The Canada Development Corporation: A Comparative Appraisal

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> Many nations have manifested their nationalism through great public acts; Canada has asserted it nationalism by looking for it.
>
> Craig Brown, The Nationalism of the National Policy.

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INTRODUCTION

A glance at book-sellers' shelves (in the "Canadiana" section) indicates that some Canadians, for the most part academics, are seriously disturbed by American domination of the national economy. The present wave of economic nationalism is not the first [1] and is unlikely to be the last. The process is not, however, strictly cyclical. For upon each appearance, this nationalism of necessity situates itself within the prevailing economic, political and social Zeitgeist. Today, the "problem" of foreign ownership and control is inextricably bound to that of national economic development generally. Though structures may — and perhaps should — be formed to deal with situations peculiar to foreign ownership,[2] the more productive and profound institutional responses must surely occur at the level of fundamental politico-economic choices. American capital has attained its present position of control within the so-called "market" — *laissez-faire cum* oligopoly. For the purposes of this paper it is unnecessary — and unwise — to question the basic validity of the rather unfettered use of private capital accumulations which grounds the contemporary system. The applicability of capitalist assumptions to institutions of economic defence is, however, another matter.

That "foreign ownership and control" is indeed inseparable from the broader development concept is evident even at the level of definition. "Foreign ownership" must encompass both portfolio and direct investment, and in the latter case everything from wholly owned subsidiaries to joint ventures with Canadian companies. Presumably, "Canadian ownership" means replacement of foreign with Canadian owners.[3] "Canadian control", however, does not necessarily increase linearly as Canadians replace foreigners in ownership positions. "Foreign control" results from the exportation of "decision-making power".[4] If a wholly owned Canadian subsidiary of an American firm is forced to release 80% of its equity onto the Canadian market over ten years, control will remain with the

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[1] One might go back to the early National Policy; see Craig Brown, "The Nationalism of the National Policy", *Nationalism in Canada*, Russel, P. (ed.), (Toronto, 1966), p. 155.

[2] *E.g.* an information agency concerned with Multi-national enterprises, *viz. Foreign Ownership and the Structure of Canadian Industry*, Report of the Task Force on the Structure of Canadian Industry, Queen's Printer, (Ottawa, 1968) p. 393.

[3] Even this step is not trivial. "Foreigners" are probably non-residents, but in the case of individuals considerations of nationality may equally arise.

[4] *Cf.* Task Force Report, *op. cit.*, p. 298.

parent through the effects of stock dispersal.[5] But beyond the technicalities of control there lies the most fundamental definitional ambiguity of all: who is the "Canadian" in "Canadian control"? If the foreign ownership and control problem is one of national domination, the referent must be the collectivity, not the individual Canadian capitalist.

The most obvious national response is public ownership. Canada has, in the past, declared certain industries or sectors of the economy to be the proper concern of the State. Public funds may equally well, however, be utilized to establish an institution whose function is not industrial, but that of economic development *per se*. "Development institution", as used in this paper, refers to a public or semi-public structure which, through some combination of interventionist policies and channelling of capital, attempts to guide the growth of various sectors of the national economy. This genus is necessarily as vague as are different the several institutions to which it shall be applied in this study.

The proposed Canada Development Corporation is such a structure. The purpose of this paper is to reach an understanding of what the CDC is, and to what extent it is an appropriate device for national development.

I. *THE PROPOSED CDC*

A. 1963-1971

Bill C-219, *An Act to establish the Canada Development Corporation*, was introduced to the House for first reading on January 25, 1971, and passed third reading essentially unchanged on June 9, 1971. Though hotly debated for nearly eight years, it emerged in the end surprisingly similar in substance to that which was presaged

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[5] The difficulty of approaching *de facto* control through direct limitation of foreign equity participation is illustrated by a recent Australian scheme. The Companies (Life Insurance Holding Companies) Ordinance 1968 set such a limit, and further limited control with voting restrictions, with respect to two specified insurance companies. Though containing a careful definition of "foreign share" as including any share held by a "foreign corporation", the Ordinance illogically set 20% of voting shares as its criterion for sufficient control for purposes of defining "foreign corporation", while allowing and individual foreigner to retain a holding of 21% in either of the two Australian companies. It is extremely difficult to choose a realistic criterion of control for a given purpose. *Cf.* David Nochimson, *The M.L.C. Ordinance — A New Legal Approach to Foreign Investment*, (1969), 43 Aust. L.J. 101.

in 1963. Like Athena it had sprung fully clothed from the head of its Zeus — Walter Gordon.

The notion of a development fund had received some attention prior to 1963, but it was only in that year that the creation of such an institution became a serious possibility, as the Canada Development Corporation was mentioned, albeit rather casually, in the Speech from the Throne of May 16.[6] Needless to say, the business and financial communities were not overjoyed. Clive Baxter [7] attributed a governmental retreat on CDC to opposition from these quarters. He predicted there would be no mention of CDC in the 1964 budget. In fact, CDC appeared in neither the budget nor the Speech from the Throne that year.

By 1965, however, rumour had it that Gordon had pulled CDC back to the top of the Finance Department list. The Financial Post ran an article headed: "Keep Canada Canadian money almost a certain bet this year".[8] And, indeed, the first official outline of the proposed legislation appeared in the 1965 Budget Speech.[9] Gordon there described the CDC as:

> ...[a] new institutional channel through which Canadians can invest their savings in a form that carries with it a share in the ownership and direction of businesses operating in this country.[10]

The mechanics of the proposal involved the government interest descending towards ten per cent, and a ceiling of three per cent on individual (and institutional) holdings so as to ensure that the shares would be widely held. CDC would be authorized to buy up the equity interest "in Crown corporations that have become viable commercial operations".[11] In keeping with its interest, the government would retain the right to appoint a small proportion of the Directors, the rest being elected in the usual way by the private shareholders.

Gordon's subsequent effort to sell the CDC to the business and financial communities was only a qualified success. Careful to point out that CDC investment would generally seek out projects which have not heretofore lent themselves to Canadian financing,[12] he went

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[6] *House of Commons Debates*, 1963 vol. II, p. 7. A resolution was passed in support of C.D.C. on June 20th, *ibid.*, vol. II, p. 1371.

[7] *Financial Post*, January 25, 1964, p. 11.

[8] *Ibid.*, March 27, 1965, p. 1.

[9] *House of Commons Debates*, 1965 vol. I, pp. 434-435.

[10] *Ibid.*, p. 434.

[11] *Ibid.*

[12] *Financial Post*, May 1, 1965, p. 1.

so far as to suggest that the CDC would be a larger and more effective Argus Corporation.[13] Nevertheless, some of the stauncher capitalists panicked.[14] It is interesting to see how an avowed socialist, Colin Cameron, reacted to a *Globe and Mail* suggestion that CDC would bring in socialism "by the back door". The CDC, he said, is the opposite of socialist; it is but another means whereby the more acquisitive members of society may acquire at the expense of others.

> We find ourselves with just a vast mutual investment trust, in no way differing from those which are already in existence except that you and I and the other citizens of Canada will be asked to sponsor it; ... We shall also be asked to stand by with the buckets to bail this Corporation out of trouble... But we are not going to control it. In fact, the Minister says plainly that this Corporation will stand on its own feet free from government control. If that is what the *Globe and Mail* calls Socialism by the back door I think its editors have a lot to learn.[15]

CDC reappeared in the Speech from the Throne of 1966,[16] but the succeeding Minister of Finance, Mitchell Sharp, moved it no closer to realization. Though he might say, for the benefit of Parliament, "[i]t is my intention to proceed with the Canada Development Corporation legislation as soon as we can find a place for it on the order paper",[17] it seems likely he gave the plan a low priority.[18]

Finally, after a few false starts,[19] Edgar Benson brought CDC to Parliament as C-219. In 1969 the Financial Post had said:

> When the CDC Bill is finally tabled, it is expected to show surprisingly little basic change from the original Walter Gordon proposal of six years ago.[20]

If we read "six" as "eight", we have arrived at C-219.

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[13] Remarks at the annual meeting of the Canadian Textiles Institute, Ste. Adèle, Québec, June 3, 1965, quoted in E.P. Neufeld, *The Canada Development Corporation — An Assessment of the Proposal,* (Montreal, 1966), p. 1.

[14] See Robin Schiele, Government's big, big grab for investment capital, *Can. Bus.,* vol. 38, no. 9 (Sept. 1965) p. 66.

[15] *House of Commons Debates,* 1965 vol. I, p. 703.

[16] *House of Commons Debates,* 1966 vol. I, p. 9.

[17] *House of Commons Debates,* 1967 vol. II, p. 1429.

[18] *Financial Post,* July 29, 1967, p. 1.

[19] Pundits felt sure Benson would introduce a Bill by summer recess in 1970, *Financial Post,* February 14, 1970, p. 5. The Minister himself confidently said in April of that year that the CDC "will be law by the end of this year", *Financial Post,* April 11, 1970, p. 1.

[20] *Financial Post,* May 25, 1969, p. 1.

B. Bill C-219

During its eight-year period of gestation, the CDC concept was elaborated in several directions by diverse interests. One private enterprise spokesman suggested a dual project: sale of capital stock in Polymer and other such "successful" Crown corporations on the open market, and creation of a State-financed CDC for capital intensive development projects.[21] Two private members' Bills during the period proposed Crown corporations, in each case delineating the objectives of the Corporation rather differently than was the case in the original government proposal.[22]

In succeeding sections, the proposed CDC will be viewed in context. It will be compared to systems of public ownership or mixed holdings, and state development schemes. Prerequisite to this synthesis is an analysis of C-219 itself. It is imperative that the particular entity established by this Bill be understood in its own terms. The following presentation is not, however, "objective"; it does not purport to eliminate the observor. The CDC shall here be viewed — albeit critically — *qua* corporation, as to corporate structure, objects, and *de facto* and legal control.

(i) *Corporate structure and capitalization.* Though a creature of statute, the CDC has been clothed — so far as possible — with the dignity of a "private corporation operating basically within the provisions of the Canada Corporations Act".[23] The Bill expressly declares the Corporation not to be "an agent of Her Majesty or a Crown corporation...".[24] Indeed the greater portion of Part I of the Canada Corporations Act is incorporated by reference, *mutatis mutandis*.[25] Excluded from application are sections of that Act dealing with inappropriate technical matters (*e.g.* letters patent) as well as substantive provisions altered by the Bill.[26]

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[21] The proposal is that of N.S. Takacsy, director and economist of Greenshields, quoted in the *Financial Post*, June 29, 1968, p. 5.

[22] Bill C-260 (Mr. Otto), 1st session, 27th Parliament, received first reading on December 21, 1966. It suggested a Crown Corporation whose prime function would be to insure certain approved Canadian stocks, held by Canadian citizens, at a prescribed fee, as a device to promote Canadian ownership. Somewhat less eccentric is Bill C-204 (Mr. Saltsman), 3rd session, 28th Parliament, introduced on December 3rd, 1970, an NDP project for a State-owned corporation which would expand the public sector where necessary, and act generally as an instrument of government planning.

[23] Department of Finance New Release, Canada Development Corporation, Jan. 25, 1971, p. 5.

[24] Bill C-219, 3rd session, 28th Parliament, s. 31.

[25] *Ibid.*, s. 26.

[26] *Ibid.*, s. 27.

During its formative years, the CDC will be wholly government owned. Of its authorized capital of $2 billion,[27] an amount not exceeding $250 million will be subscribed over three years by the federal government[28] which may receive additional shares in payment for the sale to the Corporation of the capital stock held by the government in Polymer, Eldorado Nuclear, Panarctic Oils (presently about 40% government owned) and Northern Transportation.[29] Section 39 is merely facultative; *i.e.* the CDC is not committed in any way. The nation is, however, committed as the section provides all necessary authority for the sale with the agreement of the Governor in Council. Neufeld,[30] among others, has questioned the propriety of such sales. If the reasoning were based upon administrative efficiency,[31] such transfers might be defensible. But this rationale has yet to be convincingly put, and in its absence one must infer that the lucrative earnings of Polymer and the other financially successful Crown endeavours will be used to bolster sales of CDC securities and enhance its balance sheets. Thus, not only does section 39 contain a hidden denationalization of these enterprises (once CDC shares become widely held), but it also insures a subsidization of the CDC by the public generally, through the loss of these earnings.

Though the Crown in right of Her Majesty may hold more than ten per cent of the total issued voting shares, the company, once widely held, may "at its sole option" redeem these shares and effectively keep the government participation to the level of ten per cent.[32] So far as is in the public interest, the Minister shall maintain the ten per cent minimum government holding.[33] Shareholders

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[27] *Cf.* Department of Finance, New Release, *supra,* n. 23, p. 3.

[28] Bill C-219, *supra,* n. 24, s. 36(1)(a).

[29] *Ibid.,* s. 39. The government is authorized to *loan* another $100 million to CDC; s. 37.

[30] *Supra,* n. 13, p. 7.

[31] This argument was suggested in the 1965 Budget Speech by allusion to the views of the Glassco Commission, *House of Commons Debates,* 1965 vol. I, p. 434. That industrial rationalization is not, however, the sole guiding principle of the Bill is evidenced by the removal, on third reading, of any reference to the Northern Canada Power Commission. Mr. Mahoney, Parliamentary Secretary to the Minister of Finance, frankly explained that pending legislation (C-193) would so alter the rate structure of the Commission as to make it effectively non-profit, and thus inappropriate to the CDC portfolio. *House of Commons Debates,* June 4, 1971, p. 6391.

[32] Bill 219, *supra,* n. 24, s. 36(1)(b).

[33] *Ibid.,* s. 42(3).

other than the federal Crown may not hold in excess of three per cent of the outstanding voting shares.[34]

Individual and corporate shareholders (of voting shares) must be Canadian residents, with exception made for non-resident Canadian citizens.[35] A non-resident controlled corporation is deemed non-resident for this purpose.[36] To ensure Canadian ownership, the Board may secure declarations concerning residence, citizenship, associations, etc. of any shareholder[37] and, should shares be found to be held in contravention of the Act, their voting rights will be suspended and a system of redemption put into effect.[38]

Like the shareholders, members of the Board are subject to special requirements. All must be Canadian citizens, and the majority residents as well.[39] Provisional directors, naturally, will be government appointees,[40] but as the voting power spreads, the Minister may opt between either voting the government shares in elections, or simply appointing not more than four of the eighteen to twenty-one directors.[41] In addition, so long as the government holding exceeds fifty per cent, the Deputy Ministers of Finance and Industry, Trade and Commerce are members of the Board *ex officio*, without voting rights.[42]

Section 14 takes the place of sections 84 and 92 of the Canada Corporations Act. It presents the function of the Board as including roughly the same matters touched upon in section 92 of that Act, adding some precision to the general management function (*e.g.* investment and administration of company property).

The powers of the CDC, though similar for the most part to those of a company incorporated under the Canada Corporations Act, are peculiar in certain respects. The Corporation may not enter into any amalgamation,[43] though it may enter other arrangements of a co-operative nature, such as joint ventures.[44] Its power to incor-

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[34] *Ibid.*, Schedule I, s. 2(1)(b). On the mechanics of the three per cent rule, *cf. infra*, pp. 15ff.

[35] Bill 219, *supra*, n. 24, s. 20; also Schedule I, s. 1.

[36] *Ibid.*, Schedule I, s. 4(1)(c)(iv).

[37] *Ibid.*, s. 16(2).

[38] *Ibid.*, s. 19, 21-25.

[39] *Ibid.*, s. 12.

[40] *Ibid.*, s. 5.

[41] *Ibid.*, s. 40, 11. The number of directors may be altered by the Board if the by-law is ratified by a ⅔ vote of the shareholders at a special general meeting; s. 11.

[42] *Ibid.*, s. 41.

[43] Cf. Canada Corporations Act, R.S.C., 1970, c. C-32, s. 14(1)(d).

[44] Bill C-219, *supra*, n. 24, s. 7(1)(d).

porate subsidiaries is phrased more broadly than is the case in the general Act.[45] The *ultra vires* doctrine is not applicable as against any person who purchases securities of or contracts with the Corporation.[46]

Certain exceptional acts of the company, however, require a special procedure be followed. Sections 48 through 58 of the Canada Corporations Act do not govern changes in its capital structure. Rather, such decisions, as well as modifications of the objects of the company and any alteration of conditions concerning shareholder qualifications, can only be accomplished by application for supplementary letters patent, upon a two-thirds vote in general meeting, which application requires affirmation by resolution of both Houses of Parliament.[47]

This last is surely the most significant derogation from the general company law to be found in the Bill, and represents the only serious legal control over the Corporation given Parliament. For unlike the special shareholder requirements — both as to residence and as to size of holdings — this limitation upon the autonomy of the company is not immediately reconcilable with the common law conception of a company. Share qualification rules may be imposed upon the company by its charter, but section 30 provides for a continuing relationship between the Corporation and the legislative body, or at least the potentiality of such a relationship.

(ii) *Objects and purpose.* In its formative years, the CDC was vaunted as a significant weapon in the battle against foreign control of the Canadian economy. In 1965 Walter Gordon put it thusly:

> ...The vast majority of Canadians want our country to remain free and independent. But if we lose our economic freedom — and an excessive absentee ownership of our businesses and resources means some loss of economic freedom — then sooner or later we shall lose our political freedom also. Many things must be done to prevent this. One of these is to secure in Canadian hands a greater measure of control of future economic developments. The Canada Development Corporation will help us to do this...[48]

Leaving aside the striking imagery of independence, the Watkins Report of 1968 recommended "that the Canada Development Corporation be created so as to increase Canadian participation in Cana-

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[45] *Ibid.*, s. 7(1)(f); Canada Corporations Act, *supra*, n. 43, s. 14(1)(h).

[46] Bill C-219, *supra*, n. 24, s. 8(1).

[47] *Ibid.*, s. 30.

[48] Remarks at the annual meeting of the Canadian Textiles Institute, Ste. Adèle, Québec, June 3, 1965, quoted in E.P. Neufeld, *supra*, n. 13, p. 3.

dian economic activity".[49] More precisely, the Report suggested that the CDC could reach to the centre of the foreign control — as opposed to foreign ownership — problem.

> [The CDC's] capacity to draw on the expertise of the financial community and to provide a focal point for the mobilization of entrepreneurial capital would help to meet what is presently a major flaw in the Canadian capital market, namely, that rising Canadian ownership of equity securities does not appear to be matched by rising Canadian control.[50]

When C-219 actually appeared, foreign domination rhetoric was further tempered in favour of more subtle and vague promises of "rationalization" of the Canadian economy.

> The corporation will help shape and secure future Canadian development. It will be a large-scale source of capital to create major new enterprise. It will join others in acquiring and rationalizing existing companies where competitiveness may be improved by merger, amalgamation or other corporate arrangements. In helping to bring about these changes it will reduce the risks of an undesirable degree of foreign control of the enterprises concerned.[51]

Ultimately, of course, the activities of the CDC will be governed neither by eight years of salesmanship nor by Ministerial praises but by C-219 itself. Section 2 of the Bill reads:

> The purpose of this Act is to establish a corporation that will help develop and maintain strong Canadian controlled and managed corporations in the private sector of the economy and will give Canadians greater opportunities to invest and participate in the economic development of Canada.

The section makes clear that this Bill's answer to the question asked at the outset — who is the Canadian in "Canadian control" — is the private entrepreneur. In the long term, CDC wishes to repatriate decision-making power by fostering development of private Canadian decision-makers within the present capitalist industrial structure.

The CDC is, however, more than — or, more properly, something other than — a mere subsidy scheme. Subsidization is of its nature a governmental endeavour. Yet the CDC is established as a "mixed company".[52] The essence of the Corporation is to be found in its objects which, though lengthy, merit reproduction.

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[49] Task Force Report, *supra*, n. 2, pp. 404-05.

[50] *Ibid.*, pp. 274-275.

[51] Department of Finance News Release, *supra*, n. 23, p. 1.

[52] The expression is common in Europe. It refers to companies structured as private corporations but in which the State has equity participation. See, *infra*, pp. 421 ff.

6. (1) The objects of the company are:

(*a*) to assist in the creation or development of businesses, resources, properties and industries of Canada;

(*b*) to expand, widen and develop opportunities for Canadians to participate in the economic development of Canada through the application of their skills and capital;

(*c*) to invest in the shares or securities of any corporation owning property or carrying on business related to the economic interests of Canada; and

(*d*) to invest in ventures or enterprises, including the acquisition of property, likely to benefit Canada;

and shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.

(2) In the furtherance of its objects and in carrying on its business generally, the company shall, *so far as it is practicable and profitable to do so,*

(*a*) invest in the shares or securities or corporations in which the company has or expects to have substantial holding of shares carrying voting rights; and

(*b*) invest in the shares of corporations in each of which, in the opinion of the Board of Directors of the company, the real value of the shareholders' equity after investment by the company will be, or is likely to become, one million dollars or more.

(3) Subsection (2) is directory only and shall not be construed to limit or qualify the objects of the company under subsection (1) or to derogate from the powers of the company.[53]

The Department of Finance summarizes: "The CDC will act in the broad area in which the national interest and the profit motive are compatible." [54]

The suggestion is that of a company which, by means of relatively large investments carrying with them significant control of other companies — but not to be exercised as direct operating control [55] — will act to forward the national interest envisaged in terms of Canadian participation, growth and economic development. All this and more at a profit for the private investors. It is fair to say that the CDC must aim not merely at profit-making but at profit-

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[53] Bill C-219, *supra*, n. 24, s. 6, my emphasis.

[54] Department of Finance News Release, *supra*, n. 23, p. 2.

[55] "Generally, the CDC will not seek to exercise direct operating control of the corporations in which it invests and they will therefore not normally become CDC subsidiaries." Department of Finance News Release, *supra*, n. 23, p. 2. Later, however, the Minister pointed out that the CDC would, of course, continually exert a "degree of influence on the basic policies and direction of such corporations appropriate for a major shareholder". *House of Commons Debates*, February 22, 1971, p. 3637. The choice is left to the reader.

maximization. Such, indeed, has been the key to the government's sales campaign since the beginning. Speaking in 1965, Gordon said:

> The over-riding objective of the CDC must be to satisfy the normal interest of its shareholders. Regular commercial and financial criteria must guide the investment policies of the CDC. Normal investment criteria must guide the public in deciding to invest in CDC...[56]

The conclusion necessarily follows that the CDC will not operate so as to supplement the market, but will work through it.[57]

Perhaps the best statement of objects is that of Mr. Benson at the close of his speech upon introduction of C-219 for second reading:

> Its capitalization will allow it to become one of the largest Canadian corporations. It will represent a new and significant partnership between the public and private sectors in the dynamic development of our economy. It will create a new centres [sic] of entrepreneurship and capital to help build the kind of strong and enterprising Canadian corporations which can compete successfully in an increasingly competitive world. It will enable certain government-owned enterprises to grow and develop as full-fledged members of the business and financial community, and it will help broaden the opportunities for both Canadian skills and Canadian capital to participate in our own development.[58]

Despite the paean to "partnership between the public and private sectors", the bias of the project seems clear enough. World competitiveness is to be secured by building "strong and enterprising" — and private — "Canadian corporations". The collectivity appears only at the financing stage. Perhaps most revealing is the uneasiness evidenced by the Minister in the presence of State-owned enterprises, a discomfiture often found in business circles. He sees denationalization as a process whereby Crown corporations may become "full-fledged members of the business and financial community". Such a statement reflects a fundamental postulate of pure capitalism, that public enterprise and collective economic activity generally are *prima facie* anomalies within the economic system.

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[56] Remarks at the annual meeting of the Canadian Textiles Institute, quoted in Neufeld, *supra*, n. 13, p. 5. Mr. Benson put it more bluntly. Explaining the implications of the last clause in sec. 6(1) to a Parliamentary committee he admitted: "This has implicit in it a maximization of profits within reason." Minutes of Proceedings and Evidence, Standing Committee on Finance, Trade and Economic Affairs, May 4, 1971, p. 34. While profit-making may be justified both as an index of efficiency and a means whereby the development corporation may continuously service external endebtedness, profit-maximization is another matter. For a valuable discussion of the rôle of profit in the development institution, see Petrilli, *L'Etat entrepreneur*, (Paris, 1971).

[57] Neufeld, *supra*, n. 13, p. 5.

[58] *House of Commons Debates*, February 22, 1971, p. 3640.

(iii) *Control.* Statutory governmental control over the CDC is minimal. Parliament must authorize certain fundamental changes in the charter,[59] but the Corporation has full autonomy as to its activities. It will not report to Parliament and will presumably disclose no more information than is required of corporations generally.[60] The federal government is guaranteed a minimum of four directors, few enough that any sort of by-law might be passed without government support, including removal of a director, which requires a four-fifths vote.[61]

Of course, government control *de facto* will remain for some time to come. Indeed, will the government ever lose control? In the 1965 Budget Speech Finance Minister Gordon said "the Corporation would stand on its own feet, free of government control".[62] It is unclear, however, what the Minister meant by "control".

At this point we should look in somewhat more detail at Schedule I of the Bill. The effect of the Schedule is to limit all potential voting blocks except the federal government to three per cent of the outstanding voting shares. To this end the formula groups any provincial government with agents of that government,[63] and generally any shareholder "associated" with any other shareholder.[64] Such association exists, of course, in the usual situations of interlocking control. It also exists between corporations one of which controls the other, a state of fact which obtains when in the opinion of the Board of Directors the one is effectively controlled by the other, by whatever means.[65] Finally, shareholders are also associated who,

> ...are parties to an agreement or arrangement, a purpose of which, in the opinion of the Board of Directors, is to require the shareholders to act in concert with respect to their interests in the company.[66]

Beyond the express cases of interlocking directorships and the like, all association is thus a matter to be determined by the Board. The Board will decide whether one corporation is in the effective

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[59] Bill, C-219, *supra,* n. 24, s. 30; also *supra,* p. 413.

[60] The inadequacy of disclosure provisions in Canadian company law is notorious. Task Force Report, *supra,* n. 2, pp. 166 ff.

[61] Bill C-219, *supra,* n. 24, s. 12(7).

[62] *House of Commons Debates,* 1965 vol. I, p. 455.

[63] Bill C-219, *supra,* n. 24, Schedule I, s. 2(3), s. 4(1)(a).

[64] *Ibid.,* Schedule I, s. 2(1).

[65] *Ibid.,* Schedule I, s. 4(4). The subsection specifies holding of shares and holding of debts and concludes: "or by any other means whether of a like or different nature".

[66] *Ibid.,* Schedule I, s. 4(2)(i).

control of another, be this accomplished by straight-forward shareholding, voting agreements, relations to a third company, etc. And the Board will decide more generally whether two shareholders have entered into an agreement creating a voting block. The test to be applied requires, simply, an agreement or arrangement *a* (not "the main" as in the Income Tax Act [67]) purpose of which is establishment of such a block.

If the individual, institutional and provincial investors are successfully isolated in this fashion, there of course remains the possibility of *de facto* voting patterns flowing from the similar interests of groups of investors. Nonetheless, a ten per cent interest in a widely-held company might well be considered a controlling interest in such a situation.[68]

II. *CDC IN CONTEXT: PUBLIC AND MIXED HOLDINGS*

This, then, is the Canada Development Corporation. Though perhaps unique unto itself, the CDC is not therefore incommensurable with other forms of State intervention. Much has been said of unicorns, not to speak of white elephants. The CDC is *not* a public corporation and *is* a species of mixed enterprise. Something may be learned from each comparison.

A. Public Corporations

In general, public ownership of the means of production and exchange must be linked with some "socialist" ideology.[69] R.-P. Barbe claims that the Canadian experience, on the contrary, has been that though socialist ideas may have favoured State interventionism, the true motives of Canadian public ownership lie elsewhere.[70] The motives he offers — national unity, war and economic planning, in historical sequence — do not actually contradict

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[67] R.S.C. 1970, c. I-5, s. 138.

[68] The phenomenon of a controlling interest well below 50% is hardly novel, and the government position in CDC has not escaped the notice of private enterprise critics. Neufeld noted the probability of control and added that the government is, in fact, "duty-bound" to exercise some control over the use of public money. Neufeld, *supra*, n. 13, p. 10.

[69] There exist notable exceptions in certain provincial nationalization schemes. M. Lévesque may have been motivated by considerations of collective interest in the nationalization of hydro-electric power, but justifications of his proposal were often made upon rather different grounds. P. Sauriol, *The Nationalization of Electric Power*, trans. by K. Buchanan, (Montreal, 1962). The B.C. scheme is perhaps more blatantly non-socialist.

[70] *Les entreprises publiques au Canada*, (1969), 29 R. du B. 2, 5.

the general thesis so much as they indicate an overly narrow use of the term "socialist".

The European experience, being largely based upon nationalization rather than *sui generis* State companies, is even less ambiguous in this respect. Katzarov, an eminent authority on nationalization, certainly supports such a thesis.

> Le climat social et politique dans lequel s'effectuent les nationalisations, les motifs invoqués pour les justifier et les circonstances qui les précèdent ou qui les accompagnent... nous montrent que cette intervention aussi radicale de l'Etat dans la vie économique *a pour cause profonde les aspirations à une socialisation* des conditions générales de l'existence. [Emphasis in original.] [71]

The flurry of nationalizations in France after the Second World War were justified as a "retour à la nation" of property rightfully that of the people.[72]

To the extent that public ownership rests upon a concern for the collectivity, its structures have necessarily differed from those of private enterprise joint stock companies. In the Anglo-Canadian tradition, the prime vehicle of public ownership has been the Crown corporation. Originally rather closely tied to the executive itself,[73] this form has evolved towards progressively greater autonomy — which autonomy was in fact a prime consideration in its development as distinct from the government agency[74] — all the while retaining certain basic lines of control and supervision.

The Canadian Crown corporation is governed by provisions of the Financial Administration Act, 1951.[75] This Act provides a generic[76] definition of the form:

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[71] *Théorie de la Nationalisation,* (Neuchâtel, 1960), p. 123.

[72] J.-D. Bredin, *L'Entreprise semi-publique et publique et le droit privé,* (Paris, 1957), pp. 45 ff.

[73] The courts' reluctance to attribute a significant degree of autonomy to these corporations is illustrated by the tendancy to allow them to partake of Crown immunity from tort liability. In effect, the courts were clinging to an identification with governmental departments. A similar situation obtained with respect to local taxation. *Cf., e.g., Halifax* v. *Halifax Harbour Commission,* [1935] S.C.R. 215.

[74] See, J.E. Hodgetts, "The Public Corporation in Canada", *The Public Corporation: A Comparative Symposium,* Friedmann ed., (Toronto, 1954), p. 51, at 61. Also J.A. Corry, *The Fusion of Government and Business,* (1936), 2 Can. Jour. Econ. & Pol.-Sci. 301.

[75] R.S.C. 1970, c. F-10. Subsequent amendments have not altered the sections involved here.

[76] Three classes of Crown Corporation are distinguished and to some extent different régimes apply. "Agency Corporations" are agents of the Crown and are semi-commercial in their operations, *supra,* n. 75, ss. 76(1)(a) and

> Crown corporation means a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs,...[77]

Thus the very definition makes reference to perhaps the most basic, if not always the most effective, line of control: Ministerial responsibility. Among the more specific forms of supervision is the power of the Auditor General to make examinations of all accounts relating to public property,[78] the results of which examinations are included in his annual report to Parliament.[79] All Crown corporations must themselves issue annual reports containing that information the Canada Corporations Act requires be given the shareholders, plus any other information the appropriate Minister or the Minister of Finance may desire. This report is tabled in Parliament.[80] Furthermore, each corporation must have an official auditor, designated either by the statutory charter or by the Governor General in Council.[81] This auditor makes an annual report upon the financial activities of the corporation, which report is included with that of the corporation itself and submitted to Parliament.[82] Beyond these formal controls, the government through its appropriation machinery may retain power to approve contracts and by-laws. The Board of the corporation is appointed by the Governor in Council. All payments out of the Consolidated Revenue Fund must have the authority of Parliament.[83]

These structures of supervision are automatically incorporated in Mr. Saltsman's Bill C-204 [84] which proposes a Crown corporation CDC. Having pointed out elsewhere [85] the danger inherent in a national development corporation forced to represent the interests of institutional and corporate investors, Mr. Saltsman carefully reiterates the basic line of control in his Bill, requiring that the CDC

> ...act always as an instrument of government planning and development policy and be directly responsible to Parliament through the Minister...[86]

76(3)(b). "Departmental Corporations" are also agents of the Crown, but act in an administrative or governmental capacity, ss. 76(1)(d) and 76(3)(a): "Proprietary Corporations" are commercial and ordinarily operate without special appropriations, ss. 76(1)(e) and 76(3)(c).

[77] Financial Administration Act, *supra*, n. 75, s. 76(1)(c).

[78] *Ibid.*, s. 67.

[79] *Ibid.*, s. 70.

[80] *Ibid.*, s. 85.

[81] *Ibid.*, s. 77.

[82] *Ibid.*, s. 87.

[83] *Ibid.*, s. 24.

[84] First (and surely last) reading, December 3, 1970, 3rd session, 28th Parliament.

[85] "Towards a Responsive Development Corporation", mimeo, 1969, p. 9.

[86] Bill C-204, s. 4(1)(c).

Unfortunately, his stated position upon the other fundamental attribute of Crown corporations, autonomy, is less satisfactory. In a 1967 position paper he suggested that the CDC,

> ...to be free of government intervention, justify its existence through adequate returns on invested capital; survive by proving its efficiency in the market...[87]

The government's C-219 certainly fulfills the most stringent requirement of autonomy, operation within the market. However, those mechanisms of supervision associated with the Crown corporation are generally absent. The government retains a severely limited right to appoint directors,[88] and by-laws going to the essence of the capital structure or objects of the Corporation must be laid before Parliament.[89] Beyond this, the activities of the Corporation remain its own affair, except to the extent that disclosure is provided by the general company law. Even if it is true that the government will retain control of the Corporation,[90] this *de facto* situation is no substitute for public and Parliamentary scrutiny and supervision. Surely, Crown corporations have themselves often been subject to the criticism that only the government, and not Parliament or the public, has been in a position to supervise.[91] It is thus all the more difficult to understand how the CDC, an institution supposedly designed to promote economic development in the national interest, is to escape even the minimal degree of scrutiny and supervision to which Crown corporations are subject.[92]

B. Mixed Enterprises

The combination of public and private capital and administration, though relatively rare in the common law world,[93] is a widely

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[87] "Is there an Alternative to Continentalism?", mimeo, 1967, p. 18. In fairness to Mr. Saltsman, it should be pointed out that this requirement nowhere appears in the 1969 paper. *Cf.* n. 56, *supra.*

[88] Bill C-219, *supra,* n. 24, s. 40; *cf. supra,* p. 412.

[89] *Ibid.,* s. 30; *cf. supra,* pp. 412-413.

[90] *Cf., supra,* pp. 417 ff.

[91] For such a view of the British experience, see R. Kelf-Cohen, *Twenty Years of Nationalization — the British Experience,* (London, 1969).

[92] At this point the reader might well re-reflect upon the significance of the sale of economically viable Crown corporations to a CDC constructed upon the principles enunciated in Bill C-219. The denationalization accomplished goes not only to economic benefit, but also to public control of these crucial enterprises.

[93] *Cf.* W.A. Robson, *Nationalised Industry and Public Ownership,* (London, 1960). Existing notable examples are British Petroleum (now just under

used economic form in Europe. The structure of such enterprises is surely of interest in the context of an inquiry into the workings of C-219. For the CDC is itself, in essence, of this genre.

A.-R. Brewer-Carias provides a comprehensive definition of "mixed enterprise":

> En général, le terme d'entreprise ou de société d'économie mixte s'applique aux sociétés dans lesquelles se trouvent associés des capitaux publics et des capitaux privés, en vue d'une exploitation industrielle ou commerciale.[94]

Cuban law is more precise, defining the form as including

> ...entreprises dans lesquelles l'Etat apporte un capital, et à la gestion desquelles l'Etat participe conjointement avec le capital privé.[95]

Here, a second criterion is added to that of the admixture of private and public capital; namely, joint control. Upon this second criterion, Brewer-Carias rejects as mixed enterprises those in which State participation is less than fifty per cent, preferring to term such holdings as "actionnariat de l'Etat". More realistically, the criterion of control may be separated from that of majority holding, as in Italy where even a minority "controlling interest" is sufficient to bring the enterprise in question within the purview of the law relating to mixed companies.[96]

Of interest in this study are the mechanisms of control developed by governments to insure an adequate influence upon these companies. Such mechanisms may be grouped under four heads: (i) government representation, (ii) regulation of company powers, (iii) use of so-called 'courts of accounts' and (iv) disclosure rules. A brief conclusion (v) is also proffered.

(i) *Government representation.* An almost universally applied form of control is State representation upon the governing board of the mixed company. In most countries, the proportion of such State administrators is fixed in each individual case. Occasionally, a general rule may be formulated, as in Germany where governments other than the Federal Government are required to insure adequate influence through representation,[97] this superposed on a rule that

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50% government owned) in the U.K. and Pan-Arctic Oil (40% government) in Canada. The U.K. situation could change significantly with recently introduced legislation. See, *infra*, pp. 432 ff.

[94] *Les entreprises publiques en droit comparé*, (Paris, 1968), p. 81.

[95] *Ibid.*, p. 82.

[96] Claude Ducouloux, *Les Sociétés d'économie mixte en France et en Italie*, (Paris, 1963).

[97] W. Friedmann and H. Hufnagel, "The Public Corporation in Germany," in Friedmann, ed., *supra*, n. 74, p. 146.

all such participations must exceed fifty per cent.[98] In practice, State representation has generally exceeded the proportion indicated by the State holding. In France, for example, the State in most cases "rompt le principe de proportionalité en s'octroyant dans les statuts un droit de vote supérieur à sa part d'actions".[99] Indeed, the French government has been known to legislate representation on the board when the government held no shares at all, but was merely a creditor.[100] In Italy, State nomination of company administrators is provided for in the Civil Code,[101] and includes the power to so nominate even without share participation.[102] Where more than one administrator is so nominated, one must be chairman.[103]

Wishing to retain as far as possible the "private image" of the mixed enterprise, governments for some time attempted to reconcile their special status in these enterprises with the common law of companies. In France an early plan envisaged presentation to the company of a government slate, from among whom shareholders would have to elect one-third of the board. In case of conflict between private shareholders and government, however, this system was no different in effect from State nomination. A second compromise involved a scheme of ratification by the company in general meeting of State appointed administrators. Such ratification was largely formal, and when conflicts arose the State abandoned the formula. Thus the inevitable solution was direct appointment of government administrators.[104]

Turning to C-219, it is difficult at first blush to compare government representation in the CDC with the European situation, both as to proportion of representation and method of nomination, due to the sliding degree of Crown participation, expected to decrease with time from one hundred per cent towards ten per cent. So long as participation remains above fifty per cent, the government cannot logically be prevented[105] from nominating all directors through the

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[98] Brewer-Carias, *supra*, n. 94, p. 182.

[99] Roger Tagand, *Le régime juridique de la société d'économie mixte*, (Paris, 1969), p. 80.

[100] Bredin, *supra*, n. 72, p. 82.

[101] Italian Civil Code, art. 2458.

[102] *Ibid.*, art. 2459.

[103] *Ibid.*, art. 2460.

[104] Bredin, *supra*, n. 72, p. 176.

[105] For purposes of public relations and even upon serious policy grounds — favouring private initiative — the government might well reduce its representation voluntarily.

exercise of its voting power.[106] The option to appoint four directors [107] is not, however, an adequate alternative means of insuring sufficient governmental presence. For private shareholders with two-thirds of the voting shares may raise the membership of the Board above the maximum of twenty-one provided for by the Bill.[108] Indeed, the same two-thirds vote (or four-fifths of the Board) is sufficient for removal of a director.[109] One can only presume that the government is depending upon the ceiling on holdings to prevent the formation of such a private coalition.

Regardless of the extent of government representation and the method by which it is achieved, the status of the government administrator within an overtly common law company is at best ambiguous. In France it is often the case that government "commissaires" are given by statute a certain veto power over the decisions of the board, often used to delay the effect of such decisions until the Minister can act.[110] Whether or not such special powers inhere in the government representatives, their position is necessarily rather different from that of the "private" board members. Speaking from the Italian experience, Professor Ferri has described them as

> ...contrôleurs de la société dans l'intérêt de l'Etat... [I]ls ont une position particulière au sein de la société, position différente de celle d'un véritable administrateur ou d'un véritable syndic au sens du droit commercial.[111]

As Ducouloux point out, the special status of the Italian government administrators makes it impossible to say, as does art. 2458, al. 2 of the Italian Civil Code, that they have the "same rights and obligations" as any other director. For, in fact, their rights are different (*e.g.* they cannot be removed by the company) as are their obligations (*e.g.* they are bound to disclose to the State unlike private directors who are bound to secrecy by art. 2407).[112] Bredin asserts that the very concept of a board of directors, as elaborated within a capitalist system, has been undermined by the presence of government representatives — not to mention representatives of unions and consumers, often required by statute in European mixed and

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[106] A simple majority vote suffices for such nomination by s. 88 of the Canada Corporations Act, incorporated by s. 16 of Bill 219.

[107] S. 40 of the Bill, *supra*, n. 24.

[108] That is to say, two-thirds ratification of a by-law passed by the Board, *ibid*, s. 11.

[109] Here the two possibilities are truly disjunctive, *ibid.*, s. 12(7).

[110] Tagand, *supra*, n. 99, p. 218.

[111] Cited in Ducouloux, *supra*, n. 96, p. 129.

[112] *Ibid.*, pp. 129-130.

public corporations — who are responsible not to the shareholders as such, but to the government.[113]

It would appear that the government-appointed directors of the CDC stand somewhat closer than do those of the European mixed enterprises to their homologues in the common law company. They are subject to removal by the company in general meeting or by the board itself, and are under no (express) special obligation towards the government which appoints them. Nonetheless, they cannot truly be assimilated to common law directors. For they may be imposed upon the company contrary to the will of the majority of shareholders, and are in fact present to represent the policies of the government, not merely *qua* interested and able shareholders. Perhaps most curious, the position of such directors evolves as does the extent of government participation in the Corporation. Initially, they stand as governmentally hired directors of an autonomous but wholly State-owned company. As private participation grows, they become elected board members, though owing their position to government voting power exercised in their favour. Finally, if and when the government avails itself of its statutory power to appoint under section 40, these directors become, once again, appointees, but now representative of a special minority interest on a board, the remaining members of which are elected by the private shareholders. The legal and administrative implications of this complex arrangement are undoubtedly extensive and, in all likelihood, unanticipated.[114]

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[113] Bredin, *supra*, n. 72, pp. 177, 193 ff. This analysis casts a certain shadow of doubt upon the 'representative Board' proposal which has gained a degree of popularity among North American reformers. It is not, of course, clear how a board of directors institutionally formed to accomodate interest representation might function, and European (particularly recent Yougoslavian) experiments have not yet yielded sufficient data to form such a judgment. The disparity of rôles exactly parallels the disparity of objectives in the mixed company. It is not at all clear that mixed enterprise in France, for example, has developed any differently than its private counterpart, except perhaps in the utility and transport sectors.

[114] So long as the position of the government directors' is undefined, it is impossible to even approach an adaptation of the existing law and administrative practice. As noted above, the government director has raised serious problems in European mixed enterprise as to the standards by which his functioning is to be assessed, both administratively and legally. In spite of this, C-219 erects a rôle about which Canadian company experience teaches us nothing, and complicates matters by allowing the form, if not the substance of the rôle to change with the sliding scale of government participation in the Corporation. Consider, by way of example, the difficulty of applying legal

(ii.) *Regulation.* Mixed enterprises are subject not only to those regulatory boards and agencies which supervise companies generally, but also to restrictions specifically designed to protect the interests of the State as represented by the government holdings. At one extreme are the French rules, probably the most stringent. In that country, the government will often claim special voting rights with respect to "matières privilégiées", such as alteration of capital structure. On these matters the particular statute of the company will automatically increase the government vote to, *e.g.*, two-thirds.[115] On occasion, the State will more simply arrogate to itself a two-thirds voting power in all matters.[116] Mixed companies may avail themselves of the usual régime concerning bankruptcy and insolvency, but the State may intervene in these procedures in the public interest.[117] Finally, a general decree of 1955 [118] subjects virtually all mixed enterprises in which State participation exceeds fifty per cent to relatively direct economic and financial government control.[119]

C-219 contains only minimal special regulatory control. The resolution of both Houses of Parliament required for certain exceptional by-laws [120] and the Parliamentary approval required for winding up [121] essentially exhaust this rubric, though one might add, not as controls but surely as an additional form of regulation, those peculiar rules concerning nationality and residence of shareholders [122] and redemption of shares.[123]

(iii.) *Courts of account.* The "cour des comptes" is a common European institution which scrutinizes the financial activities of public departments and corporations, judging *ex post facto* as to the appropriateness of such activities and acting generally as a means of Parliamentary intelligence. In many countries these "courts" have been given jurisdiction over mixed enterprises as

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standards of directors' duties to the government directors at each stage. Surely, creation of a new office within the corporate form — the representative director — requires new law to govern the exercise of that office.

115 Tagand, *supra,* n. 99, p. 85.

116 Bredin, *supra,* n. 72, p. 221.

117 Décret no 55-773, 26 mai 1955, J.O. du 1er juin 1955.

118 Ducouloux, *supra,* n. 96. Unlike in Italy, where the common law applies throughout in this area.

119 *Ibid.,* pp. 200 ff.

120 Bill 219, *supra,* n. 24, s. 30; cf. *supra,* pp. 412-413.

121 *Ibid.,* s. 28.

122 *Ibid.,* s. 16, 20, Schedule I.

123 *Ibid.,* ss. 21-25, Schedule II.

well.[124] Where such jurisdiction exists, the device may be an effective mechanism of scrutiny. In France, for example, specialized chambers have been formed, one of which, the "Commission de Vérification des Comptes", acts as a general economic chamber whose investigations are not limited to "comptes" but extend to broader questions of "gestion économique".[125] Furthermore, recent French law has added an individual "contrôleur d'Etat", as yet another auditing control upon the mixed enterprises.[126]

Needless to say, no such structures exist to provide information to the Canadian Parliament on the activities of the CDC. The Auditor General will not concern himself with this "private" corporation even in the years during which all or most of its shares will be owned by the Crown. Indeed, such controls seem inconsistent with the philosophical tenet of regular market functioning which has been fundamental to the CDC plan from the beginning. Surely Mr. Benson would expect the CDC itself to be a "full-fledged member of the business and financial community".[127]

(iv.) *Disclosure rules.* Regardless of how secure may be a govenment's hold upon mixed companies, it seems clear that the public interest demands disclosure of both government holdings themselves and the use to which such holdings are being put. Under the Italian structure, of which more will be said below,[128] there exists a Minister responsible specifically for State holdings. Other countries have been rather more casual about informing Parliament and the public. Beyond an annual report concerning all companies in which State participation exceeds thirty per cent, French law leaves fact-finding to various parliamentary commissions.[129] The Swedish ombudsman has no jurisdiction to investigate the workings of mixed enterprises.[130]

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[124] Such is the case in Austria, Israel, Spain (if participation exceeds 75%), Italy (where the Corti dei Conti is constitutionally entrenched) and to some extent France. Countries possessing the institution but not extending its jurisdiction to mixed companies include Brazil, Iran, the Netherlands and Sweden (where subsidized but not mixed companies are included). Cf. Brewer-Carias, *supra*, n. 94, pp. 108 ff.; Ducouloux, *supra*, n. 96, pp. 221 ff.; Stromberg "The Public Corporation in Sweden," in Friedmann (ed.), *supra*, n. 74, p. 324.

[125] Ducouloux, *supra*, n. 96, pp. 230 ff.

[126] Décrets du 6 novembre 1959, et du 10 juillet 1963.

[127] For context, v. passage cited *supra*, p. 416. *Cf.* generally the discussion and extracts from speeches, *supra*, pp. 407 ff.

[128] See pp. 429 ff., *infra*.

[129] Tagand, *supra*, n. 99, pp. 235 ff. Disclosure to the government is assured, but not so for the public. *Cf.* Ducouloux, *supra*, n. 96, pp. 200 ff.

[130] Stromberg, *supra*, n. 124.

By section 38(2) of C-219, the disclosure rules of sections 98 to 98F of the Canada Corporations Act are applied to the government holding in the CDC. Thus the ordinary provisions of company law regarding insider trading are the only 'special' disclosure rules noted. The conclusion follows that the CDC is subject to only those disclosure rules applicable to all companies under either the Canada Corporations Act or other existing legislation. Presumably the government will be privy to Corporation activities, but Parliament and the public will be forced to depend upon the efforts of *ad hoc* committees to probe the use of public funds.

(v.) *Conclusion.* As a mixed enterprise the CDC appears only loosely 'governmental' in comparison with similar institutions abroad. Having consciously rejected the public corporate form, the government has pushed the Corporation even farther in the direction of 'capitalist' ideology than the stage of mixed capital and mixed control, at least as these are practiced in States with experience in this economic form. It might be argued that the CDC as presently constructed does not quite reach to the status of mixed enterprise but stops short at "l'actionnariat de l'Etat".[131] This is certainly the case if one ignores *de facto* control by the federal government.

Is this mixed form to be brought into existence as a tool of government development policy, or is it but an expression of the State "as rentier"? [132] The answer *should* rest upon a serious policy decision that the government — and Parliament — will maintain open lines of scrutiny and supervision as provided by a statute to this effect. Given the clear wording and spirit of C-219, however, we must trust to government ambitions of control which ambitions, if they exist, run counter to eight years of hard salesmanship toward the business and financial communities.[133]

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[131] *Cf.* Brewer-Carias, *supra,* n. 94, p. 82; Though we do not subscribe to Brewer-Carias' majority criterion (*cf., supra,* p. 422), the question of control is nonetheless real. If government claims of non-interference are taken at face value, the 10% Crown holding does indeed become nothing more than a portfolio investment.

[132] That is to say, is the government employing the mixed enterprise form as nothing more than a convenient means to enjoy the benefits of corporate profits. The distinction is made by Robson, who seriously questions whether the latter activity does not raise so many conflicts of interest within a corporative economic system as to be wholly unacceptable. W. A. Robson, *supra,* n. 93, p. 481.

[133] *Cf., supra,* pp. 407 ff.

III. *THE DEVELOPMENT CORPORATION*

At best, the CDC, to paraphrase Pirandello, is a tool in search of a policy. The fact that C-219 bears such striking resemblance to the original Gordon concept makes it difficult to imagine what — or whose — policy it could possibly be a tool of. The suggestion that it has been tailored to the as yet unreleased white paper on foreign ownership being prepared by Mr. Grey, the Minister of National Revenue, has been categorically denied by the Bill's sponsor, Mr. Benson.[134] Mr. O'Connell, Parliamentary Secretary to the Minister of Regional Economic Expansion, himself commented that laudable as is the Gordon-Benson CDC, the country is nonetheless in need of an over-riding industrial policy within which such a scheme would meaningfully function.[135]

In the absence of policy, the CDC will remain a not-so-gratuitous curiosity. And assuming this lacuna in government thinking is one day corrected, can such an institution be expected to further those principles formulated? It is submitted that the CDC of Bill C-219 is, simply, not amenable to any rational policy of national economic development and/or any policy designed to cope with the problems raised by an undesirable degree of foreign ownership and control of Canadian industry. Indeed, this entity is unsatisfactory *in abstracto* given the heavy investment of public funds and the lack of scrutiny and supervision as to their use.

In this section, we shall look briefly at two wholly State owned and operated development institutions which, it is suggested, may more readily be adapted to an intelligent and comprehensive plan of national development. Finally, we shall return for a last look at the CDC in the light of these other structures.

A. The Italian IRI

In the wake of a banking crisis, the Instituto per la Ricostruzione Industriale was established in 1933 [136] to support a failing economy by means of massive State intervention. With the fall of the Fascist government, the IRI was not abolished but rather transformed [137] from a government organ into "un organisme financier de droit

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[134] *House of Commons Debates*, January 25, 1971, p. 2708.

[135] *House of Commons Debates*, February 23, 1971, pp. 3673-74; see also the statement of Mr. MacGuigen, another C.D.C. supporter, *House of Commons Debates*, February 24, 1971, p. 3729.

[136] Decree of Jan. 2, 1933, no. 5; Law of May 3, 1933, no. 512.

[137] Law of Feb. 12, 1948, no. 51.

public".[138] Despite attempts to 'freeze' the structure and liquidate its holdings, the IRI in fact expanded throughout the economy[139] to the point that in 1956 it was deemed advisable to create a Ministry of State Participation[140] to oversee the activities of this and the other large development institutions. The final authority, above the Minister, is an interministerial committee including the various Ministers concerned with economic affairs.[141]

The IRI, itself responsible to the Ministry, controls several subsidiary financial holding companies, the *societa finanziarie.* These *societa* in turn control operating companies, grouped into 'sectors'. It is the IRI[142] which assures articulation of the activities of the mixed enterprises at the bottom of the pyramid with government policy.

> Elles[143] interviennent pour achever le choix des fondements de la politique à suivre pour assurer à l'ensemble de leur secteur une unité d'action.[144]

The interest held by the *societa* in the operating companies is often less than fifty per cent, control being then assured by the share dispersal effect. Some of the operating companies are in fact joint ventures in which the IRI either directly or indirectly participates with private investors.[145]

The *enti autonomi di gestione* (IRI and ENI) are wholly State owned, but both lower tiers of the pyramid may issue equity shares with the permission of the superordinate Institute. Such issues will be bought by the Institute when the minimum control level is reached, and occur in such circumstances merely to keep down the gearing

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[138] Ducouloux, *supra,* n. 96, p. 14.

[139] As of 1954 it could be said that "direct or indirect state participation amonnts to about 50 per cent of all Italian enterprise engaged in production", Francesco Muggia, "The Public Corporation in Italy," in Friedmann (ed.), *supra,* n. 74, p. 243. Note that though we shall concentrate upon the structure and activities of the IRI, there exist other, slightly smaller but nonetheless important institutions of similar structure performing similar functions, *e.g.* the Ente Nazionale dei Idrocarburi (ENI), basically limited to mining and petrolium industries.

[140] Law of Dec. 22, 1956, no. 1589.

[141] Ducouloux, *supra,* n. 96, pp. 195-200.

[142] Generically the "enti autonomi di gestione", that is all the primary Institutes, essentially the IRI and ENI.

[143] That is, the IRI and ENI.

[144] Sartori, *Le partecipazioni economiche dello Stato,* cited in Ducouloux, *supra,* n. 96, pp. 206-207.

[145] *E.g.* Selenia is held 45% by IRI, 45% by Raytheon and 10% by Fiat. Alitalia is held 75% directly by IRI (this activity not falling within a sector controlled by the societa) and 25% privately. See M. V. Posner & S. J. Woolf, *Italian Public Enterprise,* (London, 1967), p. 44.

ratio. The preferred method of financing at all levels has been debentures. Yet a third source of funds is state endowment. Though classical doctrine frowns upon such outright grants to nationalized industry, the Italian system merely recognizes openly what is *de facto* the situation elsewhere. For endowments are not easily distinguished from written off government loans, investment allowances, incentive grants, etc. In practice the use of this source has been rather limited. Finally, both long-term and short-term loans are available, the latter only from public banks of "national interest"; *i.e.* banks themselves controlled by the IRI. It is to be noted that the Italian IRI has actually *paid* the interest on its loans, rather than "passing" such interest as is often the case elsewhere (*e.g.* the U.K.), where the lender is the government. It can be argued that subjecting such public structures to the stringency of the financial market has, in fact, imposed an extra burden upon them. For, unable to issue equity shares, they must continually divert profits to servicing outstanding debt, all of which makes even more striking the impressive economic and technological strides taken by the IRI.[146]

Having sketched the structure and financing of the IRI, we may now ask of its use, and of the lines of control which insure that it act as an instrument of government policy. Of course, the basic function of the Institutes is economic growth, and statistics indicate they have served this function well. Though IRI has itself grown at a rate slightly lower than that of Fiat, for example, it has done so with considerably higher capital output ratio, due presumably to its concentration upon capital intensive industries. It is probable that the IRI is responsible for development of the industrial infrastructure (steel, energy, etc.) which has supported the highly successful growth efforts of the Italian economy since the War.[147]

The lines of control running down from the Ministry, through the Institutes and *societa* to the operating companies, have been well developed and appear to provide a reasonably efficient mechanism whereby government policy may be translated into actual production decisions. Through the Minister, Parliament has a source of information and a point of scrutiny over the diverse activities of the Institutes, and through them over the whole range of mixed enterprises. Indeed, at the end of their study, Posner and Woolf voice as their most serious criticism of the Italian system not a flaw in the mechanism, but rather a lack of policy. The structure is sufficiently sophisticated to support a true plan, but instead it has been used

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[146] Financial analysis due to Posner & Woolf, *supra*, n. 145, pp. 71-94.
[147] *Ibid.*, pp. 69-70.

merely to perpetuate the growth of the operating companies, which are rapidly becoming indistinguishable from private industry.[148]

B. The British IRC

Created by the Industrial Reorganization Corporation Act 1966,[149] the State owned IRC is given as its function to:

(*a*) promote or assist the reorganisation or development of any industry; or

(*b*) if requested so to do by the Secretary of State, establish or develop, or promote or assist the establisment or development of, any industrial enterprise.[150]

for which it is empowered, *inter alia,* to effect:

(*a*) the acquisition, holding and disposal of securities;

(*b*) the formation of bodies corporate;

(*c*) the making of loans and the giving... of guarantees with respect to loans made by others;

(*d*) the acquisition and placing at the disposal of others of premises and plant, machinery and other equipment.[151]

The Corporation is governed by a board appointed by the Secretary of State [152] and is capitalized to a maximum — from all Crown sources — of 150 million pounds.[153] It is required to submit annual reports to the Secretary concerning finances and activities generally, and in addition must report to the House of Commons.[154]

The goal of the IRC at its inception was large-scale rationalization of the allegedly chaotic British economy. Being a representative of government policy, the IRC would be in a position to cajole private companies into mergers and amalgamations in the interests of overall industrial efficiency and other planning considerations.[155] By 1968, however, it had become clear that the IRC was not prepared to act as boldly as some of its promoters had hoped.[156]

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[148] *Ibid.*, p. 131. Which criticism does not, it must be emphasized, detract from the amenability of the system *to* such a plan. But cf. Petrilli, *supra,* n. 56.

[149] Statutes of the U.K. 1966, c. 50.

[150] *Ibid.*, s. 2(1).

[151] *Ibid.*, s. 2(3).

[152] More precisely, the chairman is so nominated and the remaining members chosen by the Secretary in consultation with the chairman, *ibid.*, s. 1(3).

[153] *Ibid.*, s. 7.

[154] *Ibid.*, s. 9.

[155] "In practice this has meant promoting certain mergers and sweetening others... which met its approval", R. E. Caves, et al, *Britain's Economic Prospects,* (London, 1968), p. 319.

[156] For example M. Posner, who was called to serve the Labour government while working on his study of the IRI in Italy, *supra,* n. 145; *Cf.* M. Posner & R. Pryke, *New Public Enterprise,* Fabian Research Series No. 254, (London, 1966).

> The IRC has disappointed those who saw it as the financial nucleus for major public initiatives in industry... Instead it has only (1) offered informal advice and (2) in its most significant moves, promoted mergers between major electrical, computer and nuclear instrument companies.[157]

Presumably, this timidity was a significant motive for passage of the Industrial Expansion Act 1968.[158] By this Act the Secretary of State, *inter alios,* may lay before Parliament for approval "an industrial investment scheme" the purpose of which is a project calculated:

> (*a*) to improve the efficiency and profitability of an industry or section of an industry;
>
> (*b*) to create, expand or sustain productive capacity in an industry or section of an industry; or
>
> (*c*) to promote or support technological improvements in the processes or products of an industry or section of an industry,
>
> but [which] would not be undertaken without such financial support as is authorized by this section.[159]

The scheme may authorize virtually any sort of financial support including loans, purchase of goods, purchase of undertakings, underwriting of losses and subscription for or purchase by agreement of shares.[160] The purchase of equity requires consent of the company, but it has been pointed out that — at least for a bid short of fifty per cent — such consent could be virtually extorted without great difficulty.[161]

In effect, the Industrial Expansion Act 1968 complements the IRC by providing the basis for a planned use of the mixed company form in promoting the rationalization and development of the British economy. Prior to the 1970 election, it might have been expected that the IRC would grow along the lines of the Italian IRI into a large holding company, though perhaps one engaged more actively in rationalization and less oriented towards long-term policy implementation.[162] Given its limited capital supply, the IRC would presumably be less interested in amassing such large holdings in mixed enterprises as required to effectively percolate govern-

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[157] Caves, et al, *supra,* n. 155, p. 388n.

[158] Statutes of the U.K. 1968, c. 32.

[159] *Ibid.,* s. 2(1).

[160] *Ibid.,* s. 2(2).

[161] Samuels, Alec, *Government Participation in Private Industry,* [1968] Jour. Bus. Law 296, at p. 299.

[162] Though the Italian IRI may not, in practice, be utilized to so effect long-term policy goals, its structure (in particular its size) makes it more appropriate to such a function than the IRC.

ment policy through whole sectors of the nation's industry.[163] Its interventionism would more efficiently take the form of carefully selected investments designed to exert control over pivotal industrial decision-making processes, so as to effect self-sustaining private sector growth and rationalization. At the same time, however, the IRC could be in an excellent position to organize and effect industrial reorganization schemes including sectoral nationalizations which, if capitalization of the Corporation were not increased, would require either new operating Crown corporations or an expansion of the holdings and activities of existing ones.

C. *The Canadian CDC*

The proposed CDC differs fundamentally from both the IRI and IRC. Structurally, this difference manifests itself as a preference in the Canadian scheme for the private corporate model, with derogations therefrom necessary to accomodate the reality of mixed enterprise kept to a minimum. A serious evaluation of the CDC must not, however, be based upon whether or not this structure is consistent with either *laissez-faire* or "socialist" ideology, but rather upon its capacity to *function* effectively. That is to say, are the functional corollaries to this structure — (a) operation within the confines of profit-maximization and (b) remoteness from the public scrutiny associated with governmental processes — consistent with and amenable to its role as agent of national economic development?

The functional approach, whether from the "left" or the "right", denies any mystique to formal ownership. Swedish economic practice under the social democratic government, for example, has generally shunned formal socialism — State ownership of the means of production — in favour of a "functional socialism" whereby ownership is seen as divisible into property functions and these latter, rather than the ownership *en gros*, are socialized in the sense that the State arrogates to itself power to determine the extent to which these property functions may or may not be freely exercised by the nominal owner.[164]

But functional economics does not thereby preclude State ownership; rather, it simply suggests that socialization short of this step may be preferable in most circumstances. There exist, however, activities over which private control is generally thought

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[163] Though the indirect effects of the smaller structure should not be overlooked.

[164] Gunnar Adler-Karlsson, *Functional Socialism*, (Stockholm, 1968).

impracticable due to the centrality of the functions to be socialized.[165] In other cases, external pressures may be such that effective control is impossible short of total socialization.[166] It is suggested that national economic development is an activity which should not, even nominally, be left to the private sector. For functional socialization of such an activity, if carried out to the necessary extent, would leave too few functions to form an efficient private enterprise. That is to say, a structurally private CDC, if properly socialized as to function, would no longer bear sufficient similarity to a private corporation to make it credible as such.

In support of this conclusion, consider the following illustration. In 1957, the Italian government passed the "Mezzogiorno law" requiring forty per cent of all investments by State concerns (sixty per cent of that directed to new industrial plant) be placed in the Southern regions.[167] In principle, nothing prevents the application of such a policy outside the realm of publicly owned or controlled enterprises; such application would constitute a socialization of the property function of investment. However, Posner and Woolf point out that the effects of the Mezzogiorno law will only be significant if the Institutes carefully tailor their Southern investments to local conditions so as to favour self-sustaining growth, organized and rationally interdependent developments, etc. Could a private firm, *i.e.* one whose ultimate goal remains profit, effect the *purpose* of the Mezzogiorno law? Is it practical to depend upon rules being so carefully drafted as to insure not merely the desired regional distribution of capital investment, but also certain complex and indeed not yet even explicated patterns of investment?

More generally, if the development institution is to function at the centre of a plan,[168] or at the centre of some other sort of overriding policy, can it do so while maintaining the functional minima of capitalism? As presently constructed, the CDC would be unable to perform the most elementary function required of such an

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[165] Virtually all developed nations operate some socialized services, such as education, health, etc. Presumably it is believed that the degree of State control over the universality, quality and availability of such services which is desired is so great as to preclude the possibility of meaningful operation within the private sector.

[166] Such may well be the case of natural resources in a country whose foreign ownership and political pressure balance sheet reads as does Canada's.

[167] Posner and Woolf, *supra*, n. 145, pp. 108-112.

[168] Surely this must be the most logical utilization of these tools. If the CDC is not intented to function within a govnernmental policy, it is difficult to understand why it is even proposed.

institution, that of passing over diseconomies associated with individual investment projects in favour of the extraneous social benefits enunciated in the plan or policy. Such activities would be most inconsistent with the "regular financial criteria" upon which the CDC is to operate,[169] and would surely be *ultra vires* the Corporation given the imperative wording of section 6(1) of C-219.[170] The IRC, on the contrary, acts purely in furtherance of policy and the IRI, thought it must produce sufficient revenue to service its permanent debt, may do so within the industrial development policy perspective it sets, thus including social costs and benefits within its decision matrix.

The second basic functional decision inherent in the present legislative proposal,[171] which goes somewhat less to the heart of capitalist theory, is that the CDC operate with only that degree of public and Parliamentary [172] scrutiny and supervision appropriate to the privately incorporated company. Though, potentially, a partial socialization by function could remedy this situation, without removing all semblance of capitalist ideology,[173] nonetheless the incursion would be a serious one and its effects must be seen as cumulative with any restriction upon the more central function of investment.

The structural differences between the CDC and a private sector corporation are explained not by any wish that the former be sufficiently socialized as to function to operate effectively within a governmental policy or plan, but rather by the mere presence of governmental capital and the minimal alterations which this entails. Even if C-219 were redrafted so as to retain only those capitalist functions, basic to it, the CDC would nonetheless remain crippled as a public instrument by the core function of profit-maximization. And as it stands, the only thing public about the CDC is its money.[174]

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[169] *Supra*, pp. 413 ff.

[170] *Supra*, p. 415.

[171] The first being profit-maximization.

[172] And, if we ignore *de facto* control, the same extends to the government.

[173] In Sweden, for example, "all agreements concluded between private producers must be registered with a special public control board", Adler-Karlsson, *supra*, n. 164, p. 36.

[174] Up to: $250 million in capital + $100 million in loans + the assets and future profits of several Crown corporations.