improvements the value of which is equal to 40% or more of the proceeds of the designated land.[94] This section ensures that a person who adds to the land is not liable for the speculation tax. The Act is aimed at persons who hold on to the land without adding anything to it, simply selling it when the market is favourable.

Any disposition of designated land attracts a tax of 20% of the taxable value of such land.[95] Where the designated land was acquired by the transferor on or before

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93. Land Speculation Tax Act, op. cit., s.1(1)(b).
94. Ibid., s.4(d).
95. Ibid., s.2(1).

April 9, 1974 the taxable value is its fair market value as of April 9, 1974. If acquired after April 9, 1974 the taxable value will be the cost of the acquisition to the transferor.[96]

The effect of these two Ontario statutes can be summed up as follows. Both affect undeveloped land sold to non-residents of Canada and developed or underdeveloped land which is kept and sold for purely speculative purposes. The aim of the legislature is to discourage non-Canadians from acquiring land in Ontario. Unfortunately the Land Transfer Tax Act has been diluted to cover undeveloped land only. This change may have been necessitated by practicalities which reflect the contradictions in the Canadian economy but it shows that foreign capital is still necessary for the future development of real estate in Ontario.

The Act will successfully keep recreation land and farms in Canadian hands and the Land Speculation Tax Act will help to ensure that urban areas will not be taken advantage of by speculators. As the opposition so vociferously argued during the debates, the only way to keep non-Canadians from acquiring land in Ontario is by means of a total prohibition. Neither the Ontario market nor the Canadian market generally is ready for such a drastic step. If such a step were taken exceptions would be the rule if real estate development is to keep up with growing demands.

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96. Land Speculation Tax Act, op. cit., s.4(g).

Quebec.*

The Quebec Task Force on Foreign Investment when it touched upon the question of real estate, was concerned above all with speculation in prime, arable land and thus the Land Tax Act which was subsequently passed dealt mainly with undeveloped land.

The National Assembly of Quebec passed the Land Transfer Duties Act (the Act) in 1976 after a number of objections by the opposition which felt, as did the opposition in Ontario, that the Act did not go far enough toward preventing the sale of land to foreign speculators.[97] It was argued by the opposition that a high tax rate was required to discourage foreign buyers. The government's reply was that the 33% rate which the Act provides for, together with tax deferrals and exemptions, would maximize the benefit Quebec could gain from foreign investment.[98] At the same time it would keep foreign speculators at bay.

The Act provides for a tax of 33% of the value of the consideration to be paid by the transferee, on every transfer of land situated in Quebec made after May 11, 1974.[99] Transferee is defined as a transferee not resident in Canada[100]

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97. Quebec Journal des Debats, 4e sess. 30 leg., p.1806., R.S.Q., 1976, c.23-24.
98. Debates, ibid.
99. Land Transfer Duties Act, op. cit., art.4.
100. Ibid., art.1.

* For an in depth analysis of the Quebec law see Yves Caron, Loi des droits sur les transfert de terrains. 1977, Revue de Barreau, 132.

and thus the Quebec Act closely resembles the Ontario Act.[1A] One difference which stands out from the start is that it is spelled out in the Quebec Act that the transferee is liable to pay the tax. In the Ontario Act it appears as though the transferor is responsible for payment of the tax, though the tax is without doubt passed on to the purchaser in the final analysis.

Section 2 of the Quebec Act defines a non-resident person of Canada as either a Canadian citizen or a person who, while he is lawfully admitted to Canada for permanent residence, is not ordinarily resident in Canada, or a person who is ordinarily resident in Canada but is neither a Canadian citizen nor has been lawfully admitted to Canada as a permanent resident.[1] Ordinarily resident in Canada for a physical person for the purposes of this Act involves a factual test. The Quebec definition is taken word for word from the Ontario Act[2] and includes a person who has sojourned in Canada for at least 366 days of the 24 months immediately preceeding that time. It also includes certain employees of Canadian government agencies residing outside Canada together with their spouses and children under 18.

A non-resident unincorporated association is one in which more than one half of the members are persons not resident in Canada, and in which interests representing more than 50% of the total value of the property of the group are owned by

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1a. Land Transfer Tax Act, S.O., 1974, c.8.
1. Land Transfer Duties Act, op. cit., art. 2(a) and (b).
2. Land Transfer Tax Act, op. cit., s.1(3).

such non-residents.[3] Lastly a trust is non-resident if non-resident persons (as herein defined) have more than 50% of the total value of capital or income interests. 'Trusts' includes trustee.[4]

Non-resident corporations for the purpose of the Quebec Act are defined in a similar manner to the Ontario statute. A corporation, wherever incorporated, of which more than 50% of the full voting shares are owned by one or more non-residents is a non-resident corporation. Similarly, if more than one half of the directors are non-resident persons or if more than one half of the members of a corporation without capital stock are non-resident persons the corporation is non-resident. Lastly appears the catch-all phrase found in most legislation of this kind - a corporation "which is controlled directly or indirectly in any manner whatever by one or more persons not resident in Canada," is also non-resident.[5]

Land is defined in the Act as land on which no building has been erected, i.e. undeveloped (recreation or farm) land or land which is deemed to be undeveloped.[6] Similarly land is considered to be undeveloped if a building is erected on the land which is equal to or greater than the value of the land, and the area of land is in excess of what is reasonably

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3. Land Transfer Duties Act, op.cit., art.2(c).
4. Ibid., s.2(d).
5. Ibid., art. 1. This expression is taken from the Foreign Investment Review Act, op. cit., s.3(1). See also Caron op. cit., p.127.
6. Ibid., art.1.

necessary for the use and enjoyment of the building or for carrying on a business other than farming.

Thus one is prevented from converting undeveloped land into developed land by simply erecting a small structure. The Quebec Act therefore includes in the category of undeveloped land basically what Ontario categorizes as 'restricted land'.

'Transfer' is defined in the Quebec Act as the transfer of an immovable right as well as a contract of lease and the granting of an option or of a promise of sale. This is very similar to the definition in s.1(1)(b) of the Ontario Act.

The tax payable is 33% of the value of the consideration. Consideration is defined in the Act as the price paid for the land and includes money paid, property furnished by the transferee, privileges, hypothecs and other charges encumbering the land at the time of the transfer as well as the amount of debt extended when the creditor acquired rights in the land as the consequence of real security. The market value of the land is the consideration if the transferee leases the land by emphteutic or other lease and where the land is given as a gift.[7] Thus, unlike Ontario, where land given as a gift is not taxable,[8] in Quebec the market value at the time of the transfer will be the consideration on which the donee will be required to pay 33% tax.

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7. s.1.
8. Bulletin LLT-8. s.1.

In the case of land transferred to several transferees and to a resident Canadian, the non-residents (transferees as defined in the Act) are jointly and severally liable for the payment of the tax.[9] In such cases the transferees (non-residents) are liable to pay 33% of that portion of the consideration corresponding to the part of the transfer made to them.[10] In Ontario provision is made for refunds in such a case.[11]

The tax is payable to the registrar at the time of transfer.[12] This time is not defined but presumably is the time when the transfer or deed of sale is executed. In Quebec the acceptance of an offer does not in itself transfer title because it does not establish a real right. If the right acquired, however, is an option, then a transfer takes place as soon as the personal right arises.[13]

If the duty is not paid and if there is no exemption or deferral the registrar will refuse to register the deed of transfer.[14] The registrar may refuse to register the deed if he has reasonable cause to believe that duties are payable and have not been paid.

In certain cases the transferor will be jointly and

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9. Land Transfer Duties Act, op. cit., art.6.
10. Ibid., art.7.
11. Ont. Land Transfer Tax Act, S.O., 1974, c.8, s.8(2).
12. Land Transfer Duties Act, op. cit., arts. 8 and 9.
13. Quebec Civil Code, art. 1476-8.
14. Land Transfer Duties Act, op. cit., art.10.

severally liable with the transferee for the payment of duties. There are three such cases, the first one being the case in which the deed of transfer has not yet been tendered for registration. The second one is designed to prevent collusion towards tax evasion. "If the consideration furnished by the transferee exceeds the amount of such consideration mentioned in the deed of transfer" the transferor and transferee will be jointly and severally liable for the duties applicable to the excess.[15] Lastly if the transferor is guilty of an offence under the Revenue Department Act[16] he (the transferor) is jointly and severally liable with the transferee for the payment of duties.[17]

Similar to the Ontario law requiring the furnishing of affidavits,[18] the Quebec Act requires a transferee to file certain particulars with the deed of transfer.[19] The particulars required include the names and addresses of both transferor and transferee, a statement that the transferee is a non-resident (as defined by the Act), a

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15. Land Transfer Duties Act, op. cit., art.12(a) and (b). See also art.15 where the Minister, if he is of the opinion that the value of the consideration is less than the market value of the property, the value of the consideration will be deemed to be equal to such market value.
16. R.S.Q., 1972, c.22, s.62.
17. Land Transfer Duties Act, op. cit., art.13(d).
18. Ontario Land Transfer Tax Act, op. cit, s.4.
19. Land Transfer Duties Act, op. cit., art.17.

statement by both transferor and transferee as to the value of the consideration furnished and lastly the amount of the duties.

The government has decided that it should monitor future land transactions and so it has provided that the above particulars must be furnished with all deeds where real estate is transferred to non-residents even if the transfer does not involve land as defined in the Act.[20]

A number of deemed transfers exist in the Quebec Act.[21] These concern land-holding corporations which are defined as corporations of which 50% or more of its property consists of interests in land.[22] It is provided that if the shares of such a corporation are issued or transferred or if an amalgamation of two corporations occurs where at least one is a land-holding corporation, resulting in direct or indirect control by a non-resident person who did not have previous control, a transfer of land to a non-resident is deemed to have occured.[23] The above two cases include land-holding corporations (50% or more of its property being interests in land) which existed either after May 11, 1976 and within

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20. Land Transfer Duties Act, op. cit., art.18.
21. Arts.24-27.
22. Art.24. Land for purposes of this section is defined by art.24(2) as including rights in land arising from an emphyteutic or other lease if the period of such lease including extensions or renewals exceed 40 years.
23. Art.24(1)(a) and (b). For the Ontario equivalent see s.1(1) of the Land Speculation Tax Act op. cit.

the 2 years immediately preceeding the issue, transfer or amalgamation.

With regard to unincorporated groups which own land (as defined by the Act) directly or indirectly, if a transfer or change should occur after May 11, 1976 which results in the group becoming a non-resident,[24] such a change will be deemed to be a transfer.[25]

Rules exist to guide one in determining whether at least 50% of the property of a corporation consists of land. Land belonging to the corporation includes land owned by another corporation which is controlled directly or indirectly in any manner by the corporation.[26] The method of computing the percentage is the difference between the market value of land owned by the corporation and the market value of all other property by the corporation.[27] Before one arrives at a final figure a deduction must be made from the market value of such property if the value of such property is in some way attributable to the market value of the land. It is provided that the market value of the property other than land must be reduced by the market value of such land.[28]

If a transfer is deemed to have taken place, in

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24. Art.2(c).
25. Art.24(1)(c), Art.26.
26. Art.25(b).
27. Art.25(a).
28. Art.25(c).

accordance with the above provisions, such new owner will be deemed to be the transferee of such land. To calculate the value of the consideration for these cases one simply assesses the market value of the land at the time of the deemed transfer.[29]

As in other instances where a transferee (as defined by the Act) is involved,[30] the transferee of a deemed transfer is enjoined to provide the Minister with a number of details including the names and addresses of the parties involved, the designation of the land with its market value plus a computation of percentages as provided for above.[31]

Transferees are able to obtain deferrals of payment of duties if they undertake to become residents of Canada within a certain period. This period is 5 years for a Canadian citizen or a corporation and 2 years for a non-Canadian.[32] Where a corporation is a non-resident because shares of its capital stock are directly or indirectly owned by a non-resident physical person, to obtain a deferral, the latter person must undertake that the corporation will reside in Canada within 5 years or 2 years depending on whether such person is a Canadian citizen.[33]

Deferrals can also be obtained by a physical person who states that he acquired the whole land in order to establish

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29. Art.26.
30. Art.17.
31. Art.27.
32. Art.29(1)(a), (b) and (c)
33. Art.29(2).

his principal resident or recreational property thereon which must be established within 10 years after the transfer has taken place if he is a Canadian citizen or 5 years if not.[34] The non-Canadian must in addition show that he has been lawfully admitted to Canada either as an immigrant or for the purpose of carrying on a business.[35] A tourist, visitor or person in transit is not eligible for such a deferral.[36]

A developer may also obtain a deferral of taxes if he states that he has acquired the land for the purpose of establishing, expanding or relocating within 2 years a commercial or industrial business, other than a farm, and that the developer intends to carry it on actively. The area and value of the land must be reasonable in the circumstances.[37] Similarly a developer who shows that he is acquiring land without buildings situated thereon so that he can erect a building thereon to sell or lease, will be eligible for a deferral if building is begun within 2 years after the transfer and is completed within 5 years.[38] Here too the land must be of a reasonable size and value.

In the case of a transferee who wishes to purchase land on which a building exists, a tax deferral may be obtained if the transferee leases or sells such building

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34. Art.30(a) and (b).
35. Art.30(b)(i) and (ii).
36. Art.30(b)(i)(ii) and (iii).
37. Art.31(1)(a).
38. Art.31(1)(b).

within 2 years. The existing building must however be renovated at a cost equal to at least the difference in the market value of the building after such renovation. Likewise if the existing building was bought in order to be demolished and replaced a deferral will be allowed if the new building is begun with 2 years from transfer and is completed with 5 years. The cost of such building must be equal to at least the market value of the land at that date.[39] Reasonableness of size and value of land is required in this case as well.

These deferrals were designed so as to encourage non-residents to share in the development of Quebec. Thus deferrals exist, as has been seen, for foreigners who establish businesses in Quebec or who construct buildings in the province. Speculation is prevented by requiring large expenditures of money on renovations or the construction of new buildings.

The transferee who wishes to obtain a deferral is required to file a number of particulars including the grant of a hypothec in favour of the Minister for the amount of duty.[40] The same is required in the case of a deemed transfer.[41]

In the case of all the above possible deferrments, if

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39. Art.31(c)(i) and (ii).
40. Art.32.
41. Art.33.

the conditions have been fulfilled within the requisite time limits, the Minister will cancel the obligation to pay the duties.[42] Should the undertakings of the transferee remain unfulfilled within the time allowed, the duties with interest will become due.[43] According to Professor Caron, the Minister does not have a Crown privilege for the payment of duties. The duties rank as a charge against the property according to its date.[44]

For policy and practical reasons the Act provides for a number of exemptions from the Transfer Duties.[45] To allow investors to borrow money from foreign finance corporations which are in the business of lending money the Act provides for an exemption in the case of a transferee who conducts a business of lending money on the security of real property.[46] This exemption will of course not be allowed if the transferee is a close relative of the transferor or if the transaction was made for the purpose of avoiding or evading the tax.[47]

Provision is also made for the exemption of certain transfers to insurance companies which are required by law to maintain a percentage of their assets in Canada.[48] Likewise exemptions are granted to transferees which are parent companies or subsidiaries of the transferor corporation. A subsidiary is defined as a corporation of

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42. Art.36. Such deferrals will thus become exemptions.
43. Art.37.
44. Caron op. cit. at p.132.
45. Arts.39-45.
46. Art.40(a). See Ont. Land Transfer Tax Act., op. cit., s.16(4)(e).
47. Art.40(b) and (c).
48. Art.41

which at least 90% of the issued shares to which full voting rights of its capital stock are attched.[49]

In the event of a physical resident person who wishes to sell his land to a non-resident corporation, a tax exemption will be granted if at least 90% of the issued shares of its capital stock to which are attached full voting rights are owned by the resident transferor immediately after the transfer.[50] One wonders how a non-resident corporation can exist if 90% or more of the voting shares are held by a resident.[51]

Similarly if a corporation transfers land to a non-resident physical person, there will be an exemption if the transferee held at least 90% of the voting shares immediately before the transaction.[52]

The Act also exempts transactions involving a consideration of less than $50, leases of a duration of less than 40 years and transfers to close relatives of the transferor.[53] A transfer to a non-resident corporation by a trust set up for the sole purpose of acquiring and holding the land until such corporation was incorporated, is also exempted and under the Act provision is made for the transfer to a trust governed by a common law jurisdiction.[54]

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49. Art.42.
50. Art.43(a).
51. See defn. of a non-resident corporation, Art.1.
52. Art.43(b).
53. Art.44(a),(b) and(e).
54. Art.44(c) and (d).

To allow existing farms to expand, the Act gives an exemption to a transaction whereby land is transferred to a non-resident who carried on a farming business from May 11, 1976 without interruption to the present time. The farming business which must be in Quebec must have had an agricultural production for market of $20,000 or more per annum and the new land must be used for the carrying on of that farming business immediately after the transfer.[55]

Finally, to provide for persons who had begun negotiations for the transfer of land, exemption from duties will be granted if a written agreement existed before May 12, 1976 in relation to such transfer as long as such transfer takes place within a reasonable time.[56]

Thus the deferrments and exemptions provided are designed to advance the interests of Quebec. They ensure that the tax does not interfere with well-intentioned investors. The Act as a whole however, subjects transfers of farm land, recreational and vacant land bought for speculation purposes to the full 33% tax.

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55. Art.44(f).
56. Art.46. See s.17 Ont. Land Transfer Tax Act, S.O., 1974, c.8.

Foreign Jurisdictions.

We will now look at a number of other jurisdictions, particularly those which are federations, so as to get some idea of how different attitudes and practices have resulted in different legislative approaches to the question of foreign land holdings.

Australia is the most obvious starting point in a comparative study as it not only is a federal state but also has the same common law background as English Canada. A further similarity exists in that Australia is also a capital importing country. It is a country large in area, rich in resources and relatively sparsely populated.

The analysis which follows below of the Australian and other experiences and legislation is not meant to be a detailed study but will point out the principal factors involved for purposes of comparison. Like Canada, Australia has a growing domestic market but because of the small population there exists a limited supply of domestic savings from which to draw investment capital.

In 1970-71 direct foreign investment in Australia accounted for 66% of the total inflow. This should be seen against the figure for the period between 1967-8 and 1970-1 which was only 20%.[1]

Until recently few restrictions against direct foreign investment existed in Australia. On the contrary the six State Governments, in order to attract capital, were competing with each other to make the process more simple for foreign investors.

The Australian Commonwealth (Federal) Parliament has legislative powers with regard to aliens.[2] Pursuant to this power parliament passed the Nationality and Citizenship Acts.[3]

The old common law rules preventing aliens from acquiring full title to real estate used to apply in all states. In New South Wales this was changed in 1898,[4] by an Act resembling those passed by Canadian provincial legislatures at the turn of the century.[5] The Act[4] provides that property of every description in New South Wales may be taken, acquired, held and disposed of by an alien, and a title to real and personal property of every description

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1. Sexton, M. Regulation of Direct Foreign Investment: A Case of Delayed Reaction in Australia and Canada. (1974)2 Aus. Bus. Law Rev. 241 at p.243.
2. Australian Constitution, 1900, 63 and 64 Vic., c.12 as amended, s.51.
3. 1948-1960.
4. The N.S.W. Naturalisation and Denization Act no.21 of 1898, s.4. (Part II), consolidating 39 Vict. no.9.
5. See p.3 et seq. (supra). See also s.33(1) of the Canadian Citizenship Act, S.C., 1974-75-76, c.108.

may be derived through, from, or in succession to, an alien in the same manner as if he were a natural born British subject.[6]

Like many countries, Australia used to control foreign investments by means of foreign exchange controls.[7] By means of these currency controls the Reserve Bank had to authorize all transactions involving capital inflow as well as outflow. All foreign investments thus had to be approved and the majority were. Even though very few were disapproved, the procedure brought all such investment to the attention of the government. This monitering system is behind many of the steps taken by the provincial legislatures in Canada.[8]

The Federal Treasurer announced in March 1973 that a study concerning foreign acquisition of Australian real estate would be undertaken. Until the completion of such study, it was further announced, that in practice the Reserve Bank would not grant exchange control approval for the entry of overseas capital which sought after the acquisition of city office blocks, suburban subdivisions

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6. Supra, note 4, s.4. See also Crown Land Amendment Act no.6 of 1964 which put aliens on the same footing as a natural born or naturalized Australian with regard to Crown Land holdings and holdings under the Closer Settlements Act.
7. Banking (Foreign Exchange) Regulations, Reg.8.
8. e.g. Nova Scotia, see p.46 supra, and Quebec, see p. supra.

or rural property.[9]

The same Treasury announcement provided for certain exemptions from this blanket ruling. Foreign investors requiring land on which to build a factory or some other incidental reason as well as foreigners who wished to purchase land for residential purposes would be permitted to do so. It appears that the reason for these harsh measures was the opinion of the authorities that foreign speculators had been a contributing factor to the sharp rise in land prices in 1972.[10]

Shortly after this step was taken by the Treasury, the Commonwealth government passed the Companies (Foreign Take-overs) Act.[11] The Act empowered the Treasurer to prohibit a takeover in cases where he was satisfied that after the take-over, effective control of the corporation would be exercised by foreign individual(s) or corporation(s) and furthermore that such exercise would be against the national interest.[12] In case of a failure to comply with the Treasurer's direction, which in practice would only be exercised in the case of corporations whose assets exceed $1,000,000, a court could order the restriction of voting rights of shares involved, withholding of dividends, the

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9. Treasury Press Release no.10 (1973).
10. Sexton op. cit., at p.249.
11. No.134 of 1972 and no.199 of 1973.
12. Ibid., s.13(1)(3).

sale of the shares or the multification of voting rights.[13] To aid the Treasurer the Act gave him wide powers to demand information and documents.[14]

The section of the Act governing foreign control lays down the figure of 15% of the voting stock in the case of a foreign individual or corporation. Where two or more individuals or corporations are involved the amount is 40%.[15] A foreign corporation is one that is incorporated outside Australia.[16] The presumption that such holdings would amount to foreign control are rebuttable if one is able to show that they do not in fact carry with them "a significant degree of control over the conduct of the affairs of the corporation."[17]

In 1975 the Commonwealth government passed The Foreign Takeovers Act.[18] This Act provides that the Treasurer must be notified of all proposals which would result in foreign control of a business.[19] Control is defined as the power to determine policy.[20] The Treasurer is then empowered to prohibit any such takeover if he feels that it is against the national interest.[21]

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13. Companies (Foreign Take-overs) Act, 1972-3, supra, s.15.
14. Ibid., s.20
15. Ibid., s.11
16. Ibid., s.4(1).
17. Ibid., s.4(2)(d).
18. No.52 of 1975. This statute repealed the Companies (Foreign Take-overs) Act of 1972-1973.
19. s.36.
20. ss.8, 9, 10 and 11. For controlling interests in corporations, see ss.9 and 18(7).
21. ss.18(2)(c), 18(4)(b), 19(1)(c), 19(4)(b), 20(1)(d), 20(3)(b), 21(2)(c) and 21(3)(b).

On April 1, 1976 it was announced by the Commonwealth Treasurer in the Federal Parliament that restrictions on foreign investments would be widened to include the establishment of new businesses as well as the expansion of existing businesses.[22] This effectively expanded the control of the Australian government to include what in the Canadian Foreign Investment Review Act is Phase I and Phase II.

There is no statutory backing to these announcements and it appears that the government is relying on exchange controls and export powers to withhold approvals and permits to enforce its policy. It was mentioned that the regulations would possibly become legislation at a future date.[23]

As part of this administrative action the government created a body called the Foreign Investment Review Board (FIRB)[24] having a very similar function to Canada's Foreign Investment Review Agency (FIRA). FIRB's role is twofold. Firstly, it advises the government generally on foreign investment matters, and secondly it lends guidance to foreign investors on how to conform their proposals to Australia's national interest. FIRB also acts as a liaison and public relations body.[24]

As in the case with FIRA certain foreign investments must be notified to FIRB. FIRB, which is made up of the

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22. Commonwealth Parliamentary Debates, Weekly (H. of R.) March 30 - April 1, 1976 at pp.1283-1292.
23. Ibid., p.1288.
24. Ibid., p.1287.

head of the Foreign Investment Division of the Commonwealth Treasury Department and up to four part time experts in commerce and industry, then decides if the investment is in the national interests of Australia.

A foreigner is defined as a non-resident individual or a business (incorporated or not) which is not necessarily foreign-controlled but in which a single foreigner beneficially owns an interest exceeding 15% or foreigners beneficially owning an interest exceeding 40%.[25]

In addition to takeovers under the Foreign Investment (Take-overs) Act,[25A] there are four other categories of reviewable take over proposals. The first is the establishment of a new business where the amount of investment exceeds $1,000,000. As under the Canadian Act, diversification by an existing business into a different field not incidental to the existing business falls under this heading.[26] The second and third categories are made up of the establishment of a new mine or natural resource or new non-bank financial institution or insurance company. The fourth is the acquisition of Australian real estate.

In order to decide if the investment should be permitted, each proposal is examined to see if it is in the national interest. The criteria for determining this are basically similar to those used in Canada.[27] The Board (FIRB) will

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25. Debates op. cit., p.1289.
25a. No.92 of 1975.
26. Ibid., p.1289.
27. Foreign Investment Review Act, op. cit., s.2.

examine whether the proposal will bring economic benefits to Australia such as new technology, management and know how and improved efficiency. The Board will then look in 15 or more areas so as to ascertain whether the business will pursue practices consistent with Australia's best interest. Some of these areas are Australian participation in decision making, local processing of raw materials and industrial relations.

The government announced that a strict approach would be taken to certain key areas.[28] Real estate is one of these areas and it has been stressed that normally all forms of foreign acquisitions of real estate would be disapproved. Certain exceptions include the acquisition of real estate (freehold or leasehold) by life insurance companies and pension funds. Foreign companies may also purchase land to be used as accommodation for its employees. Other exemptions apply to acquisitions which are incidental to future expansion and new investments where the value does not exceed $100,000 and for office accommodation.[29]

By means of legislation and government regulations the Commonwealth government of Australia has attempted to control take-overs as well as the establishment of new businesses and the expansion of existing businesses.

The basis of both the Canadian and the Australian

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28. Debates op. cit., p.1280 and 1291.
29. Ibid., p.1291.

legislation is to provide machinery to review foreign investment. The aim of both countries is to attempt to compel a greater degree of local participation. Neither country has chosen a fixed percentage requirement for local participation - i.e. 51% of the voting stock. Instead the review process allows for flexibility in reviewing each application.

The picture with regard to the foreign acquisition of real estate in Canada is much brighter than in Australia. The Australians will refuse all but a bare minimum of such investment while in Canada the federal laws are very relaxed and each province is given the freedom to take measures which are in its own interests taking into account the different circumstances involved.

New Zealand.

New Zealand, with the same common law background as Australia and English speaking Canada, also possesses legislation removing the ineligibilities of aliens to hold land.

Section 3 of the Aliens Act[30] allows an alien to acquire, hold, and dispose of real and personal property in the same way that a British subject may. It also

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30. No.28 of 1948.

permits an alien to hold such property which he may inherit. An alien is not entitled to vote or own a ship registered in New Zealand nor is he entitled to acquire certain land.[31]

The latter prohibition dates from 1968 when the Aliens Act was amended[32] by the Land Settlement Promotion and Land Acquisition Amendment Act.[33] The amendment is to the effect that no alien is permitted to acquire any property under a transaction to which Part II of the Land Settlement Promotion and Land Acquisition Act 1952 as amended, applies.[34]

Such transactions include every sale or transfer of any freehold or interest in land whether legal or equitable, a lease of any land exceeding 3 years, for the sale or transfer of any leasehold estate or legal or equitable interest in land which has more than 3 years to expire and lastly the granting of an option to purchase or otherwise acquire any freehold or leasehold estate or interest in land as mentioned.[35]

As can be seen from the previous paragraph aliens are prevented from acquiring almost every possible type of interest in land. The Land Settlement Act[36] deems certain

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31. s.3(2) of The Aliens Act, no.28 of 1948.
32. s.3(2)(d) was added.
33. No.152 of 1968, s.8.
34. s.3(2)(d)
35. Land Settlement and Land Acquisitions Amendment Act, no.152 of 1968, s.35B.
36. Ibid., s.35A.

individuals to be ordinary citizens of New Zealand and presumably non-aliens. Such individuals must have resided in New Zealand for a period exceeding 2½ years during the 3 years immediately preceeding the relevant date. It must also be likely in the court's or commissioner's (as the case may be) opinion that he will continue to reside permanently in New Zealand.

With regard to corporations, an 'overseas corporation' (i.e. an alien corporation) is defined as a company incorporated outside New Zealand or one that is a subsidiary of such a corporation. It also includes a company within the meaning of the Companies Act[36A] (1955) in which shares that in aggregate carry the right to exercise or control the exercise of 25% or more of the voting power at any general meeting of the company, are held by non-New Zealand citizens.

It is worth noting that unlike the Aliens Act[36b] which speaks of British subjects, the Land Settlement Promotion and Land Acquisition Amendment Act[36c] expressly mentions New Zealand citizens. A corporation which is incorporated in New Zealand is deemed to be an ordinary resident of New Zealand and the section applies in any transaction involving more than one purchaser if at least one of the purchasers is a non-resident individual or corporation.

Aside from the exhaustive list of transactions (supra) in which non-residents are denied participation, the Land

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36a. No.63 of 1955.
36b. No.23 of 1948.
36c. No.152 of 1968 - 35A

Settlement (Amendment) Act also prohibits transactions relating to any land which is zoned for any public utility, amenity, reserve or public work under any operative regional planning or district scheme under the Town and Country Planning Act 1975. Also included is any area exceeding five acres of non-commercial or residential land.[37]

A non-resident is prohibited from entering an agreement for the transfer of land without valuable consideration thereby ensuring that gifts do not serve as a loophole.[38] A number of prohibitions also exist to effectively exclude the foreigner, his wife, husband or child from receiving land via a trustee.[39]

The Court or Committee is empowered to grant its consent to a land purchase by a foreigner if it is satisfied that 3 criteria are met. The first criterion is that the land is not zoned or designated for any public use; the second requires that the land in question even if it is not so zoned or so designated, is unlikely to be required for public use in the future.[40] Lastly, where the land in question is farm land, the purchaser or lessee must use the land to either conduct research that will benefit agricultural industries in New Zealand or he must use such

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37. s.35 B (f).
38. s.23(3)(b). Land Settlement Promotion Act no.34 of 1952.
39. Ibid., s.23(3)(c-g).
40. Land Settlement Promotion and Land Acquisition Amendment Act no.152 of 1968, s.35H(3).

land for non-agricultural purposes to the greater advantage of the general community. A foreigner may also purchase or lease farm land if he can show that he intends to reside permanently in New Zealand and farm the land exclusively for his own benefit and that he has the ability and means to do so.[41]

A study of the approach taken by New Zealand affords us the opportunity of observing a difference in starting point to that taken by Australia and Canada. While Canada excludes certain land acquisitions by foreigners or charges a higher transfer tax to foreigners, Australia makes use of exchange control regulations to monitor and prevent certain acquisitions. The legislature of New Zealand begins by excluding all purchasing or leasing of land in the country by foreigners and then allows for a small number of exceptions.

Federal Republic of Germany.

Unlike most developed states, there is very little political opposition to the foreign purchase or leasing of real estate in Germany.[41a] Legally there is no bar to such acquisitions aside from the possibility of a foreign purchaser having to acquire a permit.[42] Such a requirement

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41. Op. cit., s.35H(3)(c).
41a. R. Volhard and D. Weber, Real Property in Germany, 1975, MacDonald and Evans, London.
42. Art.88 EGBGB (Introductory Act of the Civil Code)

does not apply to nationals or bodies of the E.E.C. member states.[43]

No other restrictions may be imposed on foreigners except that foreign Insurance Companies, before acquiring land, must obtain approval.[44] Such approval is also required before a foreigner may enter into any contract for the purchase, conveyance or usufruct of agricultural or forested land.[45] Such approval is not required if a government agency is a party to the contract, if the land is within 30 miles of a development scheme, if the land is sold by auction or if the sale involves small plots of land or the creation of leaseholds.

Approval will usually be granted for such acquisitions but will be refused if the sale would lead to an unsound division of property or would uneconomically reduce or split up one or more units of land. It will also be refused if the consideration is grossly disproportionate to the value of the estate.

Following the war, foreign exchange control regulations were rather harsh but since 1961, with the strengthening of the economy, they have been greatly reduced.[46] It appears

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43. Act of 2/4/64, Federal Law Gazette BGBI(F)1248. The E.E.C. Treaty (Treaty of Rome 1947), art.58.
44. Federal Act relating to Supervision of Private Insurance Cos. and Building Societies 1931, Reich Law Gazette RGBI(F)I 315 and 750.
45. Land Transaction Act of 1961, Fed. Law Gaz. BGBI 1091.
46. Foreign Trade and Payments Act of 1961.

that foreign investment in German real estate is not perceived as a threat. In fact, the inflow of foreign capital is seen as very important in the continued building up of the economy. The Germans are more worried about their balance of payments and the value of the mark than about the issue of foreign control of their land and thus exchange controls are activated only if the economy is threatened.

France.

France is an interesting jurisdiction to study as it is typical of those countries which control direct foreign investments primarily by means of exchange control rules.[47] Exchange control authorization is required before any non-resident individual or corporation can make a direct investment in France. Such authorization is also required by French branches of foreign companies directly or indirectly under foreign control.[48]

French policy since 1973 has been to encourage the inflow of foreign capital. Guidelines have also been issued concerning real estate.[49] The purchase or construction of

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47. For a further example see the position in the U.K.
48. No authorization is required if a non-resident purchases property through a notary, as long as the entire purchase price is in cash resulting from the transfer of foreign currency or the debit of a non-resident account in financial francs.
49. The Financial Times. Business Division. London. March 1974.

commercial premises for use as stores or offices must be financed totally in foreign currency. If a foreigner wishes to buy or build a building for residential purposes he must finance the transfer with foreign capital to the extent of at least 60%.

Conclusion.

Present-day economic realities have demonstrated that Canada needs foreign capital to develop certain types of land. That is, in order to keep up with necessary growth in land development and building construction, Canada, faced with the problem of insufficient local capital, must import large capital sums. In terms of land and construction this means direct foreign investment in Canadian real estate. This reality confronting the Canadian federal and the various provincial governments is further complicated as we have seen by the desire of Canadians to ensure that as much real estate in Canada as possible remains in Canadian control and under Canadian ownership.

The different solutions which the federal government and a number of provincial legislatures have devised, which we have examined in this study, are attempts at obtaining the maximum benefit without alienating too much of the country.

One of the first problems we encountered in discussing the laws relating to the foreigner investing in Canadian land was the breakdown of federal and provincial powers. It seems from our discussion of the constitutional problems involved that a rather practical if not very effective result has eventuated. The federal government in exercising its general powers over foreign investment in Canada through the

Foreign Investment Review Act,[1] has decided to review certain large investments in land considering them in effect to be acquisition of business enterprises. The basic criterion as we have seen, is whether such an investment will be of benefit to Canada.[2] Unfortunately, very few land acquisitions are reviewed by the Foreign Investment Review Agency due to the fact that only such very large acquisitions qualify for review.[3]

This federal law ensures some minimum uniformity in the approach to foreign investment and does to some extent take provincial conditions and policies into account.[4] Because economic, political and geographic climates differ quite markedly between certain provinces, it is felt by this writer that it is practical to allow each province to decide on the manner in which they control foreign investment and purchases of local real estate. The constitutional breakdown in legislative powers has meant that the legislation of each province relating to land and foreign investment in it, reflects both local conditions and the views of local residents.

Certain disadvantages may result from this breakdown

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1. S.C., 1973, c.46.
2. Ibid., s.2.
3. Land purchases must exceed 250,000 square feet or the purchase price must exceed $10,000,000.
4. Foreign Investment Review Act, ibid., s.2(2)(e).

of powers however, the foremost being as I have suggested the lack of uniformity of rules. A large foreign developer now is required to sift through a number of federal and provincial rules before he knows how to proceed. Whereas before the provincial and other laws came into effect the foreign investor was faced with decisions which depended on economic and political factors, he now finds himself faced with the additional legal limitations and restrictions which moreover differ from province to province.

This move away from the classical market place seems to be a necessary one. It brings Canada into line with most other countries which have felt that the factor of supply and demand of itself does not ensure that local ownership of land will be guaranteed. Foreign purchasers, especially the classical investors from the U.S., U.K.,[5] Belgium, Switzerland and Italy are now being joined by the Japanese, Germans and Arabs who have a greater purchasing power than most Canadians and given the traditional market economy would soon vie with each other for Canadian land thereby forcing up prices.[6] The fall in the value of the Canadian dollar further aggravates buying power differentials.

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5. See for example the Canadian holdings of Trizec (owned 66% by a British insurance company). A list of its Canadian holdings can be found in Cutler, How foreign owners shape our cities June 1975, Can. Geog. J., at p.46. Included among its holdings are Place Ville Marie in Montreal, CN Tower in Edmonton and the Scarborough and Yorkdale Shopping Centres in Toronto.
6. For an analysis of properties owned by foreigners see Cutler, supra.

Once the policy decision is made that foreign ownership and control of Canadian real estate is necessary, a legal solution therefore seems to be the only way to attain this end. The contradictions between the economic realities and the policy considerations have been the reasons for most controlling legislation being diluted and affecting only limited types of land.

Yet another disadvantage is illustrated by the finding in the Morgan[7] case which held that provinces are permitted to pass laws controlling the purchase of land by Canadians who are not residents of that particular province. It is unfortunate that fellow Canadians are discriminated against in some cases, but happily this has occurred in practice in only two provinces[8] both of which have argued that they felt their local economies to be unduly threatened. It is felt that it is unlikely that any other provinces will follow this example in the near future. It is the opinion of this writer that the advantages of provincial self determination in this area of the law far outweighs the disadvantages.

Aside from the Morgan case the law reports show that no litigation has occured with regard to the provincial statutes. This lack of reported cases could be the result of a number of possibilities. Firstly the statutes are relatively new. Secondly they allow for many administrative solutions such

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7. Morgan and Jacobson v. A.G. for Prince Edward Island. /1976/2 S.C.R. 350.
8. Prince Edward Island and Saskatchewan, supra p.56.

as deferrments and exemptions. The Ontario experience was such that so many exemptions were granted, that the Land Transfer Tax Act[9] had to be amended to cover only unrestricted land.[10] Thirdly, it seems that with regard to non-urban and non-industrial land in both Quebec and Ontario, buyers are either quite content to pay the 33% or 20% tax or are simply being scared off by the prospect of additional costs.

The Canadian constitutional breakdown of powers appears to give the provinces large control over foreign investment in local real estate and as submitted in this paper pre-empts any use of exchange controls as a means to control such investment. Such controls would be under foreign jurisdiction[11] and would mean a real about-face in Canadian international investment policies such as the freedom to move capital freely across borders. In countries which use such controls the central government has power over all foreign investments. The comparative study undertaken in this research is useful to show how other jurisdictions have tackled this problem but because of the unique make-up of Canada these alternatives are not pertinent to Canada. The breakdown of powers does not allow for it and the Canadian economy, although recently somewhat weakened, is still strong enough to afford the luxury

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9. S.O., 1974, c.8.
10. i.e. recreational and farmland
11. B.N.A. Act, op. cit., ss.2, 14, 15, 18 and 20.

of having no restrictions on the amount of money flowing in or out of the country. While this continues, foreigners seeking investments will be attracted to Canada as, unlike most countries, Canada allows full repatriation of profits plus capital. Foreigners are also aware that should their land be expropriated or nationalized full compensation will be made.

It is submitted that the methods used by the provincial legislatures are not the best ones available. The use of a land tax for foreign purchasers might be constitutional, as might a limited size of land allowed non-residents of a particular province, but these are inflexible rules and do not take individual considerations into account.

It seems to this writer that many problems mentioned by the provincial Select Committees can be solved by stringent land use and zoning laws. These would protect the Canadian heritage and ensure that local governments and not giant foreign corporations would decide on the future development of their cities. Most of the existing provincial legislation does not apply to urban areas anyway.[12] This is quite preposterous in that most foreign developers have concentrated their efforts in the cities. A stronger case

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12. See e.g. The B.C. Land Commission Act, S.B.C., 1973, c.46.

can be made for the use of existing controls in rural areas but land zoning would answer many of the traditional complaints of the changes foreigners are making to local lifestyles.

The Select Committee reports evidence the fact that no accurate statistics exist which show either how much land is foreign owned or whether such land has become over-priced for Canadians. This is not to say that a real problem does not exist. Even though statistics are not accurate, studies have shown that foreign ownership is definitely on the rise.[13] This means that prices will inevitably be forced up because of the fixed supply of land.

It is submitted that the most favourable solution would be to combine land use and zoning laws with a review or filter process to ensure that investments benefit Canada or a particular province.

The federal government should maintain an overall control by means of the filter process of the Foreign Investment Review Act over foreign investments which are of such great proportions as to affect the Canadian economy as a whole. Provinces should also institute a review process to assess the desireability of small investments.

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13. Ontario Select Committee on Economic and Cultural Nationalism, (1973).

In contrast to the existing window-dressing type of legislation that the provinces have instituted, to date, such a review process would cover investments in all types of land and should be based on the needs of the local economies. The provincial review agency which is proposed should have the power to negotiate with prospective foreign investors and so arrive at a position whereby the provinces could attract such needed investment while at the same time having some say in the development of the province.

The result would be that all land - commercial, industrial, residential, farm and recreational - purchases would be controlled either by a review process at the start acting in general terms and later by more specific land-use laws. A limited amount of use of such land-use laws have been instituted in one province[14] and it is suggested that these be adopted by all provinces.

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14. Prince Edward Island.

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