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Canada's Foreign Investment Review Act Revisited

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Abstract

The regulatory scheme mentioned is the Foreign Investment Review Act (FIRA) passed by the Parliament of Canada in December 1973. The FIRA was a response to a growing nationalist feeling in the early 1970's, from which developed a resentment of the seeming omnipresence of foreign business in the Canadian economy and a fear of the long-term consequences of such presence. In examining the FIRA, this Note will explore the factors that led to passage of the legislation. The Act will be analyzed in depth. Important statutory language will be defined and explained, and the review process of the FIRA will be outlined. Finally, the Note will discuss the success of the FIRA and consider its effect on investment in Canada.

CANADA'S FOREIGN INVESTMENT REVIEW ACT REVISITED

INTRODUCTION

The United States has long enjoyed a trade relationship of significant volume with Canada.¹ A large portion of United States investment in Canada is "direct investment," involving a significant share in ownership of a Canadian business rather than a mere portfolio investment.² Certain foreign direct investment has been subjected to Canadian governmental regulation since 1974. This regulatory scheme must be adhered to: failure to comply with it could lead to nullification of a transaction³ and/or a fine of Can\$5,000,⁴ regardless of innocent intent or ignorance of the regulatory requirements.

The regulatory scheme mentioned above is the Foreign Investment Review Act (FIRA),⁵ passed by the Parliament of Canada in December 1973. The FIRA was a response to a growing nationalist feeling in the early 1970's, from which developed a resentment of the seeming omnipresence of foreign business in the Canadian economy and a fear of the long-term consequences of such presence.⁶

The passage of the FIRA sparked much controversy among Canada's trading partners.⁷ Precisely what effect the Act would

1. See Gherson, *U.S. Investment in Canada*, FOR. INV. REV., Spring 1980, at 11.

2. Grover, *FIRA: In A Nutshell*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN CANADA 10 (A.B.A. 1976).

3. See notes 109-11 *infra* and accompanying text.

4. See note 105 *infra*. A Canadian dollar, it should be noted, is worth approximately 0.85 American dollars. All references to dollars are Canadian dollars unless otherwise indicated.

5. Foreign Investment Review Act, 1973-74 Can. Stat., c. 46, as amended by 1976-77 Can. Stat., c. 52 [hereinafter cited as FIRA]. See generally G. HUGHES, A COMMENTARY ON THE FOREIGN INVESTMENT REVIEW ACT (1975); J. LANGFORD, CANADIAN FOREIGN INVESTMENT CONTROLS (1974); Donaldson & Jackson, *The Foreign Investment Review Act: An Analysis Of The Legislation*, 53 CAN. BAR REV. 171 (1975).

6. See notes 27-38 *infra* and accompanying text.

7. The legislation drew an angry reaction from investors in the United States, Canada's number one trading partner. See, e.g., Murray, *FIRA: Its Origin And Purposes*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN CANADA 3, 5 (A.B.A. 1976).

have on hitherto profitable trading relationships was not known at that time. Canadians also questioned the efficacy of the FIRA. Some felt that the Act should have gone further;⁸ others would have preferred that no restraint at all be placed on foreign investment.⁹

Although several years have elapsed since the passage of the FIRA, its success is still uncertain. A special five-year report issued in 1979 could not conclusively claim that administration of the FIRA has resulted in solving any of the problems focused upon in 1973.¹⁰

In examining the FIRA, this Note will explore the factors that led to passage of the legislation. The Act will be analyzed in depth. Important statutory language will be defined and explained, and the review process of the FIRA will be outlined. Finally, the Note will discuss the success of the FIRA and consider its effect on investment in Canada.

I. *BACKGROUND OF THE FIRA*

Observation of the people and government of Canada reveals that throughout their history, the Canadians have had to struggle to keep up a national identity.¹¹ Dwarfed by a powerful neighbor to the south and heavily dependent upon foreign investment to sustain its economy,¹² Canada has longed for the capacity to set its own course and lessen its dependency on political and business decisions made in other countries. Although Canada realizes the need for foreign capital, arguments have been made for twenty years favoring regulation of foreign participation in Canadian economy.¹³

8. See, e.g., G. HUGHES, *supra* note 5, at 3 n.3.

9. See, e.g., Donaldson & Jackson, *supra* note 5, at 213 n.93. Opposition came from the poorer provinces of Canada, whose economies were not capable of developing without significant input of foreign capital. *Id.*

10. [1978-79] FOR. INV. REV. AGENCY ANN. REP. (Supp. 1979). See notes 129-49 *infra* and accompanying text.

11. Wahn, *Toward Canadian Identity—The Significance of Foreign Investment*, 11 *OSGOODE L.J.* 517, 519-24 (1973).

12. G. HUGHES, *supra* note 5, at 5; see notes 19-22 *infra* and accompanying text.

13. Several government reports called for a reappraisal of Canada's foreign investment policy. GOV'T OF CAN., *FOREIGN DIRECT INVESTMENT IN CANADA* (1970) [hereinafter cited as Gray Report]; GOV'T OF CAN., *ELEVENTH REPORT OF THE HOUSE OF COMMONS STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENCE RESPECTING CANADA—U.S. RELATIONS* (1970); GOV'T OF CAN., *FOREIGN*

Until the 1970's, however, no regulations of broad scope were set up. The legislation which was enacted¹⁴ utilized (1) the "key sector" approach, restricting foreign participation in a particular activity which the government deemed important,¹⁵ (2) the "fixed rules" approach, requiring a defined minimum of Canadian participation in any enterprise undertaken by foreign investors¹⁶ or (3) a mixture of the two.¹⁷

By 1972, public support for broad investment controls was apparent.¹⁸ The level of foreign capital in Canada, however, had already become substantial. More importantly, almost half of the foreign investment in Canada was "direct investment."¹⁹ It was estimated in 1970 that one-third of the business activity in Canada was undertaken by foreign-controlled enterprises.²⁰ In some industries, such as the petroleum and rubber products industries, Canadian ownership was almost non-existent as foreign control exceeded ninety per cent.²¹ Over three-fourths of this control was held by United States investors.²²

OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY (1968); GOV'T OF CAN., REPORT ON CANADA'S ECONOMIC PROSPECTS (1958).

14. See, e.g., G. HUGHES, *supra* note 5, at 9-10; FOR. INV. REV. AGENCY PAPERS NO. 2, SELECTED READINGS IN CANADIAN LEGISLATION AFFECTING FOREIGN INVESTMENT IN CANADA (1977) [hereinafter cited as SELECTED READINGS].

15. See, e.g., Direction to Canadian Radio-Television Commission pursuant to § 27 of Broadcasting Act, 1967-68 Can. Stat., c. 25 (current version at CAN. REV. STAT. c. B-11, § 27 (1970)), under which a license to operate a broadcasting station can only be granted to a Canadian citizen or corporation of which the entire board of directors is Canadian.

16. See, e.g., Canadian and British Insurance Companies Act, CAN. REV. STAT. c. 31, § 6(3) (1952) (current version at CAN. REV. STAT. c. I-15, § 6(4) (1970)), under which a majority of the board of directors of a federally incorporated insurance corporation must be Canadian citizens ordinarily resident in Canada.

17. See, e.g., Canada Mining Regulations, STAT. O. & R. 61-86, as amended by STAT. O. & R. 62-249 and STAT. O. & R. 66-80, under which mining leases in the northwestern provinces can only be granted to a Canadian citizen or corporation, or to a foreign corporation that allows significant Canadian participation in its operation. See also SELECTED READINGS, *supra* note 14, at 121.

18. A public opinion poll taken in February 1972 showed that 69% of Canadians favored the establishment of some sort of screening agency for foreign investment. McMillan, *After the Gray Report: The Tortuous Evolution of Foreign Investment Policy*, 20 MCGILL L.J. 213, 260 n.147 (1974).

19. See text accompanying note 2 *supra* for a definition of direct investment.

20. G. HUGHES, *supra* note 5, at 5.

21. *Id.*

22. This was significant as some Canadians feared that the pervasive presence of the United States in the Canadian economy might lead to some form of political integration. One U.S. author commented on this possibility:

A. *Foreign Investment Behavior*

For many years after World War II, foreign investors in Canada evinced a strong preference for direct investment.²³ Encouraged by the lure of a wide-open market and a high Canadian tariff,²⁴ and desirous of Canada's rich supply of natural resources and raw materials, large numbers of multinational corporations entered the Canadian business scene. Rather than moderate the onslaught, the Canadian government took on a *carte blanche* policy.²⁵

The rapid influx of capital clearly benefited Canada at first, helping industries get off to a start, increasing the production of goods and creating jobs for the local populace.²⁶ Negative repercussions, however, did exist. First, domination by parent companies led to a "branch-plant"²⁷ economy, in which the Canadian subsidiary did not develop into a self-sufficient entity. Foreign parent corporations generally limited Canadian participation in the operations of the subsidiary. The parent performed functions from marketing to research and development while the subsidiary simply supplied the local market.²⁸ Any innovations in the production process came from the operations center, not from the Canadian plant. Because all the planning and decision-making took place outside Canada, no native expertise developed in marketing, manage-

Canada, I have long believed, is fighting a rearguard action against the inevitable . . . [C]ountries with economies so inextricably intertwined must also have free movement of the other vital factors of production—capital, services and labour. The result will inevitably be substantial economic integration, which will require for its full realization a progressively expanding area of common political decision.

G. BALL, *THE DISCIPLINE OF POWER* 113 (1968), *quoted in* Wahn, *supra* note 11, at 521.

23. See Franck & Gudgeon, *Canada's Foreign Investment Control Experiment: The Law, the Context And The Practice*, 50 N.Y.U. L. REV. 76, 85-86 (1975).

24. G. HUGHES, *supra* note 5, at 6. Given the presence of a high tariff, it is advantageous for a foreign company, if economically feasible, to incorporate a separate subsidiary in the host country. The products of that subsidiary will then benefit from the protection of the tariff and the parent company will benefit by having direct access to the host market and thus avoid the tariff.

25. Fulford, *Canada Wants Out (of the United States)*, N.Y. Times, Apr. 21, 1974, § 6 (Magazine), at 19.

26. Note, *The Canadian Foreign Investment Review Act: Red, White, And Gray*, 5 LAW & POL'Y INT'L BUS. 1018, 1022 (1973) [hereinafter cited as *Red, White and Gray*].

27. *Id.* at 1022-23.

28. *Id.* at 1024.

ment or technology.²⁹ This perpetuated Canadian dependence upon foreign investment.

A second major problem caused by the dominance of multinationals was that product differentiation was based not on what was appropriate for the Canadian market but on what was appropriate for the parent country's market.³⁰ Because Canada was supplied with a greater variety of products than fit her demand, inefficient "miniature replica" markets resulted.³¹

Another difficulty was caused by the extraterritorial impact of the multinational's native laws on the Canadian subsidiary. Any subsidiaries controlled by United States interests had to abide by the Trading With The Enemy Act,³² which restricts trading with nations hostile to the United States. Thus, Canadian companies were forced to forego profitable trade relationships.

Foreign domination caused other problems as well. Multinationals often limited exports of the subsidiary, in order to avoid direct competition with the subsidiary.³³ Subsidiaries provided parent companies with raw materials, but participated no further in production: the parent would process the materials outside Canada into finished goods.³⁴ Transactions with subsidiaries were not at arms length but rather were on terms advantageous to the parent company. This often resulted in a loss of tax revenue for the Canadian government.³⁵ Finally, due to the prohibition or limitations placed by most foreign-controlling companies on Canadian equity participation in the subsidiaries, Canadian capital was forced out of Canada.³⁶

29. Note, *Canada's Changing Posture Toward Multinational Corporations: An Attempt To Harmonize Nationalism With Continued Industrial Growth*, 7 N.Y.U. J. INT'L L. & POL. 271, 274-75 (1974) [hereinafter cited as *An Attempt To Harmonize*].

30. *Red, White, And Gray*, *supra* note 26, at 1023-24.

31. *Id.* at 1023.

32. 50 U.S.C. App. § 1-44 (1976). For example, a U.S. controlled firm in Montreal was almost prevented from accepting a lucrative export order from Cuba to manufacture and sell 25 locomotives. The sale went through only after negotiations took place between the U.S. and Canadian governments. N.Y. Times, Oct. 1, 1974, at A3, col. 3.

33. English, *Foreign Investment in Manufacturing*, in CANADA-UNITED STATES REGULATIONS 88, 89 (H. English ed. 1976).

34. G. HUGHES, *supra* note 5, at 6. One source reported that "[f]or most Western industrialized countries, end products constitute approximately 60% of exports, but for Canada the ratio is only 19%." Franck & Gudgeon, *supra* note 23, at 90.

35. English, *supra* note 33, at 89.

36. Wahn, *supra* note 11, at 533. Because of the restriction on Canadian partici-

In addition to these drawbacks, developments in the scope of direct foreign investment forced Canadians to reconsider their welcoming policy. First, the growth of foreign controlled firms was financed less and less by "fresh" capital. Beginning in the 1960's, a higher proportion of foreign funding came from the retained earnings of the Canadian subsidiaries and from money borrowed from Canadian sources;³⁷ foreign capitalists dipped less into their home sources of capital to finance their Canadian operations. Therefore, Canadian capital became the major capital source for foreign controlled firms. A second, contemporaneous development was that foreign companies began to enter the market by purchasing control of already existing Canadian companies, rather than by initiating new operations.³⁸

Eventually, many Canadians began to doubt that there was any net economic gain from foreign direct investment. Under the tide of nationalism of the early 1970's, a clamor arose for legislative action to limit foreign exploitation and develop a more autonomous economy.³⁹ A broad legislative scheme, inspired by the Gray Report⁴⁰ and first introduced in the House of Commons in May 1972,⁴¹ passed in December 1973 as the Foreign Investment Review Act.

pation, almost half of the largest corporations in Canada did not have their shares available on the market. Shecter, *FIRA: Experiences Of A U.S. Lawyer*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN CANADA 38 (A.B.A. 1976). This resulted in a "vicious cycle." Canadian capital often went into U.S. companies which then used such capital for investment in Canada, sometimes direct investment. *Id.*

37. G. HUGHES, *supra* note 5, at 7.

38. *Id.*

39. Alistair Gillespie, the Minister of Industry, Trade and Commerce, called for Canada to become more than an "appendage" of foreign corporate giants south of the border. He warned:

We have become too accustomed to expecting others to do our research, product innovation and market development and too accustomed to others telling us what we might do. The degree of foreign control has dulled or inhibited entrepreneurship in Canada by Canadians in Canadian firms. . . . If we continue to rely so heavily on others . . . we turn over the future development of Canada to [foreign control].

N.Y. Times, Nov. 27, 1973, at A14, col. 2.

40. Gray Report, *supra* note 13.

41. Grover, *The Foreign Investment Review Act: Phase I*, 1 CAN. BUS. L.J. 54, 56 (1975). The original bill was entitled the Foreign Takeovers Review Act. *Id.* Certain amendments had to be made before it passed. *E.g.*, a provision was added providing for consultation with provincial governments. Gualtieri, *Canada's New Foreign Investment Policy*, 10 TEX. INT'L L.J. 46, 53 (1975).

II. PROVISIONS OF THE FIRA

The Foreign Investment Review Act came into force on April 9, 1974.⁴² The Act created the Foreign Investment Review Agency and provides that a "non-eligible" person (NEP)⁴³ proposing any of three types of investment in Canada must receive government approval of his proposal before going ahead with the investment.

The three types of investment are: (1) acquisition of control of a "Canadian business enterprise,"⁴⁴ (2) expansion of an existing business of an NEP in Canada into an unrelated line of business,⁴⁵ (3) establishment of a new business by a NEP who has not carried on a business in Canada.⁴⁶ The provisions of the FIRA regulating investments of type (2) and (3) did not come into force until October 15, 1975, so that the Review Agency could have time to gain experience in processing applications.⁴⁷

The FIRA provides that any NEP or group a member of which is an NEP may not engage in any of these three types of investment unless upon application to the Review Agency he can show that his investment will be of significant benefit to Canada.⁴⁸ The FIRA must be read carefully as the definitions of "non-eligible person," "Canadian business enterprise," "acquisition of control," and "related business" are complex. An investor not properly familiar with these terms could be subject to review without even knowing it.

42. See Grover, *supra* note 41, at 56.

43. See notes 49-57 *infra* and accompanying text.

44. See notes 58-61 *infra* and accompanying text.

45. For a discussion of when businesses are "related" for purposes of the FIRA, see notes 70-79 *infra* and accompanying text.

46. G. HUGHES, *supra* note 5, at 13. The FIRA is not retroactive. FIRA, *supra* note 5, § 5(1). Nor does it regulate the operation of existing foreign-controlled firms, which the Gray Report, *supra* note 13, had suggested. G. HUGHES, *supra* note 5, at 12. According to Garse Howarth, the Review Agency Commissioner from 1975-77, "the government had no desire to change the rules in midstream." Howarth, *Foreign Investment Review Act Not Material Change in Attitude*, *American Banker*, Mar. 12, 1976, at 4, col. 1.

47. Gualtieri, *supra* note 41, at 53. While the first phase of the FIRA was in effect, acquisition of control of a business with gross assets of \$250,000 or less and gross annual revenue of \$3,000,000 or less were exempted from review. FIRA, *supra* note 5, § 5(1)(c). When the second phase of the Act went into effect, bringing "new business" investments under review, most of the exemption disappeared. An acquisition may still be exempted from the FIRA if the acquired business is smaller than the old threshold *and* is related to a business already carried on in Canada by the acquiring party. FIRA, *supra* note 5, § 31(3).

48. FIRA, *supra* note 5, § 2(1).

A. *Non-Eligible Persons*

The threshold question a party must ask is whether he is a non-eligible person. If the individual investor or investment group falls outside the statutory definition of non-eligible person, none of the other aspects of the FIRA are applicable. The investment proposal can then be implemented without going through the review process.

Non-eligible persons⁴⁹ include: (1) Canadian citizens not ordinarily resident in Canada;⁵⁰ (2) landed immigrants⁵¹ who have been eligible to apply for citizenship for more than one year⁵² and who have not made such application; (3) individuals who are neither Canadian citizens nor permanent residents; (4) foreign governments or their agencies; and (5) corporations incorporated in Canada or elsewhere⁵³ that are controlled in fact⁵⁴ by an NEP or by a group of persons, any member of which is an NEP, who act in concert.⁵⁵

49. *Id.* § 3(1).

50. For the determination of which Canadian citizens are NEP's, see Foreign Investment Review Regulations, P.C. 1977-606, *as amended by* P.C. 1978-2309 [hereinafter cited as Regulations]; § 3(1)(B).

51. See Immigration Act, 1976-77 Can. Stat., c. 52, § 2(1).

52. Eligibility for citizenship is set forth in the Citizenship Act, 1974-75-76 Can. Stat., c. 108, § 5(1).

53. Note that a corporation incorporated outside Canada is not irrebuttably presumed to be an NEP. *E.g.*, a foreign corporation that is controlled by Canadians may not be an NEP.

54. Control in fact may be effected directly, or indirectly, *e.g.*, through a voting trust or management contract. See Gualtieri, *supra* note 41, at 57.

55. FIRA, *supra* note 5, § 3(1). It is important to note that language of "control in fact" is used only for determining whether individual corporations are NEP's. Where a group of unincorporated organizations or individuals join together or where two corporations plan a joint venture, FIRA §§ 8(1), 8(2) call for review when any one of the members of the group is an NEP. Even where the group is controlled in fact by an eligible party, it will be tainted by the NEP member and must apply for review. See Donaldson & Jackson, *supra* note 5, at 223; Note, *After Two Years: Canada's Foreign Investment Review Act*, 3 N.C.J. INT'L L. & COM. REG. 163, 166-67 n.32 (1978) [hereinafter cited as *After Two Years*].

FIRA § 3(2) sets forth presumptions to indicate when an individual corporation is an NEP. Where 25% of the voting shares of a public corporation are held by NEP's or by foreign corporations, or where 40% of the voting shares of a closed corporation are so held, the corporation is rebuttably presumed to be an NEP. FIRA, *supra* note 5, § 3(2)(a). Where 5% of the voting shares of a corporation, either public or closed, are held by one individual NEP or foreign corporation, the same presumption arises. *Id.* § 3(2)(b). For presumptions to be applied when control in fact of a corporation rests with a group consisting of both NEP's and eligible persons, see FIRA, *supra* note 5, § 3(6)(b.1). Where no person or group controls a corporation, or where the corporation does not have share capital, then the board of directors is

A party proposing an investment may apply to the Minister of Industry, Trade and Commerce for a formal opinion, after investigation, as to whether he is an NEP.⁵⁶ This opinion is binding on the Minister for two years provided that material facts disclosed to him during investigation remain substantially unchanged.⁵⁷

B. *Canadian Business Enterprise*

If it has been determined that the investor is an NEP, then he will be subject to the review process if he is proposing to acquire control of a Canadian business enterprise. If the target business does not come within the statutory definition then the FIRA may not be applicable.

A Canadian business enterprise is defined as being either a "Canadian branch business"⁵⁸ or a "Canadian business."⁵⁹ A "business" is any enterprise carried on in anticipation of a profit.⁶⁰

deemed to have control. *Id.* § 3(7)(b). The composition of the board, NEP's or eligible persons, shall then be applied to presumptions set out in FIRA § 3(7)(c) to determine whether the corporation itself is an NEP.

It should be remembered that the presumptions are not the only indicator. "Control in fact" may be indicated by past commercial and legal relationships of the corporation. Also, holdings by NEP's of less than 5%, 25%, or 40% may still cause a corporation to be ruled an NEP. *See* G. HUGHES, *supra* note 5, at 18-19; Franck & Gudgeon, *supra* note 23, at 116. It should also be noted that the presumptions do not apply to holdings by a Canadian corporation. FIRA, *supra* note 5, § 3(2)(a).

56. FIRA, *supra* note 5, § 4(1). The Minister is required to give an opinion on this matter upon request. GOV'T OF CAN., FOR. INV. REV. AGENCY, BUSINESSMAN'S GUIDE TO THE FOREIGN INVESTMENT REVIEW ACT 11.

57. FIRA, *supra* note 5, § 4(1). The investor, however, is not bound by this opinion. *Id.*

58. *Id.* § 3(1). A "Canadian branch business" is a business carried on by a foreign corporation that maintains one or more establishments in Canada to which employees of the corporation ordinarily report for work. *Id.* Businesses carried on by foreign individuals as proprietorships or partnerships are not "Canadian branch businesses" and may be exempted from coverage of the FIRA provided that the foreigner is not ordinarily resident in Canada. *See* G. HUGHES, *supra* note 5, at 25.

59. FIRA, *supra* note 5, § 3(1). A "Canadian business" is a business carried on in Canada by a Canadian corporation or an individual who is either a Canadian citizen or ordinarily resident in Canada, or by any combination in which one of such parties is in a position to control the conduct of the business. *Id.* If the business is a corporation, there must be an establishment similar to the one required of a branch business. *See* note 58 *supra*.

60. FIRA, *supra* note 5, § 3(1). Section 5(1) of the Act exempts some enterprises from its operation. These firms, most of which are held partly by the federal government, are listed in Schedule D of the Financial Administration Act, CAN. REV. STAT. c. F-10 (1970), or § 149(1)(d) of the Income Tax Act, 1970-71-72 Can. Stat., c. 63. Also excluded from consideration as a "business" is certain real estate property.

Firms which do not at first glance fit within any of the definitions of a Canadian business enterprise may still be subject to the FIRA.⁶¹

C. *Acquisition of Control*

If the investment target is a Canadian business enterprise, then the NEP should ask whether as a result of his proposal he will acquire control of the business. If control is not acquired, the investment is regarded as a mere portfolio investment and the FIRA does not apply.

"Acquisition of control" is defined more narrowly than "control in fact" under the NEP test.⁶² A person can acquire control of a Canadian business enterprise only by acquiring voting shares or substantially all of the property used in carrying on the business.⁶³

If an investor plans to acquire stock of a Canadian corporation, the provisions of sections 3(3)(c) and (d) of the FIRA should be consulted to ascertain whether control has been acquired.⁶⁴ Acquisition of stock of a foreign corporation may also come under those provisions. It has been argued that acquisition of shares of a foreign

FIRA, *supra* note 5, § 3(9). For determination of what real estate activity does constitute a business, see Guidelines Concerning Real Estate Businesses. See also Grover, *supra* note 41, at 92-95, especially at 94.

61. *E.g.*, FIRA § 3(6)(g) provides that a part of a Canadian business enterprise that is capable of being carried on as a separate business is itself considered to be a Canadian business enterprise. *Id.* FIRA § 3(6)(h) is even more far-reaching. It provides that a business carried on by a corporation, which corporation is controlled in fact by another corporation, is deemed to be carried on by the controlling corporation as well as by the controlled corporation. *Id.* See notes 65, 122 *infra* and accompanying text.

62. See Gualtieri, *supra* note 41, at 57. "Control in fact" by an NEP may be exercised by any means whatsoever. See note 54 *supra*.

63. FIRA, *supra* note 5, § 3(3)(a). Two items should be remembered. First, acquisition of a leasehold interest in business property is considered to be an acquisition of that property. *Id.* § 3(6)(e). Second, under § 3(6)(g), see note 61 *supra*, acquisition of an important business property, though not "substantially all" of the business property of the established business, could constitute acquisition of control of a business, reviewable under the Act.

"Business property" may include items such as trademarks and goodwill, in addition to physical assets. See Guidelines Concerning Real Estate Businesses 11 § 1(a).

64. FIRA, *supra* note 5, § 3(3)(c), (d). Acquisition of more than 5% of the voting shares of a corporation, or more than 20% if the shares are not publicly traded, is rebuttably presumed to be acquisition of control. *Id.* § 3(3)(c). When more than 50% of the voting shares are acquired, control is deemed irrebuttably to have been acquired. *Id.* § 3(3)(d).

corporation might possibly constitute acquisition of control of a Canadian branch carried on by that corporation.⁶⁵

If a Canadian business enterprise is carried on in non-corporate form, control may be obtained only through acquisition of business property. Unfortunately, there is no definition of what is "substantially all" of business property.

The FIRA is not retroactive.⁶⁶ Therefore, a transaction by a party who had control before 1974, which merely extends his control further, is not reviewable. Similarly, control acquired after 1974, through the review process, may be extended further without a second review.⁶⁷ Other transactions involving significant acquisitions are also exempted from the FIRA.⁶⁸

The FIRA makes special provisions for persons who acquire options or other contractual rights to acquire property or shares. Acquisition of such rights, where not given as loan security, is treated as a present acquisition of the property or shares, and may be a reviewable transaction.⁶⁹

65. The provisions on acquisition of shares refer to Canadian businesses, not to Canadian branch businesses. *Id.* § 3(3)(a)(i). See notes 58-59 *supra*. So control of a branch business may be acquired only through acquisition of business property. If the subsidiary is incorporated in Canada, however, the foreign parent might be deemed to be a Canadian business, through application of the presumption in FIRA § 3(6)(h). See note 61 *supra*. Acquisition of shares of a foreign corporation could then be subject to review under the Act. Whether this reading is correct would depend upon whether the Parliament intended the FIRA to have an extraterritorial impact. For argument that such impact is not provided for under the FIRA, see G. HUGHES, *supra* note 5, at 27-29. See also note 122 *infra*; Grover, *supra* note 41, at 69-70; Donaldson & Jackson, *supra* note 5, at 220-21.

66. See note 46 *supra*.

67. Any transaction prior to which the purchaser already had control in fact is not reviewable. FIRA, *supra* note 5, § 3(3)(d).

68. Corporate reorganizations which do not result in a change of ultimate control of a business are not reviewable. *Id.* § 3(3)(e). See Guidelines Concerning Corporate Reorganizations.

Acquisitions of stock by a venture capitalist are not reviewable. The venture capitalist, however, is closely regulated by the Minister of Industry, Trade and Commerce and may be compelled to follow a divestiture schedule. For qualifications required of a venture capitalist, see Terms and Conditions for the Venture Capital Exemption, § 2. Acquisitions of control, taken as security for a loan, and acquisition of shares by a securities dealer in the ordinary course of his business do not require approval under the Act. FIRA, *supra* note 5, § 3(3)(b)(ii), (iv).

69. FIRA, *supra* note 5, § 3(6)(c). If the right is contingent upon the death of an individual, review is not required until exercise of the right, *i.e.*, upon the individual's death. *Id.* § 3(6)(c)(ii). Thus a person who devises or bequeaths property used in a Canadian business enterprise or shares of a Canadian business cannot be sure whether his intent will be carried out, if the beneficiaries are NEP's. This problem exists, of course, only if the "control" element is present.

D. *Related Business*

If an NEP proposes to establish a new business in Canada, he may or may not have to go through the review process.

The establishment by NEP's of a new business in Canada after October 15, 1975, is generally a reviewable transaction.⁷⁰ If the new business is related to a business already carried on by the NEP in Canada, however, no approval is needed.⁷¹ While the FIRA does not state when two businesses are "related," the Minister of Industry, Trade and Commerce has set forth guidelines for such determination.⁷² In addition, an investor may require the Minister to issue an opinion on whether the proposed new business is related to the older business.⁷³

Under the Guidelines issued by the Minister, relatedness is found where there is vertical or horizontal integration between two businesses,⁷⁴ or where the product or productive process of the new business resulted largely from research and development carried on in Canada by or for the established business.⁷⁵ The definitions of relatedness listed in the Guidelines are not exclusive.⁷⁶

The definitions of relatedness are quite broad.⁷⁷ This is due to deliberate government policy⁷⁸ to encourage expanding multinationals to pursue all facets of the business process in Canada, to

70. *Id.* § 8(2). See notes 45-47 *supra* and accompanying text.

71. FIRA, *supra* note 5, § 8(2)(b).

72. See Guidelines Concerning Related Business. The first determination should be whether there is a new business at all, or an expansion of an existing business. See *id.* § 3(1).

73. FIRA, *supra* note 5, § 4(1). The effect and duration of this opinion are the same as that for the opinion on when an investor is an NEP. See note 56-57 *supra* and accompanying text.

74. See Guidelines Concerning Related Business, Guidelines 1, 2, 3, 4. For example, if the output of the new business is to be used as service, input, or capital for activities of the established business, the new business may be deemed related to the existing business. *Id.* Guideline 1(a).

75. *Id.* Guideline 5.

76. Guidelines Concerning Related Business § 4.

77. One commentator has said that the relatedness requirement is practically meaningless, as many of the multinational corporations in Canada have already diversified. *I.e.*, for a corporation participating in several different types of business, a wide range of activities would be "related" to its existing operations. *An Attempt To Harmonize*, *supra* note 29, at 298.

78. The Gray Report recommended a bias in favor of allowing new investment, and against takeovers. Grover, *supra* note 41, at 95 n.180.

utilize—and develop—native Canadian ingenuity more than they had in the past.⁷⁹

E. Significant Benefit

If it is finally determined that an NEP's investment proposal is subject to review, the NEP must then present the proposal as one that will bring significant benefit to Canada. Section 2(1) of the FIRA provides that no reviewable investment by an NEP shall be approved unless the NEP can show that the investment is likely to be of significant benefit to Canada. This is an affirmative burden on the investor. A showing of no detriment, that no one shall be harmed by the investment, will not sustain the investor's burden. He must show more than the mere fact that the status quo will not be disturbed.⁸⁰

The FIRA sets forth several factors which can be considered in determining whether a proposal will produce significant benefit.⁸¹ These factors are not always given the same weight, nor must all

79. Not all the Guideline definitions provide this encouragement. The research and development category, however, certainly does. See note 75 *supra* and accompanying text.

80. For example, a proposal was disallowed in 1974-75 because "the applicant's plans . . . did not seem much different from the course of development that the company could be expected to achieve under its existing ownership. . . ." [1974-75] FOR. INV. REV. AGENCY ANN. REP. 10-11.

81. FIRA, *supra* note 5, § 2(2). These factors are:

(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including . . . the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada; (b) the degree and significance of participation by Canadians in the business enterprise . . . and in any industry or industries in Canada of which the business enterprise . . . would form a part; (c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; (d) the effect of the acquisition or establishment on competition within any . . . industries in Canada; and (e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by . . . any province likely to be significantly affected by the acquisition or establishment.

Other factors have been looked to under the practice of the Review Agency. These include whether there is a Canadian bidding against the NEP; how the *seller* of an acquired business plans to dispose of the proceeds; whether the seller is currently Canadian-controlled or foreign-controlled. See Donaldson & Jackson, *supra* note 5, at 209; Grover, *supra* note 41, at 86, 95 n.179; *After Two Years*, *supra* note 55, at 181.

factors be considered in every investment review.⁸² In fact, the test of significant benefit is so vague that decisions may be made on almost any basis whatsoever⁸³—including a political basis.⁸⁴

Since the test is not a clear-cut one, the review process is turned into more of a negotiating session between the government and the investor, rather than a rigid application of rules. Under the FIRA, then, Canada has a chance to shape what benefits it can expect from a given investment proposal.

III. IMPLEMENTATION OF THE FIRA

A. *The Review Agency*

The administrative agency of the FIRA is the Foreign Investment Review Agency, created by section 7 of the Act. While some proponents of the original bill had intended the Agency to be an independent tribunal,⁸⁵ the role of the Agency under the Act as passed is to assist the Minister of Industry, Trade and Commerce. The Agency reviews applications of investment proposals and gives a report of its findings, with its recommendation for allowance or disallowance, to the Minister. The Minister then makes a recommendation to the Federal Cabinet. The Cabinet makes the ultimate decision whether to allow or disallow the investment; it is not bound by the Minister's recommendation.⁸⁶

82. GOV'T OF CAN., FOR. INV. REV. AGENCY, BUSINESSMAN'S GUIDE TO THE FOREIGN INVESTMENT REVIEW ACT 10.

83. It has been suggested that "these factors mean just what the Cabinet . . . says they mean. They are sufficiently broad to enable almost any policy approach to be taken to future foreign investment . . . [e.g.,] the key sector approach or the fixed rules approach." G. HUGHES, *supra* note 5, at 61. See notes 15-16 *supra* and accompanying text.

84. Affected provinces have a say in the review process. See FIRA, *supra* note 5, § 2(2); note 81 *supra*. Therefore, potential investors may wish to enlist the aid of provincial representatives before going to the Review Agency. If provincial representatives apply any measure of pressure on the government to allow a proposal, it is more likely to be approved. See Donaldson & Jackson, *supra* note 5, at 213-14.

85. The Gray Report suggested that the Review Agency be the ultimate decision maker. Grover, *supra* note 41, at 58. The Parliament did not want to give unreined power to a tribunal of bureaucrats, however. Indeed, J. Richard Murray, the first Commissioner of the Review Agency, was quick to point out in an interview in 1974 that the Agency was not at all like the powerful U.S. regulatory agencies, but rather had less real power. Borders, *Canadian Aide to Study Foreign Investing*, N.Y. Times, Feb. 21, 1974, at 55, col. 1.

86. FIRA, *supra* note 5, § 12. References to "Governor in Council" relate to the Federal Cabinet. For length of the review process, see note 95 *infra*.

The Minister, when requested, must issue opinions on whether an investor is a non-eligible person or whether a proposed new business will be related to a business already carried on in Canada.⁸⁷ The Minister may also issue guidelines⁸⁸ which aid in interpretation of the FIRA but which do not have the force of law.⁸⁹

Agency opinions may also be issued, although they are not specifically authorized by the FIRA or binding on the Minister.⁹⁰ Agency opinions frequently respond to questions such as whether an acquisition of control has taken place, whether a property to be purchased is a business enterprise,⁹¹ or whether assets being acquired constitute substantially all the business property of a Canadian business enterprise.⁹²

B. Notices

Every NEP investor or investment group that is proposing an investment covered by the FIRA is required to give notice to the Review Agency.⁹³ In addition to outlining the investor's plans for the business, this notice must supply a vast amount of confidential information about both the investor and the seller (if there is a seller),⁹⁴ and requires a significant amount of time and effort both

87. FIRA, *supra* note 5, § 4. See notes 56-57, 73 *supra* and accompanying text.

88. FIRA, *supra* note 5, § 4(2).

89. See, e.g., Guidelines Concerning Real Estate Business, introductory para. To date the Minister has issued five guidelines: (1) Guidelines Concerning Real Estate Business (1974); (2) Terms and Conditions for the Venture Capital Exemption (1974); (3) Guidelines Concerning Corporate Reorganizations (1975, 1977); (4) Guidelines Concerning Related Business (1975, 1977); (5) Guidelines Concerning Acquisitions of Interests in Oil and Gas Rights (1976). The Federal Cabinet is empowered to issue regulations. FIRA, *supra* note 5, § 28. Regulations setting forth notice requirements and providing for certain information to be supplied upon application to the Review Agency have been issued. Regulations, *supra* note 50. Unlike the Minister's guidelines, the Regulations have the force of law. See *After Two Years*, *supra* note 55, at 171 n.84.

90. GOV'T OF CAN., FOR. INV. REV. AGENCY, A GUIDE TO FILING NOTICE WITH THE FOREIGN INVESTMENT REVIEW AGENCY 4.

91. See note 63 *supra*.

92. GOV'T OF CAN., FOR. INV. REV. AGENCY, A GUIDE TO FILING NOTICE WITH THE FOREIGN INVESTMENT REVIEW AGENCY 3. In addition to Agency rulings, employees in the Rulings Division of the Compliance Branch of the Review Agency will discuss application of the FIRA and provide verbal, no-names interpretations if requested. Simon, *FIRA Procedures: Clarifying Some Legal Issues*, FOR. INV. REV., Autumn 1978, at 13.

93. FIRA, *supra* note 5, § 8.

94. E.g., an investor must provide the Review Agency with a complete descrip-

in drawing up the notice and in Agency review of the notice. Since 1977, however, an abbreviated form of notice is prescribed for investments regarding small businesses, *i.e.*, those with gross assets of less than \$2 million and fewer than one hundred employees.⁹⁵

Following receipt of notice, the Agency sends a certificate back to the investor, provided that the notice is complete,⁹⁶ and forwards the notice to the Minister. After Agency consultation with interested provincial governments,⁹⁷ the Minister either makes a recommendation⁹⁸ or advises the investor of his right to make further representations to the Agency.⁹⁹ During its review of the notice, the Agency will try to obtain undertakings¹⁰⁰ from the investor to bring even more benefit to Canada than he had represented in his notice. If further representations are called for, the

tion of any technology or "know-how" used by the seller, and any special business agreements that he (the investor) has with any affiliates in Canada. Regulations, *supra* note 50, Schedule II § 12; *Id.* Schedule I, Part II, § 1(1)(g)(iv).

Section 14 of the FIRA provides that information passed on during the review process is confidential. Yet one problem is evident: an investor may back out intentionally or otherwise from a deal, after notice has been filed, *i.e.*, after he has legally obtained inside information of a competitor/would-be seller. See Grivakes, *FIRA: Experiences of Canadian Lawyers*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN CANADA 20 (A.B.A. 1976).

95. Regulations, *supra* note 50, § 6. This addition was very significant as, based on Review Agency records from April 9, 1974, to March 31, 1978, 65% of reviewable acquisition applications and 97% of reviewable new business applications fell within the small business definition. [1977-78] FOR. INV. REV. AGENCY ANN. REP. 17. For such small businesses, the entire review process takes only about 15 days. *Id.* For investment targets not within the small business exemption, the review process takes up to an average of 90 days. *Id.* See notes 101-02 *infra* and accompanying text.

96. FIRA, *supra* note 5, § 8(4). Some notices may require further information before they can be certified as complete. See G. HUGHES, *supra* note 5, at 64.

97. Section 9(b) of the Act allows submissions to be made by any party to the proposed investment. While third party submissions (*i.e.*, made by persons not party to the investment) are not permitted under the Act, such submissions are in practice accepted by the Agency. Address by André Dorais to Columbia Univ. Law School Society of Int'l Law (March 18, 1980). See also Donaldson & Jackson, *supra* note 5, at 213. Consultation may therefore be had with several groups of persons.

98. FIRA, *supra* note 5, § 10. If upon receipt of the Minister's recommendation the Federal Cabinet is still uncertain of what action to take it may order the Minister to proceed as if he had taken the "further representation" route all along. *Id.* § 12(2). See note 99 *infra* and accompanying text.

99. FIRA, *supra* note 5, § 11(1). The investor then has 30 days in which to make further representations. *Id.* § 11(2). Failure to do so does not result in automatic disallowance of the investment proposal, but in such a situation disallowance would most probably be the outcome.

100. Undertakings are promises made by the investor with regard to the manner in which he will conduct the business being acquired or established.

Agency will continue its negotiations with the investor, but will be in an even stronger bargaining position because the investor has been alerted to possible rejection of his proposal.

The length of the review process is restricted by the FIRA. If within sixty days of receipt of notice by the Agency no final decision is made by the Cabinet, the investment proposal is deemed to have been approved.¹⁰¹ This time limit is excepted, however, if, before the deadline, the Minister calls for further representations.¹⁰²

C. Remedies For Violation of the FIRA

When an investor seeks to evade the review process, the Minister has a broad array of remedies. First, the Minister is empowered to launch an extensive investigation to determine whether the FIRA is being violated.¹⁰³ He can subpoena witnesses and business records and has access to business premises in furtherance of the investigation.¹⁰⁴ Where no notice has been given but the Minister has reasonable grounds to believe that an investment has been or is about to be made, he may demand that notice be given.¹⁰⁵ Where the investor has received Cabinet approval of his investment but is operating his business under conditions materially different from his undertakings,¹⁰⁶ the Minister may obtain a court order directing compliance with the undertakings.¹⁰⁷

101. FIRA, *supra* note 5, § 13(1). This occurred 38 times in 1974-77. *After Two Years*, *supra* note 55, at 179 n.150.

102. FIRA, *supra* note 5, 13(1). This exception practically eliminates the 60-day rule.

103. As reported in Agency Annual Reports from 1974 to 1979, over 950 investigations have been launched, leading to 105 demands for notice under § 8(3). *See* note 105 *infra* and accompanying text.

104. FIRA, *supra* note 5, §§ 15, 16, 17. Any person who knowingly hinders an investigation may be punished by up to 6 months in jail and a fine of \$5,000. *Id.* § 26(a).

105. *Id.* § 8(3). Knowing failure to file notice may be punished by a fine of up to \$5,000, while defiance of a demand for notice is punishable by up to 6 months in jail and a \$10,000 fine. *Id.* § 24(1), (2). *See also* § 27 for liability of corporations evading the FIRA.

106. The Surveillance and Enforcement Section of the Review Agency acts as a watchdog and presently monitors over 850 businesses to see that undertakings are complied with. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 16.

107. FIRA, *supra* note 5, § 21. Violation of such an order is punishable as contempt of court. *Id.* § 22. If failure to comply with undertakings is the result of changed market conditions, a flexible approach would be taken and a court order would not be sought. Donaldson & Jackson, *supra* note 5, at 212 n.90.

The Minister may choose to take somewhat more forceful action in response to evasions of the FIRA. Under section 19, he may apply for a court injunction to prevent the transaction from taking place or, where it has already taken place, restrict the actions that the investor can take in relation to the business.¹⁰⁸ The Minister may also apply for a court order rendering a transaction nugatory.¹⁰⁹ Under such an order, the court may direct disposition by the investor of any shares or property acquired, and revoke or suspend any voting rights attached to the acquired shares.¹¹⁰ Where the investor is outside of Canada and refuses to divest as under the order, the court may vest the shares or property in a trustee named by it. The trustee shall then dispose of the property and return the proceeds to the investor—after deduction for trustee fees.¹¹¹

IV. CASE HISTORY UNDER THE FIRA

Since the FIRA came into force in 1974, investors seem to have accepted the review process as a way of life. The Minister has rarely needed to resort to his statutory remedies¹¹² to ensure compliance with the Act. Most disputes that have arisen have been solved by withdrawal of the proposal or by settlement after the review process. On thirty occasions, proposals which were rejected at the conclusion of the review process were revised, re-presented, and approved after a second review process.¹¹³

Not until 1979 was court action called upon to solve a dispute. The first case, *Attorney General of Canada v. Fallbridge Holdings Ltd.*,¹¹⁴ involved two corporations that owned separate portions of the Ambassador Bridge between Windsor, Ontario, and Detroit, Michigan. The Canadian Transit Corporation, a Canadian corporation, owned the Canadian portion of the bridge, while a United States corporation, Detroit International Bridge Company, owned

108. FIRA, *supra* note 5, § 19.

109. *Id.* § 20(1).

110. *Id.* § 20(2). The FIRA attempts, where possible, to avoid causing undue hardship to third parties under nugatory orders. *See id.* § 20(1), (2).

111. FIRA, *supra* note 5, § 20(3).

112. *See* notes 103-11 *supra* and accompanying text, for enumeration of statutory remedies.

113. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 1 (Supp. 1979).

114. 7 Business Law Reports (Carswell) 275 (Can. Fed. Ct. 1979). *See* Can. Current Law, Feb. 1980, ¶ 976.

the Michigan portion of the bridge as well as all the shares of Canadian Transit. Central Cartage Company, a United States corporation, owned 24.6% of Detroit International. Under a plan between Central Cartage and Fallbridge Holdings Ltd., a Canadian corporation, a reorganization of Detroit International was to take place after which control of the Canadian side would go to Fallbridge and control of the Michigan side would go to Central Cartage. In keeping with this plan, Fallbridge acquired 24.9% of the shares of Detroit International in March 1979.

At this point, the Attorney General of Canada applied to a Canadian federal court on behalf of the Minister for an injunction under section 19 of the FIRA, seeking to freeze the Detroit International stock held by Central Cartage and Fallbridge, and to bar Fallbridge from acquiring any shares of Canadian Transit. The Minister believed that: (1) Fallbridge and Central Cartage were acting in concert, as a "group";¹¹⁵ (2) Central Cartage was an NEP and therefore, the group itself was tainted as an NEP under section 8 of the FIRA;¹¹⁶ (3) the group was acquiring control of Canadian Transit, a Canadian business enterprise.¹¹⁷ The Attorney General argued that without an injunction, the Minister would be deprived of a chance to decide whether to apply for a nugatory order under section 20 of the FIRA.

The court granted the injunction, holding that the transaction came within the FIRA.¹¹⁸ In addition, a Michigan court ordered the Canadian federal court's order to be complied with as a matter of comity of nations.¹¹⁹ Despite the court orders, however, Central Cartage followed through on its reorganization, without further participation by Fallbridge. When the Attorney General moved for the federal court to sequester the Canadian revenues of the Ambassador Bridge, Central Cartage reached an out-of-court agreement with the Review Agency, ending the dispute.¹²⁰

115. FIRA, *supra* note 5, §§ 3(1), 3(6)(b), 3(7)(a).

116. *See* note 55 *supra*.

117. *See* notes 58-59 *supra* and accompanying text.

118. 7 B.L.R. at 279-80. The injunction applied until July 31, 1979, or until the allowance of the investment by the Cabinet, whichever was earlier, and was later extended when the Cabinet had not rendered a decision on the application filed under the FIRA. Annot., 7 B.L.R. 276 (1980).

119. *Luptak v. Detroit Int'l Bridge Co.*, No. 79-924948-CZ (Cir. Ct., Wayne Co., Mich., July 30, 1979) (order granting preliminary injunction). *See* Annot., 7 B.L.R. 276 (1980).

120. Annot., 7 B.L.R. 276 (1980).

Fallbridge Holdings, besides being the first case to consider the enforcement provisions of the FIRA, is significant for other reasons. The court stated that its order was not intended to have extraterritorial effect but was confined to where Central Cartage's activities would be in Canada or have an impact on Canada.¹²¹ The substance of this ruling, however, is that Canada will sometimes claim jurisdiction where a transaction covered by the FIRA takes place outside Canada. The Canadian courts will attempt to direct action by foreigners in foreign countries where there is an impact on Canada.¹²²

The extent to which Canada will attempt to stretch the precedential value of *Fallbridge Holdings* is unclear. Further case law must point out the direction.¹²³ *Fallbridge Holdings* demonstrates, however, that effective extraterritorial enforcement may be difficult.¹²⁴

V. EFFECT OF THE FIRA

In its first five years of existence, the Foreign Investment Review Agency received 2,089 investment proposals, approximately fifty-five per cent for takeovers and forty-five per cent for establishment of new businesses.¹²⁵ Of the 1,910 applications that were resolved, 1,613 were allowed, 136 were disallowed, and 161 were

121. 7 B.L.R. at 281. It should be noted that courts in the United States assert jurisdiction in similar situations. See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1976).

122. Annot., 7 B.L.R. 276 (1980). The case is also significant for its interpretation of "acquisition of control." *Fallbridge* and *Central Cartage* were said to have acquired control of Canadian Transit through purchase of shares of Detroit International, a Michigan corporation which did no business in Canada but which owned all the shares of Canadian Transit. Thus control was acquired through purchase of shares of a foreign corporation, a result not specifically provided for in the FIRA but possible under a liberal interpretation of § 3(6)(h). See notes 61, 65 *supra* and accompanying text.

123. In June 1980 a second court decision examined the FIRA, and held that acquisition of control of a foreign parent may be subject to the review process, even though it takes place outside Canada. *Dow Jones & Co., Inc. v. Attorney General of Canada*, No. T-1176-80 (Can. Fed. Ct. June 10, 1980). See FOR. INV. REV. AGENCY Q. REP., Apr.-June 1980, at 3-4. For the present, it would seem that *Fallbridge Holdings* is a viable precedent.

124. In future litigation, constitutional challenges could possibly be raised as well as jurisdictional arguments. For discussion of the constitutionality of the FIRA, see E. Arnett, *Canadian Regulation of Foreign Investment: the Legal Parameters*, 50 CAN. BAR REV. 213, 229 (1972).

125. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 1 (Supp. 1979).

withdrawn by investors before the review process was completed.¹²⁶ The vast majority of proposals have been made by United States investors—approximately sixty per cent.¹²⁷ One half of all takeover proposals involved a target company that was currently foreign controlled.¹²⁸

The effect of the FIRA is very difficult to measure. First, as Canada itself has stressed repeatedly, the Act was not intended to discourage foreign investment *per se*.¹²⁹ Second, the FIRA does not apply to most expansions of previously existing foreign direct investment, which accounts for at least eighty per cent of total foreign direct investment in Canada.¹³⁰ Third, portfolio investments recently have assumed a much larger role in Canadian financing and foreign direct investment has declined in relative importance in the last decade.¹³¹ Fourth, as the Review Agency has stated, the impact of the FIRA on investment is minor when compared to the influence of worldwide economic pressures and business trends.¹³²

Nevertheless, it can be said with certainty that the FIRA has not discouraged businesses from investment in Canada. While passage of the Act may have intimidated many investors initially, economic indicators show that Canada remains an attractive market.¹³³ Significantly, the number of investment proposals submitted

126. *Id.* Since only about 40% of the withdrawals were made because of probable rejections, *id.*, the percentage of proposals directly prevented under the FIRA is about 11%. Thirteen per cent of takeover proposals have been prevented while 9% of new business proposals have been prevented. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 29.

127. Gherson, *supra* note 1, at 14. There has been absolutely no discrimination against United States investors in favor of other foreign investors. The figures for United States takeover proposals are: 578 allowed, 61 disallowed, 49 withdrawn. The figures for other takeover proposals are: 285 allowed, 29 disallowed, 31 withdrawn (compiled from annual FIRA reports, 1974-79). If there is any anti-United States element in the Review Act, it is only because such a large portion of "foreign" investment is United States investment.

128. The Cabinet is more likely to allow a takeover of a business controlled by foreigners than it would be regarding a takeover of a Canadian-controlled business (compiled from annual FIRA reports, 1974-79).

129. "The Act was not intended to alter significantly the *quantity* of foreign investment entering Canada. What it was intended to do . . . is to improve the *quality* of [foreign direct investment]." [1975-76] FOR. INV. REV. AGENCY ANN. REP. 25 (emphasis in original).

130. See *An Attempt To Harmonize*, *supra* note 29, at 298.

131. [1976-77] FOR. INV. REV. AGENCY ANN. REP. 25. "[I]n terms of total investment in Canada [the FIRA] is insignificant." *Id.*

132. [1975-76] FOR. INV. REV. AGENCY ANN. REP. 25.

133. *E.g.*, Canada's volume of world trade continues to soar. From 1975-79, ex-

to the Review Agency has increased every year, from 230 in 1974-75 to 454 in 1976-77 to 818 in 1978-79.¹³⁴

It should also be noted in examining the effect of the FIRA after five years that the Canadian government has a different attitude towards foreign investment than it did several years ago. Perhaps in response to a slow economic recovery in 1974-76¹³⁵ and to fears caused by the secessionist movement in Quebec, Canada's distrust of foreign direct investment has abated.¹³⁶ Opinion swung so much that it was rumored in late 1977 that Prime Minister Trudeau was considering a temporary suspension of the FIRA.¹³⁷

While the FIRA, then, has not intimidated any of Canada's trade partners, neither has it removed any of the problems pointed to in the early 1970's by the proponents of the Act.¹³⁸ For example, the Report of the Science Council to Canada on March 23, 1979, complained that Canada had no native base of technological expertise, that the development of many firms was stunted by foreign parent dominance.¹³⁹ Many other of the excesses that were complained of years ago are still continued.

While its achievement record might not appear very impressive at first glance,¹⁴⁰ the FIRA cannot be said to be a total failure.

ports grew from US\$34.1 billion to US\$55.5 billion, while imports increased from US\$36.3 billion to US\$55.1 billion. PRESIDENT'S ECON. REP., app. B, at 322 (1980). From 1973-79, Canadian exports to and imports from the U.S. have both increased by approximately 115%. See *id.* at 319.

134. The figures are compiled from FIRA annual reports, 1974-79.

135. See Brown, *Recent Tax Developments and Issues Affecting Canada—United States Transnational Business Activities*, 2 CAN.-U.S. L.J. 132 (1979).

136. See, e.g., Malcolm, *Ontario Welcoming Concerns From U.S.*, N.Y. Times, Dec. 3, 1978, at A17, col. 1. One telling figure is that the Cabinet from 1976-79 rejected less than half the percentage of proposals that it rejected in 1974-76 (compiled from FIRA annual reports, 1974-79). See, e.g., Brown, *supra* note 135, at 133.

137. Trumbull, *Canadians' Warmth Toward U.S. Growing*, N.Y. Times, Nov. 28, 1977, at A5, col. 1. This report was never officially confirmed and the suspension was never ordered.

138. See notes 27-38 *supra* and accompanying text.

139. Giniger, *Canadian Industry Draws Fire In Study*, N.Y. Times, Mar. 24, 1979, at D27, col. 1. See notes 27-29 *supra* and accompanying text.

140. Some criticize the high percentage of approvals made by the Cabinet, and say that the FIRA is simply not tough enough. E.g., J. Edward Broadbent, a leader of the opposition to Prime Minister Trudeau, charged in 1979 that the Review Agency had become nothing more than a statistical clearinghouse for foreign takeovers. He said that the Agency was in fact "hiding the continual selling out of Canada." Giniger, *Canadians' Equity Goal A Failure?*, N.Y. Times, Jan. 16, 1979, at D10, col. 3.

As the amount of reviewable transactions is very limited, progress under the Act is bound to be very gradual. Furthermore, gains have been made. As a result of the review process, the Agency has negotiated many concessions to Canadian interests that might not have been made otherwise. The Agency, in its five year report, indicates that the greatest impact of the review process has been in increasing the autonomy of Canadian subsidiaries.¹⁴¹ Frequently, for example, non-North American investors have given exclusive rights to Canadian subsidiaries to service the entire North American market.¹⁴² Undertakings¹⁴³ have been made that bring in the whole range of significant benefits under the FIRA. In approximately sixty per cent of approved proposals, investors have undertaken to process natural resources in Canada that are taken from Canadian territory.¹⁴⁴ In most cases, undertakings have also been made to purchase a significant portion of goods and services, used as input, from Canadian sources.¹⁴⁵ In sum, the Review Agency can point to many cases in which an investor has pledged to allow Canadians a fuller share in the business operations of a foreign controlled company. It is likely that the presence of the FIRA has caused some foreign investors, both new and existing investors entrenched in Canada, to consider Canadian needs and to look upon subsidiaries in a different light.¹⁴⁶

Unfortunately, progress of a case by case nature and changes in the attitude of some foreign investors has not so far met the expectations of Canadians who hoped for noticeable aggregate improvements. The Review Agency itself does not claim that the FIRA has had its desired result.¹⁴⁷ Perhaps one way that such a re-

141. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 2 (Supp. 1979). Other commentators believe that there has been a noticeable change in foreign parent behavior toward the Canadian subsidiary. One noted:

In the not too distant past in many American firms, there had been a tendency to view Canadian subsidiaries as, in effect, branches of American firms and to deal with them organizationally on that basis. Now, there is a tendency to treat Canadian subsidiaries as separate and distinct entities

King, *Recent Tax Developments and Issues Affecting Canada-United States Transnational Business Operations: Introductory Remarks*, 2 CAN.-U.S. L.J. 130 (1979).

142. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 7 (Supp. 1979).

143. See note 100 *supra*.

144. [1978-79] FOR. INV. REV. AGENCY ANN. REP. 7 (Supp. 1979).

145. *Id.*

146. See, e.g., note 141 *supra*.

147. The Agency, however, does claim some progress. One encouraging statis-

sult could be achieved is for the Canadian Parliament to enact additional legislation¹⁴⁸ that goes beyond where the FIRA begins.

CONCLUSION

Although the FIRA has been in effect for several years, Canadian participation in the economy is not nearly as great as the Canadian government would like it to be.¹⁴⁹ While the FIRA has led to piecemeal progress and has not damaged Canada's international trade relationships, problems with foreign control still exist. The majority of foreign investors are not within the coverage of the FIRA, and thus continue their past practices.

The FIRA, therefore, has not proven to be the definitive solution to Canada's foreign investment troubles. Additional legislation, perhaps covering the operation of firms already controlled by foreigners, is required before the goals of the early 1970's can be realized.

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tic pointed to is that from 1970 to 1977 the level of Canadian control of Canadian industry has increased by 4% in the manufacturing sector and by 18% in the mining industry. *FOR. INV. REV.*, Spring 1980, at 2.

148. Supplementary legislation has already been passed. Most significant is an amendment to the Combines Act, 1974-75-76 Can. Stat., c. 76, which decreed that where a judgment of a foreign court or order of foreign government can be implemented in Canada by Canadian companies, and the implementation thereof would adversely affect competition in Canada or otherwise restrain Canadian commerce, then such implementation shall be limited or even barred. *Id.* § 31.5. This amendment addressed the concern of Canadians caused by legislation such as the United States Trading With The Enemy Act. See note 32 *supra* and accompanying text. In addition, the Canada Business Corporations Act has been amended, 1974-75-76 Can. Stat., c. 33, to require that a majority of directors of companies incorporated in Canada be residents of Canada. *Id.* § 100(3).

In addition, it has been proposed in the 1980 session of Parliament that the FIRA be amended. The amendments suggested would require that major acquisition proposals by foreign companies be publicized prior to a government decision on their allowance or disallowance. In conjunction with the publication, the Canadian government would back up Canadian companies bidding against the foreign investors for control of the target business. See *FOR. INV. REV. AGENCY Q. REP.*, Apr.-June 1980, at 1. This amendment would encourage Canadians to buy back control of their home industries. It can safely be predicted that, given the existence of alternative bids by Canadian interests, significantly fewer foreign direct investment proposals would be accepted under the FIRA. See note 81 *supra*.

149. The government's general industrial policy still stresses the need to strengthen Canadian participation in and expand Canadian control of the economy. See *FOR. INV. REV. AGENCY Q. REP.*, Apr.-June 1980, at 1.