

Current Approaches to Foreign Investment Review in Canada

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The author discusses the recently enacted *Investment Canada Act* which repealed the *Foreign Investment Review Act* and provided a new approach to foreign investment regulation in Canada. After providing a short summary of the new *Act*, he sets out some potential areas of complication, examining the new *Act* in light of its predecessor.

L'auteur commente la récente *Loi sur Investissement Canada* qui amende la *Loi sur l'examen de l'investissement étranger* et qui instaure une nouvelle approche à la réglementation canadienne de l'investissement étranger. Après un bref résumé de la nouvelle loi, l'auteur relève d'éventuelles matières problématiques lors d'un examen des nouvelles dispositions à la lumière des anciennes.

I. Introduction

In December 1984, a few months after the new Progressive Conservative government took office in Canada, Prime Minister Brian Mulroney announced to the Economic Club of New York that "our message is clear here and around the world. ... Canada is open for business again." In that address, the Prime Minister emphasized his hopes for a "restoration of good and sound relationships between our two countries".¹

The Prime Minister's statement coincided with the tabling in the House of Commons in Canada of the Investment Canada Bill which the new government proposed to replace the ten-year-old *Foreign Investment Review Act*, which had originally been brought into law by the Liberal Government of Prime Minister Pierre Trudeau.²

Following the tabling of the Bill, Industry Minister Sinclair Stevens made these statements:

The Investment Canada Bill ... represents the fulfilment of our campaign promise to change both the name and mandate of the Foreign Investment Review Agency.

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¹F. Harrison & G. Gherson, "Mulroney's Investment Message to U.S. Like 'Fresh Air'" *The Financial Post* (15 December 1984) 6.

²*Foreign Investment Review Act*, S.C. 1973-74, c. 46 [hereinafter *FIRA*], as rep. Bill C-15, *Investment Canada Act*, 1st Sess., 33d Parl., 1984-85, now *Investment Canada Act*, S.C. 1985, c. 20, s. 46 [hereinafter the *Act*].

We are proposing to replace FIRA with a new agency, Investment Canada. The Agency will have a new, positive mandate to encourage and facilitate investment, the kind of investment that creates jobs, introduces innovative ideas and technologies, and expands Canada's economic and industrial base. Canada's interests will be advanced by encouraging Canadian and non-Canadian investment, not by discouraging it. We propose positive measures to achieve positive goals.³

This legislation became law in Canada at the end of last June, replacing *FIRA* and becoming the only law of general application in Canada relating to the review of foreign investment in our country.⁴

II. Summary of the *Act*

The *Act* establishes a new agency, Investment Canada, which will have a mandate to encourage and facilitate new foreign and domestic investment in Canada as well as to assist in the review of foreign investment proposals which require review. The *Act* removes from the scope of the review process a number of types of investments which were subject to review under *FIRA*. First, the *Act* establishes thresholds to limit review of acquisitions by non-Canadians to acquisitions which are of a major size. For acquisitions below the thresholds, only a notification of the investment is required. The thresholds for review are:

- (a) in the case of a direct acquisition by a non-Canadian, the acquisition of a business in Canada with assets of \$5 million or more; and
- (b) in the case of an indirect acquisition (*i.e.*, one resulting from the acquisition of a parent company outside Canada), when the Canadian subsidiary acquired has assets of \$50 million or more (or if the Canadian subsidiary acquired represents more than fifty per cent of the assets of the acquired group, the Canadian subsidiary has assets of \$5 million or more).

The *Act* also provides exceptional authority to review acquisitions or investments that establish new businesses in culturally sensitive sectors, such as book publishing, film production and film distribution. Apart from investments to establish new businesses in areas that may affect our "cultural heritage or national identity", there is no authority to review proposals to establish new businesses as there was under *FIRA*. Instead, with the above exception, all new business establishments are subject only to the requirement of notification.

The standard to be taken into account in determining whether to allow an investment proposal is whether the investment is likely to provide "net

³Investment Canada, Statements and Speeches, "Statement by the Honourable Sinclair Stevens Following the Tabling of the Investment Canada Bill" (7 December 1984) at 1.

⁴Pursuant to SI/85-128 the *Investment Canada Act* was proclaimed in force 30 June 1985, except for s. 46 repealing *FIRA* which came into force 1 July 1985.

benefit to Canada". The test under *FIRA* was "significant benefit to Canada". In making this determination the Minister responsible for the *Act*, the deciding authority, is to consider seven factors focusing on the impact of the investment proposal on the following:

- (i) economic activity
- (ii) Canadian participation
- (iii) efficiency and technology
- (iv) competition
- (v) compatibility with federal and provincial economic and industrial policies
- (vi) compatibility with cultural policy
- (vii) effect on international competitiveness.

The last two factors are additions to the list which was set out in *FIRA*. Under *FIRA*, the deciding authority was not the Minister but rather the Governor General in Council, *i.e.*, the full Cabinet. As was the case under *FIRA*, in the course of the review process, there is to be consultation with the provinces and the federal government departments that would be significantly affected by the proposal.

The time limits under the two acts are different. Under *FIRA*, if the government was unable to reach a decision within sixty days, it was entitled to extend the time for review for an unlimited period. Under the new *Act*, the Minister has a set period of forty-five days for the review of the proposal. This period may be extended to seventy-five days but can only be extended beyond that with the agreement of the investor.

As well as streamlining the scope, standards and timing of the review process, the *Act* also reduces the number of arrangements that are to be considered "non-Canadian" and the types of investment which are to be considered "acquisitions of control". For example, if two Canadians and one non-Canadian each own one-third of the voting shares of a company, that company would ordinarily be considered non-Canadian for *FIRA* purposes. Under the new legislation the company would have a good prospect of being considered Canadian, particularly where the shareholders enter into a shareholders agreement with terms that will qualify them as a "voting group" under the new *Act*.

In the case of a public company, if Canadians own a majority of the voting shares of the corporation, the corporation will be considered Canadian-controlled if it can be shown that the corporation is not controlled by a single non-Canadian or by a voting group in which non-Canadian members own half or more of the voting shares owned by the group. There is no

positive statutory requirement to show that Canadian shareholders are in control or that a majority of the board of directors is Canadian, which would likely have been required under *FIRA*.

If an investor lacks Canadian status, the investor would still be free to make the following types of investments in a corporation, since none of these investments is classified as “acquisition of control”:

- (i) a purchase of non-voting shares;
- (ii) a purchase of less than one-third of the voting shares, whether or not this results in a change in actual control of the corporation; or
- (iii) a purchase of more than one-third but less than a majority of the voting shares, if it can be shown that control is unchanged.

These rules result in considerably increased opportunities for foreign investors to make corporate business investments in Canada without being subject to the review requirements of the new *Act*.

If the foreign investor cannot structure its investment within these rules, it will have a further alternative which is not available under *FIRA*: instead of investing in an existing Canadian business, it could establish, without review, a new business which is not of a type prescribed by regulation as related to Canada’s “cultural heritage or national identity”. Other potential opportunities exist where the proposed investment is to be structured on a non-corporate basis, for example, as a partnership or a joint venture.

In the statement referred to earlier, Mr Stevens went on to make the following remarks about the underlying rationale of the new legislation:

We believe that the establishment of new businesses is beneficial to Canada. That is why we propose in the new Act to exempt new business investment from review. We are also proposing to confine the review of investments to acquisitions that can have an important impact on our economic, industrial and cultural life. By exempting new business investment and by limiting review to larger acquisitions, we will reduce by about 90 percent the number of transactions which are now subject to review under the Foreign Investment Review Act. So, when we say that we want to dismantle needless barriers to enterprise in this country, we mean it.

At the same time we believe that Canada requires the means to safeguard its national interests. Industrialized countries do not simply throw their doors open and invite others to take over the components of their economic, cultural and political sovereignty. It is for that reason that we have retained a review mechanism.⁵

⁵Investment Canada, *supra*, note 3 at 2.

It was generally recognized in Canada that the announcement of the new legislation was a major initiative on the part of the new government. *The Financial Post* (Canada) remarked on the event as follows:

The perception of the Foreign Investment Review Agency, and the legislation that underpinned it, may have been worse than reality. But perception counts heavily when it comes to decisions on where to do business and where to put your money. And it's plain that many foreign investors steered clear of Canada because of *Fira*. That's why the government's decision to replace it with a new agency called Investment Canada as announced by Industry Minister Sinclair Stevens, is most welcome. ...

Of just as much value as cutting down on the review process is the agency's fresh mandate to aggressively promote new investment, especially joint-venture projects with Canadian partners and investments in the high-tech field. This is the sort of activity, along with the positive message Prime Minister Brian Mulroney gave to U.S. executives this week in New York, that should help dispel the negative perception many business people have of Canada.⁶

III. The Experience to Date

At a superficial level it is quite easy to state what the experience to date has been with the Progressive Conservative government in the area of foreign investment review and to show how that record contrasts with the record of the previous government. The Conservative government has not turned down any case which it has decided, either under *FIRA* or under the new *Act*. In contrast, under the Liberal government which was in power for most of the ten-year lifetime of *FIRA*, there was typically some percentage of disallowed cases, ranging from a high in the teens to a low of under ten per cent.

That contrast may, however, be superficial and inadequate for a number of reasons. First, the Conservative government has been in power for only one year and the record shows only the cases decided, and not the cases which have been submitted for review but, for one reason or another, have not yet worked their way through the system to a decision. As a related matter it appears that some difficult cases, particularly in the area of the cultural industries, have been brought before the government but still remain to be decided; this matter is considered further below. Moreover, there is nothing in the scheme of the legislation which requires the government to maintain the level of allowances at any particular percentage. On the other hand, it seems clear to most observers that the present government is fully committed to its widely heralded pro-business, pro-investment approach. It therefore seems highly unlikely that the government would move away, to any significant degree, from a close-to-full approval record. This should

⁶Editorial, "Opening the Doors" *The Financial Post* (15 December 1984) 9.

not be taken as a prediction that all of the cases that are approved will go through the system routinely. While I believe that this will be true in most cases, I also believe that, even with the present government, there are reasons to expect that some major cases will encounter delays and demands that the parties to the transactions may well consider highly significant. In the following pages I hope to explain some of the reasons for this view and to indicate some of the forms that these complications may take.

IV. Potential Complications

In considering where complications may arise in the future in the course of the administration of the new *Act*, it is instructive to take into account the kinds of criticisms that were made of *FIRA* and its administration both by non-Canadian, principally American, and Canadian critics. In the first group of factors considered below, the potential for trouble along the lines of the traditional criticisms is explored. Following that, the discussion moves on to consider some of the potential complications that could arise with respect to specific policies of the Conservative government, some explicit and others not entirely explicit, which bear upon foreign investment review.

1. *Indirect Acquisitions*

The requirement for review of indirect acquisitions under *FIRA* was a continual source of irritation to critics of *FIRA*. Here is one formulation of the criticism:

FIRA review of mergers between U.S. parent companies that involve transfer of ownership of a Canadian subsidiary (whether or not the merger results in an increased level of foreign ownership of the Canadian subsidiary) has extra-territorial applicability and has the capacity to necessitate a forced sale of a Canadian subsidiary by the acquiring U.S. company. This may have expatriatory implications and can reduce U.S. exports to Canada ...⁷

Under the new *Act*, indirect acquisitions are still reviewable, but the force of the above criticism is considerably weakened by the fact that the thresholds for review in the case of indirect acquisitions have been raised enormously. Under *FIRA*, any indirect acquisition was reviewable. Under the new *Act* the indirect acquisition is reviewable only if the Canadian business has gross assets of \$50 million or, where it represents more than half of the global assets of the acquired business, it has gross assets over \$5 million.

⁷*Issues on United States-Canadian Economic Relations: Hearing Before the Subcomm. on International Economic Policy and Trade and on Inter-American Affairs of the U.S. House of Representatives Comm. on Foreign Affairs, 97th Cong., 1st Sess. (21 October 1981) (Statement of R.J. Waldmann, Asst. Sec. for Int'l Policy, U.S. Dept. of Commerce) 6 at 11 [hereinafter *Issues on United States-Canadian Economic Relations*].*

Although this should reduce the potential for irritation to a very considerable extent, it will not necessarily eliminate it entirely. For example, it seems reasonable to expect that in the oil and gas industry some indirect acquisitions will occur from time to time which will exceed the \$50 million threshold, and it would seem that this is an industry where the government feels bound to assert special requirements for the approval of foreign investment; this matter is considered further below.⁸ Moreover, it may be fair to expect that any transaction involving a Canadian company with gross assets of \$50 million or more will likely require, because of its size and the public attention it will attract, the government to subject it to a degree of special scrutiny.

2. *Delays*

Delays in the review process was a criticism under *FIRA* at various times until around mid-1982 when it became apparent that the streamlining of *FIRA* procedures was being implemented effectively. One report in November 1982 described the development this way: "Foreigners are finding it twice as fast and twice as easy to invest in Canada"⁹ The process of accelerating the review process appeared to have taken hold in the administration of the *Act* by 1983; it could generally be expected that a smaller transaction would be decided within about a month and a larger transaction within about two months. When the Progressive Conservative government came into power, the general impression was that the decision times were about the same or perhaps improved.

The new *Act* seems to contain at least two factors which would potentially make for an elimination or a reduction in delays. One of these is the provision that limits the review time to seventy-five days except where the parties agree otherwise. The second is that the deciding authority is the Minister rather than the Cabinet. It should be noted, however, that an investor might well wish to extend the review period beyond the seventy-five days. That might typically be the case where it was apparent that, otherwise, the Minister would consider himself bound to disallow the proposed investment. Second, while it will certainly be beneficial to the timing of decisions that the matter need not go to the Cabinet, the Minister is an extremely busy man with a number of priority demands upon his time. Consequently, in a case which he considers difficult to approve, there may be a potential for delay and a good reason for the investor to agree, albeit grudgingly, to such delay.

⁸See *infra*, note 16 and accompanying text.

⁹"FIRA's Rejections are Halved, Proposals Handled Doubled" *The [Toronto] Globe and Mail* (9 November 1982) B6.

The government has not yet released information relating to the average time taken for the review processes under *FIRA* and the new *Act* under the administration of the Conservative government. There has been at least one decision which would indicate a potential for delays in the operation of the review process. On 9 August 1985, Industry Minister Sinclair Stevens announced a decision approving the acquisition by Alexander & Alexander Services Inc. of New York of control of the business of Reed Stenhouse Companies Ltd of Toronto. This transaction, which resulted in the formation of one of the world's largest insurance brokerage companies, was a carryover from *FIRA*, under which it had been submitted for review some six months previously.¹⁰

3. *Vagueness of Standards*

This point was succinctly put by one American commentator as follows:

In judging an application by a foreign investor, *FIRA* applies a vague standard: whether there is a significant benefit to Canada.¹¹

The test under the new *Act* of "net benefit" is certainly different from "significant benefit": it would appear to mean that the prospective benefit must outweigh the prospective detriment (if any), but that it need not do so to any significant degree. In this sense, it may not be different from a test of "no detriment". However, since the factors to be taken into account by the Minister in deciding whether there is a prospect of net benefit are of the same degree of generality, and are in fact largely the same as the factors under *FIRA*, there would still seem to be ample room for the exercise of discretion on the part of the deciding authority. In this respect, it would appear that the standards are no more specific or objective than they were under *FIRA*. On reflection, this should not seem very surprising, given that the statute has the broadest possible application and that models designed for specific industries or industry sectors would provide only limited guidance in the formulation of general standards.

In the absence of more specific guidance on the meaning of "net benefit", it seems that the best one can do is to refer to the accumulating experience under the legislation and the known concerns and priorities of the government of the day. On this basis, a rough and incomplete list of types of transactions that would likely be singled out for special scrutiny under the *Act* would run somewhat as follows:

¹⁰Investment Canada, Release IC-2 (9 August 1985). In its press release of 17 June 1985, Alexander & Alexander Services Inc. stated that its application for approval of the transaction was filed on 1 February 1985.

¹¹*Issues on United States-Canadian Economic Relations*, *supra*, note 7 (Statement of E.B. Johnston Jr, Dep. Asst Sec., Economic and Business Affairs, Dept of State) 26 at 37.

- (i) very large transactions;
- (ii) acquisitions that might have a strategic effect on the strength and international competitiveness of Canadian companies;
- (iii) acquisitions that will cause a reduction in employment in Canada;
- (iv) transactions which, because of highly visible economic consequences or other reasons, will attract adverse public comment and give rise to political concerns and anxieties.

Of course the question in such transactions is what the investor can do to bring about a favourable decision on its investment. Here it is very likely that it will be necessary to resort to giving undertakings to the government relating to the manner in which business will be carried on and/or owned. More is said on this subject below.

4. *Lack of Transparency*

The *FIRA* review procedure was frequently criticized for lacking explicitness and openness in its decision-making process.¹² This criticism would seem to be conceptually allied with the criticism discussed above concerning the vagueness of the standard for decision. Under *FIRA*, the investor typically made its submissions to Agency officials and depended on them for an indication as to how well the file was progressing in the judgment of the Minister and the Cabinet. It was unusual for the investor to meet with the Minister and, as far as I know, no investor ever met with the Cabinet or a Cabinet committee as such. It was my impression that the Agency under *FIRA* endeavoured to ensure that the investor had a good understanding of the strengths and weaknesses of the file as they were seen by the Agency and I believe this continues to be the practice. However, it was not and is not the practice of the Agency to disclose to the investor the text of any written memorandum going forward to the Minister with reference to the merits of the application and it may well be that there are matters that the Agency feels, for administrative reasons, it cannot disclose to the investor. Now that the administration of the legislation is in the hands of a single minister rather than the Cabinet, there is a better prospect of communicating, where necessary, with the deciding authority. Indeed, Mr Stevens has met with representatives of investors in various cases and has in fact directly engaged in negotiating with investors undertakings that have been considered critical to the favourable decision in those cases. For the reasons mentioned earlier in connection with the demands upon the Minister's time, one would not expect this type of direct communication with the Minister to occur very frequently.

¹²*Ibid.* at 38; see also G. Howarth, Letter to the Editor, "FIRA's Operations Chill Investors, U.S. Envoy Says" *The [Toronto] Globe and Mail* (8 September 1982) 7.

5. *Undertakings*

FIRA, like the new *Act*, contained provisions enabling foreign investors to give undertakings relating to the future ownership and performance of the acquired business and authorizing the deciding authority to take such undertakings into account in reaching a decision.¹³ One American criticism of this practice was as follows:

As a condition to the new foreign investment, *FIRA* signs legally enforceable agreements with foreign investors specifying when firms must buy Canadian goods in violation of the provisions of *GATT* *FIRA* may also require firms to export a specific share of their Canadian production which distorts trade flows. Foreign firms may also be prevented from distributing their products in Canada which can seriously restrict trade.

The United States is seeking here a complete elimination of these requirements.¹⁴

Following these and other criticisms, the Agency's practice in respect of undertakings was altered to focus exclusively on matters that were considered to be "key" to the approval, and to ignore for the most part, possible undertakings on non-essential matters. Now, with the advent of the new *Act* it appears that the role of undertakings is to be diminished further. According to a report in *The Financial Post*:

Industry Minister Sinclair Stevens is getting ready to announce a further softening of the already much diminished foreign investment review process. In particular, Investment Canada's controversial practice of negotiating legally binding "Canada benefits" conditions with foreign investors on certain take-overs is to be substantially curtailed.

(These undertakings, rarely appreciated by foreign businesspeople, are a left-over from the *Fira* days. Mostly, they're promises to pursue corporate policies that will benefit the Canadian economy — for example, to continue local sourcing, maintain the existing level of Canadian employment, give Canadian operations a world product mandate, and the like — in return for government approval of the investment.)¹⁵

The practice of the Agency seems to be consistent with this report. In discussions and representations relating to proposed acquisitions, Agency

¹³*FIRA*, *supra*, note 2, ss 9 and 21; *Investment Canada Act*, *supra*, note 2, ss 19(c) and 21.

¹⁴*Issues on United States-Canadian Economic Relations*, *supra*, note 7 (Statement of D.R. Macdonald, Dep. U.S. Trade Rep.) 2 at 4. In January 1982, the United States requested consultations with Canada regarding *FIRA* under *GATT* art. 22. In March 1982 the United States presented a formal request for the creation of a panel under *GATT* art. 23 to examine *FIRA* and to rule on its compliance with *GATT* requirements: see S. Clarkson, *Canada and the Reagan Challenge: Crisis in the Canadian-American Relationship* (Toronto: James Lorimer, 1982) at 47.

¹⁵G. Gherson, "Investment Door Opens" *The Financial Post* (24 August 1985) 1 at 2.

officials will frequently ask for clarification or elaboration of items in the statement of plans contained in the application. Usually, where they are satisfied that the additional comments are consistent with the original application and do not significantly alter the information in it, the enquiry will stop at that point. If it is felt that the further comments add significantly to the business plans, the investor may be invited to submit the additional information as a supplement to the plans. While this seems to be the practice for the most part, this should not be taken as an indication that undertakings are never used. On the contrary, undertakings are still used in significant cases. In particular, based only on personal experience, my judgment is that where a case is considered important enough to warrant the personal involvement of the Minister in negotiating some conditions for the approval, it is ordinarily to be expected that those conditions will be set down in writing in the form of undertakings. On what sorts of matters might a foreign investor expect to be invited to give undertakings under the new *Act*? It is, of course, too early to tell, but experience to date would suggest that the most important matters will be the maintenance of Canadian operations and activities — with related undertakings as to the continuation of employment in Canada, management of the business in Canada and the head office of the business in Canada — and the maintenance or enhancement of the degree of Canadian ownership in the business.

I think most observers of the present government, when it was in its formative stages in opposition, would not have expected it to interest itself in undertakings as to the degree of Canadian ownership; that was usually thought to be a shibboleth unique to the Liberal government and its nationalist following. It appears to me that the present government is not likely to seek such undertakings for traditionally nationalist motives. Instead, the government will be prepared to resort to such undertakings as an additional means of ensuring continuing business operations in Canada, on the assumption that operations will to some extent follow ownership, and also to ward off adverse nationalist comment on its foreign investment decisions. In any event, my conclusion so far is that this government is not prepared to forego ownership commitments entirely.

A question of a different type about undertakings concerns undertakings that were given under *FIRA* in circumstances where no undertakings would be required now under the new *Act* if the investment were made today. For example, a company wishing to establish an automobile distributorship in Canada would not need any Investment Canada approval to do so but might well have required a *FIRA* approval before last July. If the investor came in in the earlier period, when *FIRA* was in force and gave undertakings, it might well feel that it is potentially prejudiced in its competitive efforts against new competitors who now enter the market without any similar

need to provide undertakings. It seems likely that, over time, investors who feel that they are suffering prejudice in the circumstances will seek some relief from the government. I would not be surprised if the government decided to give favourable treatment to those requests in due course but I would not look for it to happen too soon.

6. *Oil and Gas Industry*

The Liberal government of Prime Minister Pierre Trudeau introduced, in 1980, the National Energy Program to enhance the availability to Canadians of the energy resources in Canada. Included in the objectives of the Program was the enhancement of Canadian ownership in the oil and gas industry; specifically, the stated objective was to attain fifty per cent Canadian ownership in the industry by 1990.¹⁶ Another priority objective of the Program was to enhance the amount and timing of oil and gas exploration and development in Canada, including in particular the frontier and off-shore areas under the jurisdiction of the Federal government. It was made clear that *FIRA* would have a role to play in fostering the achievement of these objectives.¹⁷ Accordingly, it came as no surprise to practitioners that it was ordinarily very difficult to obtain approval for a significant foreign investment in the oil and gas industry unless it was accompanied by undertakings of two types:

(i) commitments to enhance the Canadian ownership in the acquired business in a manner that would contribute to the stated government objective of fifty per cent Canadian ownership within the industry; and

(ii) major commitments to fund new exploration and development activity in Canada.

While a number of acquisitions in the oil and gas industry were allowed, they almost invariably were accompanied by press releases indicating commitments along these lines. Perhaps the most spectacular of these was the allowance of the Getty Oil indirect acquisition of Canadian Reserve in 1982. At that time, Getty agreed to sell fifty per cent of Canadian Reserve to Canadians over five years and to spend hundreds of millions of dollars on petroleum exploration and development and on research projects over ten years.¹⁸

¹⁶Canada, *The National Energy Program* (Ottawa: Energy, Mines & Resources Canada, 1980) was announced as part of the Federal budget in November 1980 and deals with issues of pricing, ownership, security and supply, and taxation in the oil and gas industry.

¹⁷*Ibid.* at 50.

¹⁸G. Gherson, "Foreign Investment Curbs Still Have Teeth" *The Financial Post* (16 February 1985) 4.

Against this background and in the light of some pre-election announcements from Progressive Conservative party spokesmen that their party would treat oil and gas as a sensitive area requiring special standards of Canadian ownership, interested observers watched closely to see how the new government would handle the major oil and gas transactions lining up on the horizon. All four cases that have materialized — Voyager Petroleum, Texaco, Chevron/Gulf and Mobil/Canadian Superior — have been approved, but in all cases the approvals were accompanied by significant commitments relating to ownership and performance. Indeed, as is well known, in the case of the Chevron acquisition of Gulf the ultimate result has been the disposition of Gulf Canada to Olympia and York Resources Inc. of Toronto with associated transactions with Petro-Canada and others relating to component parts of the Gulf assets.

It is instructive to consider the commitments that were given in each of the decided cases, according to government press releases. In summary, they are as follows:

- (i) Voyager — to sell thirty-five per cent of the equity to Canadians within five years and to offer an additional thirty-five to fifty per cent of the exploratory property for joint development with Canadians and to spend \$100 million on exploration and development;
- (ii) Texaco — to provide Canadians a full and fair opportunity to acquire control of the Getty Mining and Minerals Companies which Texaco was seeking to sell; to offer to sell in Canada within approximately three years an additional ten per cent, approximately, of common shares of Texaco Canada; and to make capital and exploration expenditures of not less than \$1.7 billion in Canada by the end of 1988;
- (iii) Chevron — to offer its shareholding in Gulf Canada Ltd for sale to Canadian-controlled purchasers for a fair and reasonable price, and failing any such sale, to ensure that Canadians had the opportunity to participate in the ownership of Chevron's combined business in Canada, including Gulf Canada, to an extent greater by at least twenty per cent by the end of 1989, along with other commitments to maintain Canadian ownership in the Hibernia interests or to maintain future exploration and development efforts in Canada at planned levels indicated in the range of \$800 million for 1985;
- (iv) Mobil — to increase both Canadian ownership and exploration expenditures, including giving Canadians the opportunity to purchase upstream

oil and gas properties valued at \$350 million within the next four years and reinvesting \$1.4 billion in Canada during that period.¹⁹

One assessment in the press of these cases is that they indicate that the demands being placed by the present government on foreign investors in major oil and gas transactions are more relaxed than under the Liberals.²⁰ This may well be so. For example, it would appear that while the government was concerned to ensure that major commitments on Canadian ownership were given, they apparently did not feel bound to ensure that those commitments amounted to fifty per cent ownership of each company by 1990. Industry participants will have to decide for themselves whether the apparent degree of relaxation and flexibility is in fact significant. It certainly appears to a non-industry observer that the commitments could be fairly characterized as major from any relevant perspective.

It is equally clear that the government places great importance on the end result of these transactions. In a release from Investment Canada on 2 August 1985, Mr Stevens is reported to have said: "By this purchase of Chevron's controlling interest in Gulf Canada, some \$5.6 billion in assets become Canadian-controlled. This is the largest instance of Canadianization in the history of the Canadian oil and gas industry. An equally important fact is that this Canadianization has been achieved through the private sector."²¹

7. *Cultural Industries*

As mentioned earlier, the new *Act* provides for the review of acquisitions falling below the statutory thresholds and of the establishment of new businesses of a type "related to Canada's cultural heritage or national identity" where the Cabinet issues an order for the review of the investment. Potentially, therefore, any "culturally sensitive" investment, whether by way of acquisition or by way of establishment of a new business, is subject to review. This gives critical importance to the definition attributed to the term "Canada's cultural heritage or national identity".²² The relevant regulation identifies the following four types of business as being related to Canada's heritage or national identity:

¹⁹With respect to Voyager, see *ibid.*; see also R. McQueen, "Canada Warms Up to U.S. Business" *Fortune* (4 March 1985) 114 at 115-16; A. McCallum, "FIRA Denies Oil Deal is Major Shift" *The [Toronto] Globe and Mail* (13 October 1984) B12. With respect to Texaco and Chevron, see *ibid.*; see also Foreign Investment Review Agency, Release, "Government Allows Acquisition by Texaco" (7 February 1985); and Foreign Investment Review Agency, Release, "Government Allows Acquisition by Chevron Corporation" (7 February 1985). With respect to Mobil, see Investment Canada, Release (6 December 1985).

²⁰See *supra*, note 18.

²¹Investment Canada, Release, "Gulf Canada Canadianized" (2 August 1985).

²²See *Investment Canada Act*, *supra*, note 2, s. 15(a).

1. Publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form
2. Production, distribution, sale or exhibition of film or video products
3. Production, distribution, sale or exhibition of audio or video music recordings
4. Publication, distribution or sale of music in print or machine readable form.²³

Observers of Canada's foreign investment regulation did not expect this area of cultural industries to be a quiet corner of the legislation, and it has not been. In December 1984, Gulf & Western Industries Inc. of New York announced its indirect acquisition of Prentice-Hall Canada Ltd of Toronto, a transaction that was apparently reviewable under *FIRA* and was continued under the new *Act* by reason of a Cabinet order under section 15 of the new *Act*. Subsequently, at about the time the new *Act* came into force, W.H. Smith and Sons (Holdings) PLC of England announced its proposed takeover of Classic Book Shops (International) Ltd of Toronto, a transaction which was also subject to Investment Canada approval. The Cabinet also directed the review under the new *Act* of three other publishing/media transactions, one of which was subsequently approved on 12 July 1985. The W.H. Smith - Classic Book Shops transaction was approved on 26 September 1985, and the Gulf & Western - Prentice-Hall transaction was approved on 12 March 1986.²⁴

On 6 July 1985 Mr Marcel Masse, the Communications Minister, announced the Government of Canada's policy on foreign investment in the Canadian book publishing and distribution industry.

The Government believes that it is essential that there be a strong book publishing and distribution industry that is owned and controlled by Canadians, one able to perform effectively its important role in defining Canada's social and cultural identity ...²⁵

Mr Masse said that the government will, in accordance with the provisions of the *Investment Canada Act*, review all proposed foreign investment, both direct and indirect, in book publishing.

²³*Investment Canada Regulations*, SOR/85-611, s. 8, Schedule IV.

²⁴Report Bulletin No. B15 (July 1985) in P.R. Hayden, J.H. Burns & G.W. Kaufman, *Foreign Investment in Canada: A Guide to the Law*, vol. 3 (Scarborough, Ont.: Prentice-Hall, 1974) at B15-1-B15-3 [hereinafter *Foreign Investment in Canada*]. See also Investment Canada, Release (26 September 1985) and Investment Canada, Release (16 March 1986).

²⁵Department of Communications, Release (6 July 1985). According to the subsequent Investment Canada announcement of the approval of the Gulf & Western acquisition of Prentice-Hall, the transaction was assessed against the policies in place at the time of the transaction, which was December 1984, and not under the new policy. The announcement stressed that the new policy would apply to investments concluded after 6 July 1985: Investment Canada, Release, "Government Reaches Agreement with Gulf & Western" (12 March 1986) at 2.

Concerning direct investment, the Minister stated:

The government will look with favour on proposals to establish new businesses or to acquire directly existing businesses, whether Canadian or foreign controlled, provided the investment is through a joint venture with Canadian control. For direct acquisitions of foreign-controlled business, allowances will be possible if the divestiture of control to Canadians occurs within a reasonable period (of two years) at a fair market price.²⁶

The Minister stated that the government will review indirect acquisitions case by case. It will generally allow such acquisitions provided, first, that the acquisition would not significantly lessen effective competition by Canadians in any segment of the book market and, second, that the applicant undertakes to divest control of the business to Canadians at a fair market price within two years.

The Minister also said:

This policy confirms the government's commitment, as enunciated in the Investment Canada Act, to maintaining Canada's cultural sovereignty and supporting the economic viability of the nation's crucially important cultural industries In particular, the government recognizes that the Canadian publishing industry must have opportunities to grow within its own domestic market and that foreign investment should not be allowed to jeopardize such development.²⁷

8. *The Trade Agenda*

Canada's foreign investment review practices have bumped up against its international trade policies and treaty obligations in the past. With the increasing attention being paid to world trade questions generally, and the question of new bilateral trade negotiations with the United States in particular, the interaction of foreign investment review policy with trade policy may become a more urgent matter in the foreseeable future.

In the only challenge to *FIRA* under *GATT* to date, the *GATT* panel ruled that the Canadian government practice of favouring "buy Canadian" undertakings from foreign investors breached the *GATT* provision which requires *GATT* members to offer foreign traders "national treatment in their domestic markets".²⁸ The implications of this development were by no means clear. It seemed possible that Canada might well be able to bring itself into compliance with the ruling by substituting for the typical undertaking a new form of undertaking to the effect that the investor would ensure that Canadian suppliers have an opportunity to bid and that all competitive

²⁶Department of Communications, *ibid.*

²⁷*Ibid.*

²⁸See E.J. Arnett & E.P. Mendes, "Restrictive Trade Policies Could Backfire" *The Financial Post* (23 July 1983) 9.

bids would be given equal consideration.²⁹ There was one feature of the panel decision which was favourable to the Canadian government position: the panel did not find any contravention in the *FIRA* practice of receiving commitments from foreign investors that they would increase their exports from their Canadian operations. This might have strengthened *FIRA* efforts to encourage "world product mandate" undertakings in appropriate cases.

This decision does not necessarily exhaust the range of complaints that might be made against Canada's foreign review legislation and practice under the terms of the *GATT*. The question has been raised, and may be raised again, "whether undertakings, exacted under pressure, ... after a major investment has been made, to achieve percentage levels in repair, maintenance and Canadian value added or to use a specific ... system are not in effect more demanding than higher tariff levels or as demanding as quantitative restrictions, both of which are prescribed by *GATT*."³⁰

This type of consideration may well give rise to heightened concerns if Canada and the United States move, as many expect them to, into bilateral discussions to explore the feasibility of a comprehensive trade agreement. If the United States government continues to perceive Canada's foreign investment policy, even at its present relatively relaxed level, as a type of anti-free-trade posture, the Canadian government might well come under pressure for further relaxation of the review process and perhaps its entire elimination.³¹ Such a development would not be beyond the realm of probability. While official American government statements regarding Canadian foreign investment review law have generally taken care to state that there is no dispute as to the legitimacy of the legislation as such, American criticism of the legislation always seems to have the potential to move in that direction. Such a move would be consistent with reflections such as those contained in the statement of C.F. Bergsten to the U.S. Senate Sub-Committee on International Economic Policy in July 1981, in which he suggested "the possibility of a new strategy for U.S. international investment policy: a major multilateral effort to develop ... a 'GATT for investment'"³²

²⁹PR. Hayden, "Further Musings on the *GATT* Ruling" (New Ideas) in *Foreign Investment in Canada*, *supra*, note 24, 2135.

³⁰D.S. Macdonald, "Canadian Industrial Policy Objectives and Article III of *GATT*: National Ambitions and International Obligations" (1982) 6 *Can. Bus. L.J.* 385 at 396 and 404-5.

³¹J.M. Spence, "FIRA: A Decade of Evolution" in J.M. Spence & W.P. Rosenfeld, eds, *Foreign Investment Review Law in Canada* (Toronto: Butterworths, 1984) 315 at 336.

³²*U.S. Policy Toward International Investment: Hearings Before the Subcomm. on International Economic Policy of the U.S. Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. (30 July 1981) (Statement of C.F. Bergsten, Senior Associate Carnegie Endowment for International Peace) 1 at 6.

9. *The Positive Mandate of the Agency*

In any discussion of the potential complications facing the administration of the new *Act*, it is important not to lose sight of the fact that the government has given the new Agency a specific positive mandate to foster new investment from foreign sources.³³ While the concept of seeking out attractive foreign investment is itself not new, there are indications that the government proposes to carry out a coordinated program with this objective. A recent report mentioned a program of ministerial visits, the appointment of special investment counsellors in key foreign diplomatic posts, a stepped-up advertising campaign and the launching of government-sponsored investment seminars for prospective investors. Within Investment Canada itself a new investment development division has been formed and is reportedly ready to start.³⁴ There is no question that a positive program of this type can be of assistance. It is reported that already, "interested foreign investors are coming to Investment Canada for assistance in locating business opportunities or ironing out regulatory red tape."³⁵ One area in particular where the Agency may well be of assistance is in negotiating favourable rulings or other determinations by other government departments, such as tax rulings from the Department of National Revenue. The report mentioned earlier comments that the Agency will be "monitoring" tax rates, government regulations and even broader issues such as labour costs, and making comparisons with other countries)."³⁶ Early, and potentially dramatic, evidence of the prospective success of this range of measures may be found in recent reports about the results of Mr Stevens' discussions in the Pacific Rim and Japan. Proposals for new foreign investment in major automotive plants in Canada are under way with Honda, Hyundai, Toyota and Suzuki. At the time of the preparation of this paper, announcements about some of these projects had been made and other announcements may be imminent.³⁷ Positive results in these discussions are obviously important in themselves and could also have significant influence on other prospective foreign investors.

³³For a discussion of earlier proposals for a positive mandate and some related considerations, see Spence, *supra*, note 31 at 340-41.

³⁴See Gherson, *supra*, note 15 at 2.

³⁵*Ibid.*

³⁶*Ibid.*

³⁷See J. Daw, "Canada May Capture More Auto Plants" *The Toronto Star* (3 September 1985) D1; T. Walkom, "Stevens Plans to Not Intervene in Toyota's Choice of Location" *The [Toronto] Globe and Mail* (4 September 1985) B2; R. English, "Hyundai's Canadian Plant May Spur Others" *The Financial Post* (7 September 1985) 9.

V. Summary

Whether the government succeeds with the new approach to foreign investment regulation in Canada depends on a number of possible alternative developments and the order in which they occur. If the government succeeds in arranging new beneficial investment of the type now being discussed in connection with new automotive plants, it is fair to expect that that will win good press in Canada and also influence foreign observers. On the other hand, if new investment develops only very slowly and in the meantime the government is forced to take some hard decisions on, for example, the cultural cases, there will be a risk of displeasing significant constituencies either in Canada or abroad. If, in the meantime, some of the existing foreign investment in Canada folds up with consequent loss of employment in Canada this will be bad news domestically and may adversely affect the government's posture on foreign investment. Finally, if Canada-United States bilateral trade negotiations are initiated and these negotiations turn the spotlight on Canada's foreign investment policy in a critical fashion, this could lead to a degree of adverse reaction in Canada detrimental to the policies themselves and also to the trade talks. It seems to me that it would be very difficult in the present climate for the Canadian government to tighten up its foreign investment review controls but it would probably be equally difficult to loosen those controls to the point of effectively eliminating them.³⁸

³⁸ The question of whether further innovations in Canada's foreign investment review legislation are needed was addressed in the recent *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Supply & Services Canada, 1985) at 430:

The review of foreign investment proposals should be conducted by a quasi-judicial tribunal to ensure full public disclosure and political accountability. Fast-track procedures and practices for the handling of commercial confidences would need to be developed. Commissioners believe that new foreign investments need no longer be reviewed; the tribunal should review acquisitions only. The threshold for review should be raised from \$5 million in gross assets to at least \$50 million in order to focus resources on the larger and more critical take-overs. The review process should emphasize the competitive and technological conditions surrounding the proposed foreign take-over. The government should clarify the standards governing the post-entry behaviour of foreign investors by promulgating a general code of conduct applicable to all major firms, domestic and foreign, operating in Canada. To promote compliance with the code of conduct and to improve our understanding of the consequences of foreign control, the government should legislate an annual reporting requirement for all major firms or for corporate groups operating in Canada with assets in excess of \$50 million. Firms should be required to disclose specified types of information relevant to their observance of these guidelines. Canadian directors should be required to file an annual statement detailing their firms's efforts to achieve the objectives of enterprise performance set out in the proposed code of conduct.