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After Two Years: Canada's Foreign Investment Review Act

by Robert A. Jaffe*

The Foreign Investment Review Act¹ is one of the most important recent enactments of the Canadian Parliament. In terms of impact outside of Canada, it has certainly been the most significant. Designed to meet nationalistic political demands for the control of foreign investment, the Act aroused considerable concern on the part of American and other foreign investors upon its passage in 1974. In practice the Act has been applied so as to accomplish its goals without causing serious disruptions in the flow of foreign investment. Nevertheless, the FIRA is now the central concern of any potential foreign investor.

The principal forces behind the Act's passage were the considerable Canadian apprehension over the high degree of foreign (especially American) ownership and control of the economy² and the current nationalistic resolve of the Canadian people to seek their own "enlightened self-interest."³ Only after a long and thoughtful national

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¹Foreign Investment Review Act, 1973-74 (21-22 Eliz. II) Can. Stat., ch. 46 (1973), *acclaimed*, Dec. 12, 1973, *in force*, April 9, 1974 and Oct. 15, 1975 [hereinafter cited as the Act or FIRA].

See generally, AMERICAN BAR ASSOCIATION SECTION ON INTERNATIONAL LAW, CURRENT LEGAL ASPECTS OF DOING BUSINESS IN CANADA (1976); P. HAYDEN, J. BURNS & J. SCHWARTZ, FOREIGN INVESTMENT IN CANADA (1974 and as supplemented); G. HUGHES, A COMMENTARY ON THE FOREIGN INVESTMENT REVIEW ACT (1975); J. LANGFORD, CANADIAN FOREIGN INVESTMENT CONTROLS (1975); PRICE-WATERHOUSE, DOING BUSINESS IN CANADA (1975); J. McDONALD, FOREIGN INVESTMENT AND INTERNATIONAL TRANSACTIONS (1967); Glover, *Canada's Foreign Investment Review Act*, 29 BUS. LAW. 805 (1974); Wahn, *Toward Canadian Identity - The Significance of Foreign Investment*, 11 OSGOODE HALL L.J. 517 (1973).

²The Grey Report estimated that, in 1970, over one-third of Canada's manufacturing and natural resource industries were under direct foreign control, with the concentration higher in certain key sectors; also eighty percent of that foreign control was by Americans. *See* GOV'T OF CANADA, REPORT ON DIRECT FOREIGN INVESTMENT IN CANADA (1972) [hereinafter cited as the Grey Report]. For the role of the Grey Report in the formation and passage of the Act *see* note 4 and text accompanying *infra*.

There is no reason to believe that the percent of foreign ownership had declined at the time of the passage of the Act in 1973; nor has the total direct foreign ownership significantly declined since the passage of the Act.

The Act does not cover indirect portfolio investment by foreigners in the Canadian economy, that which does not bring along ownership or control, nor will this Article deal with it.

³In addition to much popular concern over this problem and its possible solutions, there were repeated Government studies into the subject dating back over a decade, most notably two well-known government reports: GOV'T OF CANADA, FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY (1967) (commonly known as the Watkins Report) and the Grey Report, *supra* note 2. The Grey Report took four years to prepare and formed the basis of the draft of the Act finally passed by Parliament.

debate⁴ did the forces of circumstance and public opinion coalesce. That debate included two well known government studies, the Watkins Report⁵ and the Grey Report;⁶ the latter formed the basis for the Act.

The Foreign Investment Review Act does not directly restrict, reduce or ban new foreign investment in Canada, and it does not affect existing investment at all. Instead, the Act seeks to define what will be considered foreign investment, and sets up a procedure whereby — as the title of the Act suggests — the Government can *review* whether it should be allowed. That decision is made pursuant to certain specified criteria.⁷

The Act forthrightly states its purpose:

This Act is enacted by the Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of the Canadians to maintain effective control over their economic environment is a matter of national concern, and that it is therefore expedient to establish a means by which measures may be taken under the authority of Parliament to ensure that, in so far as is practicable after the enactment of this Act, control of Canadian business enterprises may be acquired by persons other than Canadians, and new businesses may be established in Canada by persons other than Canadians who are not already carrying on business in Canada or whose new business in Canada would be unrelated to the businesses already being carried on by them in Canada, only if it has been assessed that the acquisition of control of those enterprises or the establishment of those new businesses, as the case may be, by those persons is or is likely to be of significant benefit to Canada, having regard to all of the factors to be taken into account under this Act for that purpose.⁸

To fulfill this purpose the Act defines a certain type of investment — the “acquisition” or “establishment”⁹ of a “Canadian business enterprise”¹⁰ — by a certain type of person — a “non-eligible person” or “group”¹¹ which is subject to a certain type of procedure — “notice,” “review” and “investigation”¹² — to be judged by a certain

⁴Prime Minister Trudeau’s phrase to describe a Canadian national policy of maintaining existing economic and political ties with its traditional allies and partners, especially the United States, while at the same time following divergence within the framework of those relationships when doing so would better serve Canada’s independent needs and interests.

⁵Note 3 *supra*.

⁶Note 2 *supra*.

⁷See text accompanying notes 145-49 *infra*.

⁸FIRA § 2(1).

⁹See text accompanying notes 51-63 *infra*.

¹⁰See text accompanying notes 44-50 *infra*.

¹¹See text accompanying notes 17-43 *infra*.

¹²See text accompanying notes 82-144 *infra*.

type of criteria — “significant benefit to Canada”¹³ — before it can be approved and carried out. The bulk of the Act is devoted to the definition of these concepts.

DEFINITIONS

*Non-Eligible Person*¹⁴

The statutory definition of a “non-eligible person” is simple and straight-forward as far as natural persons are concerned. Any individual who is neither a Canadian citizen normally resident in Canada nor a qualified landed immigrant is deemed to be a non-eligible person.¹⁵ The definitions and surrounding presumptions, however, become more complex as to corporations and groups.

In the Act . . . ‘non-eligible person’ means . . . a corporation incorporated in Canada or elsewhere that is controlled in any manner that results in control in fact, whether directly through ownership of shares or indirectly through a trust, a contract, the ownership of shares of any other corporation or otherwise, by [a non-eligible person] or a group of persons any member of which is [a non-eligible person].¹⁶

Since the Act deems a corporation that is controlled in any way by non-eligible persons to be a non-eligible person itself, elaborate presumptions and definitions as to “control” are necessary.¹⁷

A corporation is presumed to be controlled by non-eligible persons, and hence to be a non-eligible person itself,¹⁸ if it is either publicly owned¹⁹ and more than twenty-five percent of its shares²⁰ are held by non-eligible persons,²¹ or privately owned with more than

¹³See text accompanying notes 145-49 *infra*.

¹⁴A non-eligible person is in fact not ineligible for anything. As a result there is no such thing as an “eligible person” under the Act. In fact, the Act totally lacks the concepts of eligibility and ineligibility. Therefore the reader will find phrases in this article such as “not a non-eligible person.” See, e.g., text accompanying note 29 *infra*.

¹⁵FIRA § 3(1) “non-eligible person”(a). The Act also simply classifies a government, political sub-division or agency of a country other than Canada as a non-eligible person. FIRA § 3(1) “non-eligible person”(c).

¹⁶See FIRA § 3(1) “non-eligible person”(c).

¹⁷In the Act “presumptions” are legal conclusions drawn from a set of facts which are assumed to be true but may be rebutted by evidence to the contrary. Other provisions of the Act define or “deem” certain conclusions to be irrebuttably true given a certain set of facts.

¹⁸Because the Act considers the status of the ultimately controlling party, if there are several layers of corporate ownership, it may be necessary to go through this elaborate control analysis several times.

¹⁹A corporation is considered to be publicly owned if its common voting shares are ordinarily traded in the usual public market, such as being listed on a major stock exchange. FIRA § 3(6)(a).

²⁰All references in the Act and herein to shares of a corporation refer to common voting shares.

The ownership of options to purchase shares or the right to vote them is deemed to be the equivalent of ownership of such shares. FIRA § 3(6)(c)(i).

²¹FIRA § 3(2)(a)(i).

forty percent of its shares held by non-eligible persons.²² A corporation is also presumed to be a non-eligible person, whether it is publicly or privately owned, if any single non-eligible person owns more than five percent of its shares.²³ Notwithstanding the percentage of non-eligible ownership, a showing that the corporation is in fact controlled by persons other than non-eligible persons will rebut the presumption that the corporation itself is a non-eligible person.²⁴

Conversely, a corporation is presumed *not* to be a non-eligible person²⁵ if (1) no single person owns more than one percent of its shares, (2) its records show no shareholder with a registered address outside of Canada, and (3) an officer of the corporation certifies that there is no reason to believe any of the shares are owned by non-eligible persons.²⁶ The Government can rebut this special presumption with evidence that any of the shares is in fact owned by a non-eligible person.²⁷

The smallest group of persons that could control a corporation,²⁸ by virtue of that group's share ownership, is deemed to do so,²⁹ unless the persons in that group can establish that they deal with each other on an arm's-length basis.³⁰ Whether or not it actually exercises control,³¹ the group is deemed to have it. If any member of a group that controls the corporation is a non-eligible person, the corporation itself is a non-eligible person.³²

²²FIRA § 3(2)(a)(ii).

²³FIRA § 3(2)(b).

²⁴FIRA § 3(2). See note 22 *supra*.

²⁵See note 16 *supra*.

²⁶FIRA § 3(5).

²⁷*Id.* See note 19 *supra*.

²⁸As measured by the percentage limits stated in text accompanying notes 22-26 *supra*.

²⁹FIRA § 3(6)(b).

³⁰*Id.* This is a deemer provision and not a presumption, because the conclusion cannot be rebutted by a showing that it is not true, but only by the special showing set up in the provision. See note 22 *supra*.

³¹FIRA § 3(6)(b). Nor does it matter whether the group is part of a larger group which controls the corporation in fact. *Id.* See also note 19 *supra*.

³²It is important to note that if any group which controls a corporation contains as a member any non-eligible person, corporate or otherwise, the whole of the group will be considered to be a non-eligible person. See FIRA § 3(1)'non-eligible person'(c). This must be considered in light of the provision in the Act, discussed in notes 33-36 and text accompanying, *supra*, that the smallest group that could control a corporation is deemed to do so.

However, if there is a group which controls or is presumed or deemed to control a corporation, and the members of that group who are not non-eligible persons own more than fifty percent of the voting shares of the corporation and the non-eligible members of the group do not constitute more than twenty percent of the voting shares of the corporation then the corporation is irrebuttably deemed to be controlled solely by those members of the group who are not non-eligible persons, and by no other group or person. FIRA § 3(6)(b.1). Hence such a corporation would not be a non-eligible person notwithstanding any other provision of the Act.

These elaborate analyses as to control are only necessary when the potential investor is a corporation. A natural person or a government rises and falls on its own

Unless it can be shown that all of the shareholders of a corporation actually act together to control the corporation, they are not a group for the purposes of the Act.³³ If no person or group controls the corporation by virtue of share ownership, then it is presumed that the corporation is controlled by its Board of Directors.³⁴ This presumption may be rebutted by showing that the corporation is in fact controlled by a different person or group by a means other than share ownership.³⁵ If fewer than twenty percent of the members of a controlling Board are non-eligible persons,³⁶ then the corporation is irrebuttably deemed not to be a non-eligible person. If a controlling Board consists of more than twenty percent but less than fifty percent non-eligible persons, then, upon a showing that fewer than twenty percent of the non-eligible persons deal with each other on other than an arm's-length basis, the corporation is deemed to be controlled by those Board members who are not non-eligible persons.³⁷ A corporation so controlled is not a non-eligible person. A corporation with a controlling Board made up of more than fifty percent non-eligible persons is irrebuttably deemed to be a non-eligible person.³⁸ If more than half the Board members are foreigners, the corporation is also ineligible.

Canadian Business Enterprise

The Foreign Investment Review Act subjects a non-eligible person to review when he acquires or establishes a "Canadian Business Enterprise." This term encompasses "Canadian Business" and "Canadian Branch Business."³⁹

A Canadian Business is any business carried on in Canada, in whole or in part, by either a Canadian citizen or a Canadian corporation.⁴⁰ A Canadian Branch Business is a business or part of a business carried on in Canada by a non-Canadian corporation or business.⁴¹

status. A partnership or joint-venture either contains a member who is a non-eligible person and hence is a group containing a non-eligible member and itself is a non-eligible person or not. The Act deems that a trust making an investment shall be considered to be a corporation with the beneficiaries being considered the shareholders and the trustees being considered to be the board of directors. FIRA § 3(3)(f).

³³FIRA § 3(7)(a).

³⁴FIRA § 3(7)(b).

³⁵No evidence of control in fact by a board is needed for this presumption of control to come into play. See note 19 *supra*.

³⁶FIRA § 3(7)(c)(i).

³⁷FIRA § 3(7)(c)(ii).

³⁸FIRA § 3(7)(c)(iii).

³⁹FIRA § 3(1) "Canadian Business Enterprise."

⁴⁰FIRA § 3(1) "Canadian Business" (a) & (b). Canadian Business also includes businesses carried on in Canada by a combination or group of other Canadian Businesses. FIRA § 3(1) "Canadian Business" (c).

For the purposes of this section Canadian corporation means a corporation incorporated in Canada. A Canadian Business is deemed to be carried on in Canada notwithstanding the fact that it is partly carried on elsewhere. FIRA § 3(6)(f).

⁴¹FIRA § 3(1) "Canadian Branch Business."

Any undertaking for profit is considered to be a business.⁴² If a Canadian Business Enterprise has a part that is capable of being carried on as a separate business, then that part is considered to be a separate Canadian Business Enterprise.⁴³ If a corporation is controlled in any manner by another corporation, then the controlled corporation has the identity of, and is considered to be carried on by, both itself and its controlling corporation.⁴⁴ The Act also defines "New Business" as any business not previously carried on in Canada.⁴⁵

Acquisition and Establishment

There are two significant actions that a non-eligible person can take in relation to a Canadian Business Enterprise under the FIRA that will subject the transaction to the procedures of the Act. Those actions are to "acquire" control of a Canadian Business Enterprise currently being carried on or to "establish" a New Business in Canada.

For the purposes of the Act, acquisition of control can only be accomplished through⁴⁶ acquisition of the property and assets⁴⁷ used in carrying on a business⁴⁸ or through the acquisition of the shares of a corporation which is carrying on a business.⁴⁹

The statutory rules as to when control of a corporation is acquired through acquisition of its shares are complex. The mere acquisition of fewer than five percent of the shares of a public corporation or fewer than twenty percent of the shares of a private corporation by one or more persons acting together is deemed not to be acquisition of control.⁵⁰ If five percent or more of the shares of a public corporation or twenty percent or more of the shares of a private corporation are

⁴²FIRA § 3(1) "business."

⁴³FIRA § 3(6)(g).

⁴⁴FIRA § 3(6)(h).

⁴⁵FIRA § 3(1) "New Business."

⁴⁶FIRA § 3(3)(a).

⁴⁷The acquisition of a leasehold in or an option to purchase any property or assets of a business is deemed to be the equivalent of the acquisition of such property or assets. FIRA § 3(6)(d)&(e). The exercise of such an option is deemed not to be the acquisition of such property or assets. FIRA § 3(6)(d.1).

⁴⁸The portion of the property of a business which must be acquired to acquire control of that business is all or substantially all of the property used in carrying on that business. FIRA § 3(3)(a)(i)(B). Also the acquiring of property that is capable of being carried on as a separate business is considered to be the acquiring of control of that separate business. See FIRA § 3(6)(g) and text accompanying note 17 *supra*.

⁴⁹The acquisition or holding of an option to purchase or a right to control any shares of a corporation is deemed to be the equivalent of the acquisition or holding of such shares. FIRA § 3(6)(c)&(d). The exercise of such a right is deemed not to be an acquisition of such shares. FIRA § 3(6)(d.1).

⁵⁰FIRA § 3(3)(b)(i). If either an individual or a group acquires less than the specified percentages it is presumed that they have not acquired control. However, this provision does not bar a showing by the Government that through other or supplemental means control in fact was acquired and hence an acquisition of control has taken place. *Id.*

acquired by a person or group, it is presumed that an acquisition of control of the corporation, and any business carried on by it, has taken place.⁵¹ If any person or group acquires more than fifty percent of the shares of any corporation, it is deemed that control has been acquired.⁵²

Control is not acquired by any action when, prior to that action, the relevant person already controlled the corporation in fact.⁵³ Acquisition of control, through shares or property, can be gained through more than one transaction.⁵⁴ This holds true even if the several transactions are not related or if some of them occurred before the Act came into force. The final acquisition that resulted in acquisition of control must have occurred after the Act entered into force.⁵⁵

The foregoing rules apply only to ongoing businesses. The Act also, however, covers and defines the establishment of a New Business in Canada.⁵⁶ New Business is any business not previously carried on in Canada by the person or group now seeking to begin to carry it on.⁵⁷ A business is established in Canada only if the business is first carried on at the time when its employees first report to a given place where the business is to be normally carried on.⁵⁸

⁵¹FIRA § 3(3)(c). This section is strangely worded "... all, unless the contrary is established, be deemed ..." Even though it is cast in the form of a deemer provision the conclusion supposedly deemed from the facts can be rebutted by evidence to the contrary of that conclusion, hence the section is clearly only a presumption. See note 19 *supra*.

⁵²FIRA § 3(3)(d).

⁵³Control, however it is acquired, cannot be acquired twice. This means that if a person controlled a corporation in fact by any means before the passage of the Act his raising his share holdings above the percentages specified in the Act would not be an acquisition of control. This is in keeping with the policy of the Act of only seeking to review investments that take place after the passage of the Act. Another example of this general principle in the Act that control can only be acquired once and therefore not at all by someone who holds it is discussed in notes 49-51 and text accompanying *supra*.

⁵⁴FIRA § 3(8).

⁵⁵*Id.* Here the Act is seeking to review an acquisition of control that occurs after its passage even though some interest might have been held before. See note 55 *supra*.

⁵⁶FIRA § 3(4).

⁵⁷FIRA § 3(1) "New Business." See note 53 and text accompanying *supra*.

⁵⁸FIRA § 3(4). The choice of test is not clear. It appears possible that a non-eligible person could enter into and conduct a business in Canada without the establishment of that business becoming subject to the provisions of the Act as long as the business is carried on without establishing a plant, office or other like place, or if it does not use employees or agents; in which case it would not meet the statutory test of there being an establishment to which employees report. However in practice it is clear when a New Business subject to the Act is being established.

Related Activity

A non-eligible person already carrying on a business in Canada may establish⁵⁹ or acquire⁶⁰ a New Business that is related to his current business or expand his current business without that establishment or expansion being subject to review under the Act.⁶¹ An established business is one that existed before the Act, that was established or acquired under the Act, or that was established as a related business and carried on for at least two years.⁶²

Guidelines issued under the Act seek to define when a New Business is related to an established business.⁶³ An expansion is exempt as long as the product or service produced or provided is the same as or substantially similar to one previously produced or provided by the business.⁶⁴ The meaning of "substantially similar" is not defined. The creation of new facilities or the change of employees or the organization and carrying out of the business is, however, not determinative. The theory is that as long as a person already engaged in a business in Canada does not enter into a different type of business, he should not be considered to be establishing a New Business.

Vertical expansion is a related business when the output of the New Business is either service, capital or input items to be used in the course of the already-established business.⁶⁵ For this exemption, it must be projected that at least one-half of the output of the New Business will be used in the established business for at least two years.⁶⁶

If a New Business's product is a market substitute⁶⁷ for the current output of the established business, the businesses are related.⁶⁸ If the New Business enjoys the same Canadian Industrial Classification, then it will be considered to be related to the established business.⁶⁹ Moreover, if a New Business uses the same basic technology, proces-

⁵⁹FIRA § 8(2). This section exempts related businesses by only requiring Notice under the Act as to unrelated businesses. *Id.*

⁶⁰FIRA §§ 5(1)(c) & 31(3). These sections set threshold amounts of gross assets of \$250,000 and gross revenue of \$3,000,000 and state that acquisition of related businesses below that amount are exempt from the provisions of the Act.

⁶¹Expansion of an existing business is not mentioned in the Act but is assumed to be neither an acquisition nor an establishment and hence such an expansion is not covered by the Act.

⁶²Guidelines Concerning Related Business 2(1).

For a general discussion of Regulations and Guidelines under the Act *see* notes 85-86 *infra* and accompanying text.

⁶³Guidelines Concerning Related Business.

⁶⁴*Id.*

⁶⁵*Id.*, Guideline 2.

⁶⁶*Id.*

⁶⁷The term "market substitute" is also undefined but it probably has the same meaning as "substantially similar product." *See* text accompanying note 66 *supra*.

⁶⁸Guideline Concerning Related Business. Guideline 3.

⁶⁹*Id.*, Guideline 6.

ses and skills as an established business, then it is considered to be related.⁷⁰ Under the last two criteria, however, the established business, as compared to the New Business, is required to continue as primary activity for at least two years.⁷¹

If a New Business produces a good or service that is the result of research carried out in Canada by an established business, it is considered to be related to that established business.⁷² The research must be directly related to the carrying on of the established business, that is, it must not be, in and of itself, a New Business under the Act.⁷³

A New Business of the kind normally carried on by businesses in the same industry with the established business is considered to be related. The reason is that the New Business is customary.⁷⁴ A New Business that is essential to the continued carrying on of an established business is also considered to be related.⁷⁵ In addition to the designated exemptions, the Guidelines recognize that a New Business may be related to an established business on some other basis.⁷⁶

PROCEDURES

The Agency

The Act is administered by the Foreign Investment Review Agency⁷⁷ which is headed by a Commissioner⁷⁸ and staffed by employees of the Department of Industry, Commerce and Trade.⁷⁹ The Agency and Commissioner are responsible to the Minister of Industry, Commerce and Trade.⁸⁰ The same Minister supervises the Act on behalf of the Cabinet⁸¹ and is required to make an Annual Report to Parliament about proceedings under the Act.⁸² The Cabinet has the power to promulgate Regulations under the Act⁸³ while the Minister has the power to issue Guidelines.⁸⁴

⁷⁰*Id.*, Guideline 4.

⁷¹*Id.*, Guidelines 4 & 6.

⁷²*Id.*, Guideline 5.

⁷³See note concerning Guideline 1.

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶See *id.*, notes concerning the Guidelines in General.

⁷⁷FIRA § 7(1).

⁷⁸FIRA § 7(2).

⁷⁹FIRA § 7(3).

⁸⁰FIRA § 7(1).

⁸¹FIRA § 3(1) "Minister."

⁸²FIRA § 30.

⁸³FIRA § 28. Regulations promulgated by the Cabinet are conclusive and have the force of law.

⁸⁴FIRA § 4(2). Guidelines issued by the Minister are not conclusive nor do they have the force of law. However they are presumptively correct as interpretations of the Act and they do serve as a guide to investors as to how various provisions of the Act will be administered.

The Agency, on behalf of the Minister, may, when requested, issue opinions as to whether or not a person is non-eligible⁸⁵ and whether a proposed business is related or unrelated to an existing business.⁸⁶ These opinions will be binding on the Agency and the Minister for two years provided that all material facts were truthfully disclosed when the opinion was sought and remain substantially unchanged.⁸⁷ There is no express authority in the Act to issue opinions as to what is a Canadian Business Enterprise or whether an act amounts to acquisition of control.

The Notice

Whenever a non-eligible person proposes either to acquire control of a Canadian Business Enterprise or to establish a new, unrelated business in Canada, he must give Notice to the Agency.⁸⁸ When the Minister reasonably believes that an investment as to which Notice is necessary is being proposed or has been made, he may demand Notice from the person or group believed to be proposing or to have made such investment.⁸⁹

The Minister is given the power to carry out an investigation upon the belief that an investment is proposed or has been made without complying with a Demand to give Notice under the Act.⁹⁰ He⁹¹ may subpoena information in the form of Notice, documents, persons and testimony. He may also enter, search and inspect places.⁹² Knowingly hindering a proper investigation is a criminal offense under the Act.⁹³ The same power of investigation exists when the Minister believes an approved investment is being carried out on a basis other than the approved terms,⁹⁴ or that a proposed investment is being carried out while approval is pending.⁹⁵ Failure to give Notice when due or to comply with a Demand for Notice is made a criminal violation by the Act.⁹⁶ An officer or director who is responsible for a corporate violation may be held personally liable.⁹⁷

⁸⁵FIRA § 4(1).

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸FIRA §§ 8(1)&(2).

⁸⁹FIRA § 8(3).

⁹⁰FIRA § 15(1)(a).

⁹¹FIRA § 15(2).

⁹²FIRA § 16(1). Before taking such steps an *ex parte* court order is required. Such an order can only be issued on a showing of reasonable cause. FIRA §§ 17(1)-(6).

⁹³FIRA § 26.

⁹⁴FIRA § 15(1)(b).

⁹⁵FIRA § 15(1)(c).

⁹⁶FIRA §§ 24(1)&(2). Though a mere failure to file Notice will probably result in a Demand before any criminal action is taken.

⁹⁷FIRA § 27.

Although "proposed investment" is purported to be defined by the Act, the term has only its natural meaning.⁹⁸ The intent of the Act appears to be that Notice should be given as soon as sufficient information is available to do so.⁹⁹ Upon the filing of the Notice, the Agency must certify its receipt.¹⁰⁰ This certificate sets forth the date from which the time of review is measured.¹⁰¹

Regulations set out in detail the information that must be disclosed in the Notice.¹⁰² It must include: (1) information concerning the identity of the proposed investor, his financial status, (2) information concerning the Canadian Business Enterprise (if an acquisition), its business, property, structure, ownership and terms of purchase, (3) information concerning the applicant's plans for the Canadian Business Enterprise, changes in its operations, management, marketing, supply sources, employees, research and development activities and proposed capital improvements and (4) information concerning the proposed New Business (if an establishment), its ownership form, capital activities, products, marketing, material sources, management, employment and technology.¹⁰³ The Notice Regulations have been simplified, especially for small businesses, and as long as the proper information is supplied, the form of Notice is not critical to the Agency. The applicant may make any other submission that he believes is relevant. Since the applicant will be held to the representations in his Notice in carrying out his investment, and since approval is conditional on such representations, great care is required on the part of the applicant in completing the Notice.

In order to encourage foreign investors to set forth fully what well may be considered sensitive information, the Act makes it a criminal offense for any Government employee to disclose any information received in connection with his duties under the Act.¹⁰⁴ Information may be released, however, to the extent necessary to carry out the Act or in a relevant legal proceeding.¹⁰⁵

⁹⁸See FIRA §§ 3(1) "proposed investment" & 8(3)(a). The question is when does a potential investment reach whatever state of maturity that would make a "proposed investment" subject to the Notice provisions of the Act.

⁹⁹See FIRA § 8(2) which requires Notice to be given containing certain information. At such time as that information is available there is no reason why the Minister could not serve a Demand, and by the terms of the Act a Demand is only timely when a required Notice has not been filed. See FIRA § 8(3).

However the Agency has been cooperative in helping investors in their pre-Notice stage, implying that there is a pre-Notice stage to a proposed investment and also showing that Notice is not being Demanded at an unreasonably early time in a proposals formulation. See text accompanying note 158 *infra*.

¹⁰⁰FIRA § 8(4). A copy of the certificate is to be sent to the investor. *Id.*

¹⁰¹*Id.*

¹⁰²Foreign Investment Review Regulations. For a general discussion of Regulations and Guidelines under the Act, see notes 85-86 *supra* and accompanying text.

¹⁰³*Id.*

¹⁰⁴FIRA §§ 14(1), 26.

¹⁰⁵FIRA §§ 14(2)-(4).

Review

When the Agency receives the completed Notice, it forwards it to the Minister for the start of the review process.¹⁰⁶ The Minister, upon reviewing the Notice, Undertakings and the submission of any affected Province,¹⁰⁷ has sixty days to determine whether he can recommend to the Cabinet¹⁰⁸ that the investment be allowed. If he can, he must submit his recommendation and supporting reasons to the Cabinet. The sixty day period continues to run while the Cabinet decides whether to allow or to reject the recommended investment or that it cannot so decide.¹⁰⁹ If the Cabinet cannot decide, the matter is returned to the Minister to proceed as if he was originally unable to recommend that the investment be allowed.¹¹⁰

If the Minister finds that he is unable to reach a recommendation or that he is unable to recommend that the investment be allowed, or if the investment is returned to him by the Cabinet, then the Agency shall advise the applicant of the Minister's opinion¹¹¹ and of the applicant's right to submit additional Undertakings regarding the investment.¹¹² If by the end of sixty days from the date of the filing of the notice the applicant is not informed of the Cabinet's approval or disapproval or of his right to make further representations, then the proposed investment is irrebuttably deemed to have been allowed.¹¹³ The applicant shall be so informed by the Agency.¹¹⁴ This is the only time limit built into the Act, and once the applicant is informed of his right to make further representations, the time for additional review is indeterminate.

If within thirty days the applicant does not inform the Agency that he wants to make further representations, he waives his right.¹¹⁵ The Minister will then submit to the Cabinet the original Notice and any other related submissions without making a recommendation as to whether the proposed investment should be allowed.¹¹⁶ The Cabinet

¹⁰⁶FIRA § 9.

¹⁰⁷It has been the practice of the Agency to consult first with the affected Provinces and Government departments. *See* FIRA § 9(d).

¹⁰⁸FIRA § 10.

¹⁰⁹FIRA § 12(1).

¹¹⁰FIRA § 12(2).

¹¹¹FIRA § 11(1).

¹¹²*Id.*

¹¹³FIRA § 13(1). Given the purpose of the Act to enable review of foreign investments, it is unlikely that the Cabinet will permit any major investments to be allowed under § 13(1) without a review. To stop it from taking effect, the Cabinet must only decide to review the case further. In fact only a small number of investments have been deemed to have been allowed. *See* note 152 *infra*.

¹¹⁴FIRA § 13(2).

¹¹⁵FIRA § 11(2).

¹¹⁶*Id.*

must either approve or disapprove the application on such a submission,¹¹⁷ and the agency informs the applicant of the decision.¹¹⁸

If the applicant replies that he wishes to make further representations concerning the proposed investment, he may then offer additional Undertakings.¹¹⁹ The Minister shall consider them in reassessing the proposal.¹²⁰

After the further representations are made and any new Undertakings given, the Minister shall reassess the proposed investment in light of the original Notice and any new Undertakings.¹²¹ If the Minister concludes that he can recommend that the investment be allowed, he shall so recommend to the Cabinet.¹²² Otherwise, he shall recommend that the investment not be allowed.¹²³ Accompanying his recommendation shall be a supporting report including the documents on which his recommendation is based and the Notice and Undertakings.¹²⁴ Upon receipt of the recommendation of the Minister, the Cabinet shall either allow the proposed investment or disallow it,¹²⁵ and the Agency shall inform the applicant of the Cabinet's decision.¹²⁶ Note that the Cabinet¹²⁷ (the Ministers of the Executive Branch of Government) has reserved the ultimate power of reviewing and approving all foreign investment in Canada falling within the purview of the Act.

Undertakings

Undertakings are commitments that the investor gives to the Government concerning the manner in which his proposed investment will be carried out.¹²⁸ Any approval of a proposed investment is conditional on the carrying out of the Undertakings that are given.¹²⁹ The purposes of the Undertakings are to allow an investor to show how his investment will be of benefit to Canada and to commit him to carrying it out in the approved manner. Also, the Government can

¹¹⁷FIRA § 12(1).

¹¹⁸FIRA § 12(3).

¹¹⁹FIRA § 11(3). For a discussion of Undertakings, see notes 130-32 *infra* and accompanying text.

¹²⁰FIRA § 11(4).

¹²¹*Id.*

¹²²*Id.*

¹²³*Id.*

¹²⁴FIRA § 11(5).

¹²⁵FIRA § 12(1).

¹²⁶FIRA § 12(3).

¹²⁷In the Act the Cabinet is referred to by its official name, the Governor in Council. For a discussion of the possible political implications of the Cabinet being the ultimate reviewer of foreign investment, see text following note 163 *infra*.

¹²⁸See FIRA § 9(c). The Undertakings are formally made by the investor to Her Majesty in right of Canada.

¹²⁹See FIRA §§ 15(1)(c) & 19(1)(b), which equate the making of an investment in a manner which significantly varies from that proposed in the Notice and Undertakings with the making of an unauthorized investment.

view the investment in terms of the manner in which it will be carried out in assessing whether or not to approve it.

The investor is free to refrain from committing himself to any Undertakings when submitting his Notice. He is also free not to make additional Undertakings if the proposal is not originally approved. Without some Undertakings, however, committing him to carry out the investment in a certain manner, this investment might not be approved. In any event, there will usually be something in the investor's plans that he will wish to emphasize in obtaining approval, and the Undertakings can emphasize that aspect.

The Government will not demand Undertakings from any investor. The Agency will, however, advise investors as to the fact that Undertakings might increase the likelihood of approval.¹³⁰

Specific points that the Government is looking for in the Undertakings include: (1) production in Canada for export, (2) diversification of Canadian industry, (3) plans for future expansion in Canada, (4) introduction of new technology into Canada, (5) location of research and development facilities in Canada, (6) financing in line with current Canadian economic needs and (7) use of Canadians as managers, officers and directors.

Violations

In case an investment which is subject to the Notice and review provisions of the Act should be made without approval, the Minister has the power, upon informing the investor, to seek an injunction on whatever terms the court finds proper.¹³¹ The Minister and the investor shall then proceed with the Notice and review provisions of the Act to see whether the investment should be allowed.¹³² The same power applies when an approved investment is carried out in a manner that differs from that approved after review of the Notice and Undertakings.¹³³ Although an approved investment is technically subject to review to see whether it should be allowed in the unapproved manner in which it has been made, it is unlikely that the Cabinet will permit what amounts to an amendment of the approved terms at this point. This is especially true if the term that is not being complied with is an

¹³⁰The Undertakings emphasize certain points about the investment and the manner in which it will be carried out, as opposed to the Notice, which gives details of the actual investment. For example, an investor might propose in his Notice to take over a factory, and in his Undertakings promise to export half the output.

Many of the benefits that Canada wishes to reap from its review process are not related to the type of investment but rather to the manner in which foreign investment in Canada is carried out. See text following note 135 *infra* and the discussion of the concept of Significant Benefit to Canada in text accompanying notes 142-46 *infra*.

¹³¹FIRA § 19(1)(a).

¹³²FIRA § 19(6). See also FIRA § 19(2). The Minister should also serve a Demand for Notice on the party.

¹³³FIRA § 19(1)(b).

Undertaking that is considered to be of significant benefit to Canada.¹³⁴ The unapproved investor, having already made some investment, will be under a high compulsion to offer a favorable Notice and Undertakings to the Government in order to win approval of his investment. If, after the review, the investment is allowed, it may be carried out on the terms approved.¹³⁵

If an investment is made without approval or if it is carried out in a manner other than the one approved, the Act gives the Minister the power to move in court that the investment be rendered nugatory.¹³⁶ The court shall dispose of the case in such a manner that the violating investment will end as soon as possible without causing undue hardship to any person who did not knowingly fail to comply with the provisions of the Act.¹³⁷ The court has the power to take control of the shares representing the investment or the property involved in it.¹³⁸ In relation to an approved investment carried out in other than the approved manner, the Government has the option of first taking the less drastic step of seeking a court order that the investment be carried out in the manner set forth in the Notice and Undertakings.¹³⁹ Since the investment was approved in that form, it is likely that the Government will seek compliance before moving to bar the investment altogether.

SIGNIFICANT BENEFIT

The purpose of the Foreign Investment Review Act is to review acquisitions of control of Canadian Business Enterprises and the establishment of New Businesses in Canada by non-eligible persons and to approve them only if they are found to be of significant benefit to Canada.¹⁴⁰ This is the standard that the Minister and the Cabinet are to use in reviewing a proposed investment and in determining whether or not to approve it.¹⁴¹

In assessing, for the purposes of this Act, whether any acquisition of control of a Canadian business enterprise or the establishment of any new business in Canada is or is likely to be of significant benefit to Canada, the factors to be taken into account are as follows: the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employ-

¹³⁴The Minister may also merely seek to have the investor comply with his Undertakings. FIRA § 21.

¹³⁵See FIRA § 19(6).

¹³⁶FIRA § 20(1).

¹³⁷FIRA §§ 20(1), (2).

¹³⁸FIRA § 20(2).

¹³⁹FIRA § 21.

¹⁴⁰FIRA § 2.

¹⁴¹See FIRA §§ 9, 12(1).

ment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada; the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part; the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect of the acquisition or establishment on competition within any industry or industries in Canada; and the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the Government or legislature of any province likely to be significantly affected by the acquisition or establishment.¹⁴²

This, in two hundred and ten words, is what Canada wants to get from its complex new law. The five basic factors to be considered are (1) beneficial effect on the Canadian economy and economic development, (2) significant participation by Canadians, (3) increase in technology in Canada, (4) competitive effect on Canadian industry and (5) that the proposed investment fit national and provincial economic policies.¹⁴³ If the factors are present, the proposed investment is of significant benefit to Canada and therefore likely to receive Cabinet approval. These are the factors that the investor will try to enhance in presenting his investment in the Notice and the Undertakings. It is not the purpose of the Act to bar foreign investment, but rather to give the Government the power to ensure that future investment will be of significant benefit to Canada.

The burden is on the foreign investor to show that his proposed investment will have a beneficial impact. It is not enough that it is not detrimental or that no detriment can be shown. A foreign investment that is neutral, such as the transferring of a Canadian subsidiary from one foreign multi-national to another with no proposed change in operation, does not have a significant benefit and ought not to be approved under the Act.¹⁴⁴ Canada, through the FIRA, has sought to achieve a policy whereby it can ensure that foreign investment serves national as well as the investor's needs.

¹⁴²FIRA § 2.

¹⁴³The Agency in carrying out its review process has slightly redefined these categories. See text accompanying note 164 *infra*.

¹⁴⁴However the fact that the investor can offer undertakings which will commit him to carrying out the investment in a definite manner, even if it is the same as the current manner or merely involves some proposed changes which though beneficial will not change the nature of the investment, may be enough to show Significant Benefit to Canada.

PRACTICE UNDER THE ACT

The Foreign Investment Review Act has now been fully in force for two years.¹⁴⁵ Notwithstanding the near secrecy in which the Agency operates,¹⁴⁶ some conclusions as to its interpretations and enforcement of the Act can be drawn.¹⁴⁷ Through the first half of 1977,¹⁴⁸ the Cabinet has ruled on 697 proposed establishments or acquisitions.¹⁴⁹ Of these, 630 have been approved,¹⁵⁰ and 67 have been rejected.¹⁵¹ This overall approval rate of greater than 89 percent has been constant, whether dealing with acquisitions or establishments¹⁵² and when dealing with different nationalities of investors. Half of the acquisitions were of businesses in Ontario,¹⁵³ and one-third of the acquirers have been Americans.¹⁵⁴ There has been less concentration in both these areas on New Investments.

The Agency has modified the Regulations as they pertain to Notice in such a way that a simplified filing is possible and the form of Notice more closely fits the proposed investment.¹⁵⁵ The Agency has been cooperative with investors in the pre-Notice stage,¹⁵⁶ advising them on what information and presentation the Agency would like to see or would consider proper in the Notice. Generally, the Agency has asked that information on the ultimate controlling party rather than the immediate investor be provided.¹⁵⁷ One of the first steps the Agency takes upon receiving a Notice is to consult with the relative province or government department.¹⁵⁸

The Agency has come to view the Undertakings as an opportunity for the investor to state clearly his plans for the proposed investment in such a way that whether a Significant Benefit to Canada exists can be

¹⁴⁵The implementation of the Act was staggered. Any Canadian Business Enterprises taken over by foreigners were covered as of April 9, 1974, and New Businesses in Canada were included as of October 15, 1975.

¹⁴⁶Due to FIRA § 14, discussed in text accompanying note 109 *supra*, none of the information given to the Government by the investor can be made public. Some question as to how the Agency determines Significant Benefit to Canada has developed.

¹⁴⁷The Agency exercises all the power vested in it by the Act as well as that vested in the Minister on his behalf. No court cases decided under the Act have been found.

¹⁴⁸From May 23, 1974 through June 16, 1977.

¹⁴⁹This figure does not include proposals withdrawn before Cabinet action. Of course, there is no way of telling how many potential investors were discouraged by the Act to the point of not even filing notice.

¹⁵⁰Including 38 proposals which were deemed to be approved under FIRA § 13(1).

¹⁵¹Not including an additional 10 proposals which were originally rejected by the Cabinet but upon reconsideration were approved.

¹⁵²Of the 697 proposals, 277 were new investments and 420 were take-overs.

¹⁵³The most heavily industrialized province.

¹⁵⁴The largest foreign investor in Canada.

¹⁵⁵See Foreign Investment Review Regulations.

¹⁵⁶See note 104 *supra*.

¹⁵⁷See FIRA § 3(1) "non-eligible person" (c).

¹⁵⁸See FIRA § 9(d).

readily determined.¹⁵⁹ Although its power could be interpreted as extending to proposing¹⁶⁰ Undertakings or negotiating their content with the proposed investor, the Agency has not done so. Instead, the Agency has sought to have the investor formulate his plans for the investment more specifically than he has done or might otherwise do. Moreover, the Agency points out areas in which the investor may, in line with his investment, offer Undertakings which would be considered to be of Significant Benefit to Canada.

The main complaint¹⁶¹ of investors, now that the new Regulations have simplified the red tape, is that the Agency, beyond being helpful and courteous to them, projects an aura of optimism toward all proposals such that it comes as a rude shock when a proposal is rejected by the Cabinet. The Agency's reply is that it certainly wishes to be helpful and courteous, and that it tried to help the investor shape a proposal as favorably as possible. Further, once the Agency has helped the investor master the paperwork and formulate Undertakings which best show the Significant Benefit of the investment to Canada, the Cabinet, rather than the Agency, passes on and approves or rejects the investment. The Agency, in this ministerial role, has remained and probably will continue to remain, non-political. The Cabinet will respond from time to time to various current political pressures in reaching its decisions. The implications of the nature and place of a proposed investment are certain to be considered, and the current national economic conditions will certainly influence decisions.

The Agency has regrouped the five statutory factors¹⁶² of Significant Benefit to Canada into ten categories. It analyzes the whole impact of a proposed investment against these categories to help determine whether the proposal is of Significant Benefit to Canada. The categories are: (1) increased employment, (2) new investment, (3) increased resource processing or use of Canadian parts and services,

¹⁵⁹For a general discussion of Undertakings, see text accompanying notes 130-32 *supra*.

¹⁶⁰See FIRA § 11(3).

¹⁶¹This contrasts with the difficulties of White Consolidated Industries which are not typical. White twice tried to take over the appliance division of Westinghouse of Canada by its WCI Canada Ltd. subsidiary, as part of an attempted world-wide take-over of Westinghouse's appliance business. White however was unable to get Cabinet approval. Rather the Government encouraged GSW, Ltd., the largest Canadian appliance manufacturer, to set up a co-owned subsidiary with Canadian General Electric called CamCo. CamCo, despite G.E.'s involvement, was not considered to be a non-eligible person and the union was not subjected to Canada's anti-trust laws.

The Government would not let White acquire Westinghouse's facilities in Canada and made it clear that it expected that they would be sold to CamCo, which they were. White, however did receive assignment of the Westinghouse trademark in Canada which CamCo wanted. The assignment of the trademark was not held to be a reviewable transaction.

In this case the Government decided to place a previously foreign-held industry under Canadian control rather than allow its transfer from foreigner to foreigner.

¹⁶²See text accompanying note 148 *supra*.

(4) additional exports, (5) Canadian participation as shareholders, directors and managers, (6) improved productivity and industrial efficiency, (7) enhanced technological development, (8) improved production variety and innovation, (9) beneficial impact on competition, and (10) compatibility with industrial and economic policies. A checklist of approved investments in which certain of these categories were found to have Significant Benefit to Canada is the only information concerning the Agency's assessment of proposals that is regularly made public. The categories are constant for all investments, but, depending on the nature of the proposal, they may be given different relative weight in various instances.

Some generalities concerning the administration of the Act can be made. There is no apparent bias against Americans, as opposed to other foreign investors, as was originally feared by some Americans. Canada has not used the Act to close the door to foreigners or sought to "buy back" Canada. There is, however, a definite pro-Canadian bias in that it is more likely that an investment will be allowed to pass from one foreigner to another than that the Government will allow an investment to pass from Canadian to foreign control. Moreover, an unofficial factor in considering the Significant Benefit to Canada of a proposed take-over is the existence of an alternative Canadian taker.¹⁶³

CONCLUSION

Canada has decided that, as a matter of national policy, it wishes to assert some control over the great volume of direct foreign investment in its economy. It realizes, however, that it does not wish to ban or even to curtail significantly the very foreign investment on which much of its economic strength is based. The Foreign Investment Review Act sets up a procedure whereby every foreign acquisition of a Canadian Business Enterprise or establishment of an unrelated New Business by a non-eligible person or group is reviewed to determine whether it is of Significant Benefit to Canada. Only if it is will it be allowed.

Potential investors know, through the statutory requirements, what Canada wants from any foreign investment. They also know that the Government is going to review their proposed investments for the presence of those requirements. This certain review by known standards in itself may result in the investments being proposed in a form more conscious of Canadian needs.

The requirement that investments proposals be submitted for review encourages potential foreign investors to develop their

¹⁶³The case of Zeller's Ltd. concerns this point. The Government knew that due to outside factors an approved sale of Zeller's had to be reached by a certain date. Yet it delayed any decision on the proposal of an American investor until a less attractive offer of a Canadian buyer had been accepted by Zeller's.

plans in the context of the Canadian economic-social environment and to place appropriate emphasis on aspects of business activity which are considered important to Canada. In the course of the review many investors inevitably acquire a greater awareness of Canada's economic and industrial objectives. That greater awareness is likely to influence their behaviour and attitude not only with regard to the investment under review but toward any other business activity they may already have or may undertake in the future.¹⁶⁴

That Canada and the foreign investor can better understand each other and their relationship seems to be both the purpose and the result of the Foreign Investment Review Act.

¹⁶⁴THE SECOND ANNUAL REPORT UNDER THE FOREIGN INVESTMENT REVIEW ACT FOR THE FISCAL YEAR ENDED MARCH 31, 1976, *reprinted in part in*, P. HAYDEN, J. BURNS & J. SCHWARTZ, FOREIGN INVESTMENT IN CANADA. 1401 at 1413 (1974 and as supplemented through 11/30/76).