Canada and the Challenge of Foreign Investment: The First Decade of Foreign Investment Review

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I. Background and Design

The enactment of the Foreign Investment Review Act did not halt the evolution of foreign investment policy, nor did the creation of the Foreign Investment Review Agency (FIRA) end the foreign investment problem. For many, the agency became part of the problem. Now, a decade since its inception, FIRA operates in one of the few areas of government endeavour that has no statutorily developed foreign investment policy. The effectiveness of the agency as an articulator and implementor of foreign investment policy requires evaluation. This paper will review the Canadian government’s response to the foreign investment challenge — the development of legislation for the regulation and control of foreign investment. It will explore how the structure of the agency, which puts the task of decision-making in the hands of the political executive, and its failure to develop and publish policy guidelines provide an irritant to relations both between Canada and the United States and between government and business.¹ The period of divergent radicalism following the Canadian and American elections of 1980 set the stage for the reforms now underway at the agency.

(a) Setting the Stage

The opening years of this decade saw Canada and its dominant

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1. The Hon. Mark MacGuigan, speaking to the Los Angeles World Affairs Council in Los Angeles on January 29, 1982, as Canada’s External Affairs Minister, described the importance of the partnership as follows: “Canada is one of the world’s greatest trading nations. We export over a quarter of our GNP, compared to the United States which exports about 8 percent. Canada and the United States have the largest bilateral trading relationship in the world. Your trade with us is almost as large as your trade with the entire European Community, almost twice your trade with Japan... You have approximately $70 billion invested in Canada and we have about $13 billion invested in your country. I recite all this arithmetic simply to underline the importance of Canada-U.S. relations. Clearly we have a great deal at stake.”
partner in trade and investment, the United States, moving on a collision course. A newly elected Trudeau government, committed to a more aggressive Canadian ownership stance with a strengthened Foreign Investment Review Agency and a generally greater involvement in the economy, came to power in 1980. In the United States, the Reagan administration, which came to power in 1981, was committed to reducing government involvement in the economy, eliminating impediments to the free flow of goods and investment, and, in general, the defence of the United States's economic interests. The institutional dynamics of each nation responded to their different priorities. The energy crisis of the late seventies produced windfall revenues for the producing provinces and for the largely American-owned oil and gas industry. Responding to its own revenue needs, the Canadian federal government saw the oil and gas industry as a major new source of revenue with which it could control its growing deficit. The merchandise trade balance between the two nations moved from a surplus in 1975, which favoured the United States, to a major deficit in 1982, amounting to over $9 billion (U.S.).\(^2\) In the United States, the U.S. Trade Agreements Act, implementing the Tokoyo Round of the General Agreement on Tariffs and Trade (GATT) tariff reductions, had prepared the new administration to react with a greater capacity. The Office of U.S. Trade Representative had been created to coordinate trade policy, a Cabinet-level Trade Policy Committee had been expanded to mirror the responsibilities of the Trade Representative, and, in addition, the Trade Representative was given a special mandate to study moves to liberalize trade with the rest of North America. The United States had thus acquired the legal capacity, the institutional framework, and the political will with which to respond quickly and decisively to perceived threats to American interests. The new decade also saw a number of highly visible Canadian take-over bids against such major firms in the United States as St. Joe Minerals, Conoco, City Service, and Hudson Bay Oil and Gas. Such corporate initiatives were suspect in that the Canadian firms were viewed as operating from a base that was safe from take-overs.

In contrast to the early 1970s, the 1980s began as a period of net outflows from Canada of foreign direct investment, amounting to

some $4.6 billion in 1981, of which $3.6 billion went to the United States. At a time of growing Canadian corporate investment and export-penetration, American firms faced open hostility from the new Canadian government. In April 1980, the Canadian government announced amendments to the Foreign Investment Review Act which were to take the form of performance reviews of foreign-owned corporations currently operating in Canada, publication of significant take-over proposals in order to allow Canadian investors a chance to bid, and assistance to Canadian companies bidding against proposed take-overs. Later that year, Canada unveiled its National Energy Program (NEP), which was aimed at reducing the role of foreign-owned corporations in the oil and gas industry, most of which were U.S.-based. The FIRA set the allowable rate for foreign investment in the oil and gas industry, for the year ending 31 March 1981, at 53 percent for new business applications and 39 percent for take-over applications, down nearly one half from 93 and 73 percent, respectively, in 1978. The rate of take-overs allowable under FIRA fell to 18 percent in the following year. Not surprisingly, Canadian foreign investment policy became a flash point for Canada-United States relations, both bilaterally and multilaterally.

If 1980 and 1981 set the stage for a major reconsideration of the role of FIRA as the primary vehicle for foreign investment policy, 1982 marked a climax in such discussions. On 5 January 1982, the United States initiated an action under the GATT, alleging that

4. Grey, in Trade Policy in the 1980's: An Agenda for Action (Montreal: C. D. Howe Institute, 1981) at 71, stated that "the N.E.P. tends to merge with U.S. concern about the FIRA program. . . It is likely the United States will be increasingly vigilant about the determination of "significant benefit to Canada". It will . . . be concerned that FIRA may negotiate undertakings requiring minimum levels of exports and thus improve export performance or may insist on the application of domestic content preferences in company purchasing policies."
5. Such an approval rate, expressed as a percentage of "resolved" cases, can be criticized as overstating the actual survival rate, since it fails to consider the firms who withdraw from the review process prior to "certification as reviewable". The review agency considers a case "resolved" when the application is completed. In the course of FIRA requests for information to clarify investment intentions, the firm may gain an appreciation of its likelihood of success and withdraw from the review process.

It is probable that the 18-percent approval rate for the oil and gas industry might decline to near zero if two other factors were considered. First, the 18 percent
FIRA obliged nonresident investors to undertake certain trade commitments, the effect of which was to distort the flow of international trade. Such undertakings, it was alleged, were in conflict with Canadian obligations under the GATT. By mid-year, Canadian business leaders had become aware both that the recession was approaching the levels of the 1930s and that FIRA's new, tougher approach may have contributed to the economic downturn.

The respected Burns Fry "Economic Commentary" for 6 August 1982 alleged that "Canada's experiment with economic nationalism [was] now costing us about $38 billion of lost output a year along with the lost jobs and lost profits." On 22 October, Burns Fry again attacked FIRA, saying: "The repeal of the Foreign Investment Review Act" was "desirable not only to stop discouraging the foreign investment that will create jobs... but to stop the substantial drain of income... The negative impact appears to us to be both sizeable and clear." In August of 1982, the provincial first ministers called for the abolition of FIRA as part of their Economic Recovery proposal. By the fall of 1982, FIRA was to have both a new minister and a new commissioner.

(b) Policy Development

Since the 1960s, Canadian legislative schemes and policy regarding the regulation and control of foreign investment have gone through at least five successive stages.6 The first stage was characterized by a series of amendments, designed to generate a greater degree of Canadian ownership, particularly of voting shares. Many of the amendments were made to enactments regulating so-called key

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6. Donaldson and Jackson, The Foreign Investment Review Act: An Analysis of the Legislation (1975), Can. Bar Rev. 175, and Donaldson, Foreign Investment Review and Canadianization [1982] Special Lectures LSUC 462. Others would begin such a study of "dirigiste" policies in response to American investment with the building of the C.P.R. and what Aitken has viewed as the defensive nature of government intervention in Canada: "It has been part of a general strategy of continuing the expansionism of the stronger and more aggressive economy of the
sectors of the Canadian economy, for example, the Bank Act,\(^7\) the Canadian and British Insurance Companies Act,\(^8\) the Loans Companies Act,\(^9\) the Trust Companies Act,\(^10\) and the Investment Companies Act.\(^11\) Regulations restricting mining\(^12\) and oil and gas leases\(^13\) on crown lands and mineral exploration assistance grants were also amended.\(^14\) These amendments generally required a base level of Canadian directors, coupled with Canadian ownership of corporations in key-sector industries.\(^15\) For example, the Broadcasting Act\(^16\) identified communication and culture as a key-sector industry. Pursuant to the act, the Governor-in-Council issued directives to the Canadian Radio-Television and Telecommunications Commission (CRTC) prohibiting the granting of broadcasting licences to persons who were not Canadian citizens or "eligible Canadian corporations". In addition, the withholding tax levied through the Income Tax Act on payments made by Canadian corporations to nonresidents was reduced where 25 percent of the board of directors was Canadian and where 25 percent or more of the voting shares was owned by resident Canadians.\(^17\) For "Canadian controlled private corporations", the act was amended to provide for a tax rate of about one half the normal rate.\(^18\)

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United States and preserving a distinct political sovereignty... each phase of expansion in Canada has been a tactical move designed to forestall, counteract, or restrain the northward extension of American economic and political influence. Primary responsibility for maintaining and strengthening this policy of defensive expansionism has fallen on the state." H.G.J. Aitken, "Defensive Expansion: The State and Economic Growth in Canada", in W.T. Easterbrook and M.H. Watkins, eds., Approaches to Canadian Economic History (Toronto: McClelland & Stewart, 1961) at 221.

7. S.C. 1966-67, c. 87, subsecs. 10(4), 18(3), 20(2) and ss. 52-56.
8. S.C. 1957-58, c. 11, s. 3 and S.C. 1964-65, c. 40, s. 3.
13. Canada Oil and Gas Regulations, SOR/60-182.
15. These base levels normally required 75 percent of the directors to be resident Canadian citizens and individual nonresident shareholders to hold no more than 10 percent of the outstanding voting shares.
Throughout this period of amendments to key sector regulatory legislation and to certain legislation of a general application, legislators and policy-makers often suffered from a lack of information. In view of this problem, the Corporations and Labour Unions Returns Act was enacted in 1962 to aid in the determination of the extent and nature of foreign ownership in Canada.19

The second stage of policy development was characterized by ad hoc executive-level intervention to stop proposed transactions.20 In 1971, the government intervened to prevent the sale of control of Denison Mines Limited to foreign interests and, in 1972, to prevent the proposed acquisition of the Home Oil Company Limited.21 Such intervention made obvious the need for legislation of general application, as it was felt that such "ad hoc intervention had a detrimental effect on investment certainty and predictability", for workable guidelines were needed to provide "an environment of certainty and continuity in which commercial transactions could flourish."22

The third stage of development was characterized by searches for an appropriate instrument to respond to the effect of foreign investment and ownership on Canadian industry, namely, the attendant truncation and lack of technological innovation.23

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19. S.C. 1962, c. 26. This enactment of the Diefenbaker government was, in large part, the result of the Royal Commission on Canada's Economic Prospects (the "Gordon Commission") and what was seen as the Kennedy administration's intervention into Canadian affairs through American-based corporations and unions operating in Canada. Until 1979, the Minister of Industry, Trade and Commerce, the FIRA minister, was responsible for the act. The Corporations and Labour Unions Returns Act Annual Report for 1979 (Statistics Canada, 71-202) indicates that "the purpose of the Act is to collect financial and other information on the affairs of certain corporations and labour unions carrying on activities in Canada. Such information was considered necessary to evaluate the extent and effect of non-resident ownership and control of corporations in Canada and the extent and effect of the association of Canadians with international labour unions."

20. See Frank and Gudgeon, infra, note 93 at 96-97.


22. Donaldson, supra, note 6 at 474. and Donaldson and Jackson, supra, note 6 at 176.

23. It is worthwhile to consider Britton and Gilmour, The Weakest Link: A Technological Perspective on Canadian Industrial Underdevelopment (Background Study 43, Science Council of Canada, 1978) at 97-98, which states the following:

In large part the symptoms of dependency . . . have been captured in the concept of truncation, as developed by the Gray Report. . . .

A truncated firm is one which does not carry out all functions — from the
Watkins Task Force Report on Foreign Ownership and the Structure of Canadian Industry had recommended that an agency be established to coordinate policies with respect to multinational enterprises and to exercise surveillance over the operation of foreign corporations in Canada. The agency was to take over the administration of the 1966 ‘‘Guiding Principles of Good Corporate Behavior’’ (the ‘‘Winters Guidelines’’). Watkins recommended that the government explore the option of requiring foreign investors to guarantee greater benefits to Canadian industry. The next relevant report was that of the Standing Committee on External Affairs and National Defence (the ‘‘Wahn Report’’), which recommended that a ‘‘Canadian Ownership Law’’ and a ‘‘Canadian Ownership and Control Bureau’’ exist under the direction of a minister. As well as performing the functions referred to in the Watkins Report, this agency would cooperate with other government departments and agencies to devise better methods for assuring that foreign enterprises complied with the Winters Guidelines. The third major report contributing to the development of foreign investment policy, entitled *Foreign Direct Investment in Canada*, was the result of a Cabinet-level working group headed by the Honourable Herb Gray. Known as the Gray Report, it was to provide the underlying rationale and basic framework for the Foreign Investment Review Act, introduced the year after the report was published. The report recommended that new direct investment be subject to a screening

original research required through all the aspects of marketing — necessary for developing, producing and marketing its goods. One or more of these functions are carried out by the foreign parent . . . [T]runcation may mean less production for the Canadian market, less opportunity for innovation and entrepreneurship, fewer export sales, fewer supporting services, less training of Canadian personnel in various skills . . . less spillover of economic activity and so on.

These perceptive observations from the Gray Report are central to understanding why Canadian secondary manufacturing is stunted and underdeveloped. Many of those who shrugged off the report as another piece of nationalistic rhetoric, and others who believe that foreign ownership is not a problem to Canadian industry, have not stopped to consider, or have failed to grasp, the essential structure of a truncated medium/high technology industry in Canada.

or review process having five central features: cost benefit analysis, evaluation on a case-by-case basis, a bargaining or negotiating process with foreign investors, a framework of policy guidance, and selectivity and concentration on major transactions.

The Gray Report, like the Watkins Report, saw the proposed foreign investment review process as seeking to "maximize the benefits of foreign investment and its costs of bargaining on a case-by-case basis with individual investors." The bargaining process was to be subject to certain conditions, first through articulated policy guidance and, second, through its application only to economically significant transactions. The review process would thus "be guided by criteria established by legislation" and operated within the framework of the government's industrial strategy. 26 It was held that "[r]eview should concentrate on the relatively small proportion of foreign investments which were of greatest concern to Canada at any point in time," 27 that is, on "transactions of defined significance." 28

The Gray Report inaugurated the fourth stage of regulation and control of foreign investment, which Donaldson termed "screening and review legislation of a general nature and broad application." 29

On 4 May 1972, two days after the official release of the report, the government introduced Bill C-201, the Foreign Take-Over Review Act. 30 This bill provided for a mandatory screening and review of takeovers of Canadian business by nonresidents. However, the bill died on the Order Paper with the election in the fall of 1972. 31 In January 1973, the new government introduced Bill C-132, the Foreign Investment Review Act, 32 which expanded the old bill to include the review of new direct investment in Canada, "crystallizing the government policy formed in the Gray Report." 33

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26. The Gray Report, supra, note 25 at 456, recommended that bargaining "not operate on the basis of economically unsound incrementation but in accordance with the government's industrial strategy."

27. Ibid, at 453.


31. Bill C-201 had been both approved by the House of Commons Standing Committee on Finance, Trade and Economic Affairs and considered by the Senate Standing Committee on Banking, Trade and Commerce.


33. Donaldson, supra, note 6 at 476.
The Foreign Investment Review Act was not to represent the last stage of foreign investment policy, however. Instead, the fifth, or post-FIRA, stage was to be marked by "the Canadianization of certain industry sectors and an enhancement of the economic and social benefits for Canada in other sectors." Later developments reflect major policy initiatives taken outside of the Review Act, such as the new Bank Act and the National Energy Program. The new Bank Act allows foreign banks, for the first time in Canada, to operate through representative offices and subsidiaries. It prohibits the Minister of Finance from issuing letters of patent incorporating a foreign bank subsidiary unless the minister is satisfied that the subsidiary has the potential to make a

34. Ibid, at 464.
35. Bill C-104, infra, note 37, represents an exception, and not a substantive amendment, to FIRA.
37. Department of Energy, Mines and Resources, The National Energy Program: Update 1982. At 19, the Update states that, since the beginning of the NEP, the government has sponsored 14 new bills:

<table>
<thead>
<tr>
<th>Bill</th>
<th>Title</th>
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<tr>
<td>C-75</td>
<td>An Act respecting a home insulation program for certain provinces.</td>
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<tr>
<td>C-76</td>
<td>An Act respecting a home insulation program for certain Maritime Provinces in Canada.</td>
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<tr>
<td>C-77</td>
<td>An Act respecting oil conservation and the substitution for oil of other energy sources.</td>
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<tr>
<td>C-60</td>
<td>An Act to amend the NEB Act.</td>
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<tr>
<td>C-87</td>
<td>An Act to amend the NEB Act (No. 2).</td>
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<tr>
<td>C-48</td>
<td>An Act to regulate oil and gas interests in Canada Lands and to amend the Oil and Gas Production and Conservation Act.</td>
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<tr>
<td>C-101</td>
<td>An Act to amend the Petro-Canada Act.</td>
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<td>C-102</td>
<td>An Act to amend the Department of Energy, Mines and Resources Act.</td>
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<tr>
<td>C-103</td>
<td>An Act to amend the Petroleum Administration Act and to enact provisions related thereto.</td>
</tr>
<tr>
<td>C-104</td>
<td>An Act respecting petroleum incentives and Canadian ownership and controls determination and to amend the Foreign Investment Review Act.</td>
</tr>
<tr>
<td>C-105</td>
<td>An Act to amend the Canadian Business Corporation Act.</td>
</tr>
<tr>
<td>C-107</td>
<td>An Act respecting motor vehicle fuel consumption standards.</td>
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<tr>
<td>C-108</td>
<td>An Act to amend the National Energy Board Act (No. 3).</td>
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</tbody>
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38. The new Bank Act requires at least 50 percent of the directors to be Canadian. Assets must be maintained in Canada and the overall asset limit of all foreign banks may not grow beyond 8 percent of the total assets of all Canadian banks. Since 30 July 1981, nearly 60 foreign banks have been authorized to operate in Canada.
contribution to competitive banking in Canada and that reciprocal
treatment for Canadian banks exists in the foreign bank's home
jurisdiction. None of the shares may be transferred without approval
of the minister. The jurisdiction of the Foreign Investment Review
Act in connection with new business or take-over activities of
foreign banks is excluded by subsection 307(1) of the new Bank
Act. Under subsection 307(2), the establishment by a foreign bank
of a representative office in Canada which has been registered with
the Inspector of Banks is deemed not to be the establishment of a
new business for the purpose of FIRA.

The National Energy Program, unveiled in the 1980 budget, has
Canadian ownership objectives that include not only Canadian
private ownership and control targets, but also a major government
acquisition program and strict requirements for the use of domestic
goods and services. The Canadianization objective of the energy
policy is to secure 50 percent Canadian ownership (government and
investor owned) by 1990. This emphasis "on gaining for Canadians
increased ownership and control over their own resources reflect[s]
a conviction that there are important economic benefits in
encouraging Canadians to own more of the oil and gas industry, and
to participate more actively in its management in the future."39

(c) The Scope of the Foreign Investment Review Act

The Foreign Investment Review Act provided for the establishment
of the Foreign Investment Review Agency. That agency receives
applications and does preliminary processing, acting as a secretariat
for the statutory decision-makers, namely, the minister and the
Cabinet. The FIRA minister advises Cabinet on each application,
and Cabinet, in turn, allows or disallows each reviewable
investment application and decides on the basis of a "significant
benefit test", using the five criteria found in section 2(2). The
political executive is required to allow the investment if it concludes
that, having regard to the factors enumerated in subsection 2(2),
"the investment is or is likely to be of significant benefit to
Canada." The test is political and economic, not legal, and it is the
sole test of whether a reviewable investment should be allowed or
rejected. By law, it must be applied to every case — that is, to any
"acquisition of control" of a "Canadian business enterprise" by a

“non-eligible person” of a “new business”, or the expansion of an existing business, controlled “in fact” by a “non-eligible person”, existing business, controlled “in fact” by a “non-eligible person” into an “unrelated business.” The threshold test of the need for an investment to be reviewed is whether or not the investor is a noneligible person. Such an investor must establish, to the satisfaction of Cabinet, that the proposed investment is likely to be of significant benefit to Canada under the section 2(2) criteria. The question as to the applicability of the act is essentially a legal one.

The review agency may accept commitments from the applicant in regard to its findings of significant benefit: “While . . . undertakings . . . are not mandatory, it is obvious that [they] can often help the applicant to make his proposal complete and precise, and thus allow the government to access with greater certainty the effects of the investment. Undertakings are . . . binding on the applicant if the investment is allowed, and there are provisions in the Act whereby in case of non-compliance the Minister may apply to the courts for remedial orders.” These undertakings are an indication to the observer of the particular industrial policy being pursued at that moment. Applicants often undertake to spell out in a quantitative fashion their local sourcing intentions and their plans to import components or to export and market them internationally. For example, Bally Canada Inc. announced on 3 July 1981 that the Swiss retailer and manufacturer of shoes undertook to purchase 50 percent of its requirements from Canadian manufacturers by 1985. And, on 21 September 1981, Apple Computer announced that “to perform at least 80 percent of all repairs and maintenance service for products . . . [in Canada] at the end of the first year following allowance, Canadian value added, calculated in accordance with the specified formula, will not be less than 30 percent of the cost of the goods sold in Canada.”

Every year, the Enforcement Division of the agency reviews many of the outstanding undertakings in order to monitor compliance. In 1982, the agency “monitored the implementation of plans and undertakings provided by investors in 1,198 proposals.

42. FIRA News Release, F-180, September 21, 1981.
that had been allowed..."43 Where the agency finds that the investor has been unable to comply with his undertaking, due to economic conditions, undertakings may be renegotiated under what has become known as the "frisbee provision".44 This provision states that: "In normal circumstances the inability to fulfil undertakings will lead to discussions with the Minister and perhaps to the negotiation of new undertakings... If... the failure to comply with an undertaking is clearly the result of changed market conditions — for example, the undertakings to export frisbees is followed by the collapse of the frisbee market — the person would not be held accountable."

In The Weakest Link: A Technological Perspective on Canadian Industrial Underdevelopment, the Science Council of Canada described FIRA "as a good instrument in search of the appropriate policy."45 The review agency, it said, was "put in place totally lacking in the essential guidance which only a national industrial development strategy could provide, at a time when Canada was already a 'mature' industrial country, and when foreign interests already totally dominated Canadian industry." In 1974, shortly after the establishment of FIRA, Feltham and Ravenbush concluded that its success "as a policy instrument in the context of the Canadian economy as a whole" depended on "the development of well-reasoned and well-articulated industry policies."46 In words that were to become prophetic, the Gray Report had recommended that bargaining should "not operate on the basis of economically unsound incrementalism but in accordance with the government's industrial strategy." Otherwise the review process might concern itself solely "with bargaining for more exports... procurements and... research and development without regard to their impact on efficient industrial development... To avoid such a costly approach, the review agency should be directed to follow certain

43. FIRA Annual Report (FY 1982) at 5.
44. FIRA Minister Gillespie in Committee on 5 June 1973. The first public reference to a "frisbee" was that of Marks & Spencer. The agency published the new undertakings, even though the first undertakings had never been released at the time of the initial approval. See Bryon, The Canadian Experience of Marks & Spencer (1978), Foreign Investment Review 4:4.
45. Britton and Gilmour, supra, note 23 at 185.
criteria or guidelines in considering investment proposals. Such criteria could be spelled out in legislation or in regulation." 47

II. In Search of Policy

(a) Statutory Criteria

The only guidance in the act regarding policy is found in the five criteria enumerated in section 2(2) as follows:

The effect of the acquisition or establishment on the level and nature of economic activity in Canada, including without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada; the degree and significance of participation by Canadians in the business enterprises . . . and on exports . . .; the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; The effect of the acquisition or establishment on competition within any industry . . .; and the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

Subsection 2(1) implies that the significant benefit test is to be based exclusively on these criteria, "having regard to all of the factors to be taken into account under this Act for that purpose." Grover interprets the words "having regard to" as precluding the executive from allowing considerations other than those in section 2(2) to influence its choice, thus making the criteria enumerated therein of critical importance to the applicant and the decision-maker. 48 The first FIRA Minister reported to Committee that these criteria were "exclusive" and that the review process would "be bound to the range of five factors and only those five factors." 49 In 1982, FIRA Minister Gray also agreed that "the determination of significant

48. Grover at 37 in "Foreign Investment in Canada", a paper delivered in August 1982, to a symposium in San Francisco on "New Developments in Foreign Trade and Investment", presented jointly by the International Law Institute of Georgetown University, the Law Institute of the Pacific Rim, and the Law Institute of Australia and North America.
benefit to Canada is based solely on the assessment factors that are set out in some detail in the legislation.”  

(b) Additional Criteria

“Notwithstanding the opening language in ss. 2(2) of the Act and the comments of the Minister suggesting that the enumerated factors are exclusive,” Donaldson indicates that those experienced with the review process have learned that at least fourteen other considerations, known as the New Principles of International Business Conduct, or the Gillespie Guidelines, are often taken into account. These include the geographic location of the investment; the structure of the transaction; the financial position of the Canadian business being acquired; the presence of intervenors; the elimination of Canadian ownership; under-utilization of the industry sector; the past experience, if any, of the applicant in dealing with the agency; the present attitude of the government of the day towards foreign investment; the presence of unique technology; world product mandates; the use of joint ventures; vendors’ commitments; and the industry sector under review. The Toronto Star, usually a defender of FIRA, stated on 29 July 1982 that the agency’s task “is to establish whether each . . . application meets the test of ‘significant benefit’ . . . on the basis of 10 criteria . . .” The Act provides for five criteria, the Star found ten, and Donaldson found an additional fourteen. However, the Member of Parliament, the investor’s solicitor, the editorial writer, and the foreign government can be excused if they are somewhat confused about the number of criteria used under the act. When the Gillespie Guidelines were tabled in the Commons on 18 July 1975, the minister indicated that they would “provide” an additional indication of the sort of benefits the government looks for in assessing investment proposals.” On 26 May 1981, Mr. Gray indicated before Committee that “the criteria applied by the government in administering the . . . Act are those spelled out in Section 2(2) . . . [E]ven though I think [the guidelines] require some further clarification or updating, provide a very good basis for corporations to assess the way they are conducting themselves as

50. The Hon. Herb Gray, in correspondence between himself as FIRA Minister and David Weatherhead, M.P. for Scarborough, undated (appears to have occurred summer of 1982).
51. Donaldson, supra, note 6 at 501.
good corporate citizens.'" The Gillespie Guidelines have never been updated, nor has their official position been regularized under ss. 4(2). In a brief to the minister, the Canadian Bar Association (CBA) asserted that "the legislation does not appear to permit the Review Agency to take into account the [Gillespie Guidelines] in measuring significant benefit (and indeed this is the Review Agency's position)." The 1982 budget promised a paring down of the criteria, saying: "The agency will confine its examination of undertakings to the key elements of an investment proposal."

If the political executive uses nonstatutory criteria that are compatible with the act, then it has a responsibility to enunciate them for applicants, intervenors, and general observers of the review process. These criteria might be outlined in guideline form (as is done to advantage by the CRTC), informally through interpretative notes (as is done under the Income Tax Act), or simply through reasons for decisions. Such articulation of "rules" would satisfy the need for greater certainty and transparency in the review process without limiting flexibility. As Laskin C.J.C. said in *Capital Cities Communication*, "it was eminently proper that [the CRTC] lay down guidelines . . . An overall policy is demanded in the interests of prospective licencees and the public . . . Although [such a policy] could mature as the result of a succession of applications, there is merit in having it known in advance."

(c) Absence of Publicly Articulated Guidelines under Section 4(2)

For the applicant and the Canadian vendor, profound uncertainty exists as to the rules of the game, thereby unnecessarily complicating major business decisions. The process is apt to be

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52. "s. 4(2) The Minister may issue and publish, in such manner as he deems appropriate, guidelines with respect to the application and administration of any provision of this Act or any regulation made pursuant to this Act".
53. Canadian Bar Association, "Brief to the Minister on the Foreign Investment Review Agency" (September 1981) at 49 (hereafter the "CBA's brief to the minister").
54. On 23 August 1982, Minister Gray announced that he had "authorized the Agency to issue interpretation notes covering certain provisions and expressions of a legal nature used in the Act which experience has shown to be particularly difficult to interpret". The notes issued since that time have been in regard to appealable eligibility issues — "non-eligible persons", and "Canadian business enterprise". There is no indication that notes will be issued in regard to the important significant benefit test.
55. BL D.L.R. (3d) 605 at 620.
viewed as capricious by participants, particularly by those that fail to select lawyers specializing in the process, who, in turn, may be aware of the expected undertakings and informal criteria employed at any given moment. Working Paper No. 6 of The Economic Council of Canada indicates that "for one governmental participant the negotiating process is akin to a game of water polo in a lake: the absence of specified boundaries results in a situation wherein at some point participants get tired and simply decree an outcome." FIRA Minister Gray responded to criticism of his agency's failure to issue clarifying guidelines by pointing out that the test criteria have, in fact, been clarified through several means: "First, decisions on some 4,500 investments have been reported [as either approval or disapproval] in news releases . . . and, in a substantial number of cases, the news releases outline in some detail actual undertakings given by investors . . . Second, FIRA's annual reports . . . Third, a supplement to the 1978/79 Annual Report described in considerable detail the types of benefits sought under each of the assessment factors. Fourth, a number of examples of significant benefit have been published in the Agency's journal, the Foreign Investment Review." While the FIRA Minister failed to articulate guidelines for various sectors of industry under section 4(2), other ministers were not so reticent; ministers responsible for cultural industries and energy did develop Canadian ownership strategies. Such departmental strategies for key industry sectors represent the fifth stage of foreign investment policy development. In theory, at least, these policies ought to make the Canadian ownership strategy useful in the determination of significant benefit under the act. Applicants might be expected to develop investment proposals, with undertakings reflecting the Canadian ownership strategy for that sector. To date, FIRA decisions in these sectors have almost uniformly mirrored the government's or the department's Canadian ownership strategy.

(d) Cultural Policy

The Secretary of State, who was recently joined by the Minister of Communications, has outlined the government's strategy for

57. Gray, in correspondence to Weatherhead, supra, note 50 at 2-3.
Canadian ownership of cultural industries, under which a major segment of the publishing industry would be owned by Canadians. On 7 November 1977, in an address to the Audit Bureau of Circulation in New York, Mr. Roberts alluded to a Canadian ownership policy for the publishing industry: "In publishing it is the stated objective of the Canadian government to arrive at a situation in which the majority of the Canadian publishing system is under Canadian ownership. The Foreign Investment Review Agency has taken action to insist that when there is an entry into Canada, or takeover, by companies in the communications area . . . that there be significant benefit for Canadian cultural interests." In the book publishing sector, the current Minister of Communications has indicated that his department alone has ultimate responsibility for determining the specific benefits for Canada in accordance with the Foreign Investment Review Act. Apart from the energy sector, perhaps, in "no other industry have Agency decisions so clearly crystallized a policy objective of the federal government." Under the act, Cabinet disallowed Gulf and Western's attempt to indirectly acquire Simon and Schuster (Canada) Ltd. on 7 May 1976, as well as Mattel's attempt to indirectly acquire Whitman Golden Limited on 11 April 1980, Dow Jones' attempt to indirectly acquire Irwin-Dorsey on 10 December 1976, and, on 18 January 1979, Harper and Row's attempt to indirectly acquire Lippincott on 30 July 1981. The Irwin-Dorsey and Lippincott disallowals resulted in the announced closure of the Canadian operations in the summer of 1982.

The closure of the Canadian operations and the accompanying furor in Canada marked a turning point. The Canadian media expressed outrage and, on 30 July 1982, the Globe and Mail ran an editorial, entitled "Publish and Perish", which pointed out that Lippincott had operated in Canada since 1897 and that one Canadian author of Lippincott textbooks had been published in eight languages. The editorial continued, "'few people understand what makes FIRA tick. The agency rejects applications . . . and scares other[s] . . . off. They take their jobs with them . . . FIRA, by its own yardstick, is not of significant benefit to the country. In cases like Lippincott, it is part of the problem. In the end it will have to be dismantled.'" On 5 August 1982, in another editorial, entitled "A

58. See note 61.
59. Donaldson, supra, note 6 at 504, note 135.
Distressing Neighbor”, the Globe and Mail stated that “the agency not only delays, and often prevents, foreign companies from investing . . . using yardsticks which appear arbitrary and inconsistent — but can refuse to let one foreign owner sell a firm to another foreign owner. We saw this in the [Lippincott refusal] — although there would have been no change in the percentage of foreign ownership and no new foreign investment in Canada.” And on the same day, the Halifax Chronicle-Herald asked:

How does the [review agency] arrive at its bedevilling definition of what is of significant benefit? . . . Take the case of . . . [Lippincott], FIRA’s most recent closed book. [It] operates in Canada for more than eight decades, filling a market for medical texts and providing an outlet for Canadian scientific writing. The U.S. parent is purchased by another distinguished American publishing house, but FIRA will not permit the Canadian subsidiary to be part of the transaction on the grounds the new arrangement will not provide significant benefit. . . If the Lippincott case is an example, FIRA can achieve the letter of its cultural objectives by pushing more American-controlled business south of the border . . . leaving a poorer but purer rump behind in Canada.

Shortly after Lippincott failed on its second application and announced its intention to close, Cabinet approved the take-over of Random House (Canada) by the Herald Company of Syracuse, N.Y. Herald undertook to offer employment to those about to lose their jobs as a result of the Lippincott closure. Similar approval was given on 19 November 1982 for the take-over of Whitman Golden of Cambridge, Ontario, a bid which had been rejected in 1980. FIRA had become the focus of criticism of foreign investment policy, although the review agency neither made policy nor articulated it.\(^{60}\) The focus of public attention may now be about to shift to the cultural industries minister. In May 1982, Coca-Cola acquired Columbia Picture Industries and, thus, indirectly acquired the Canadian subsidiaries. On 16 July 1982, the Department of Communications requested that the agency make a detailed review instead of the normal expedited review for small business

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60. Working Paper No. 6, supra, note 56 at 54, considers the argument that the “lightning rod” function may have been the raison d’être of the review agency. “[It could] act as a ‘lightning rod’ drawing criticism away from the real decision-makers . . . becoming itself the central reference point in debates on the policies and process for reviewing foreign investment.”
The request said that a "forced-divestiture of U.S. control in [Columbia Pictures] to Canadian interests will represent real benefits to the Canadian film industry: it will enhance the perception of the government's determination and intentions among other subsidiaries . . . it is consistent with the Department of Communications' plans regarding the film industry, it reflects the outcoming recommendations from the Cultural Policy Review.'" Criticism of this matter has been focused on the Minister of Communications, with New Democratic Party spokesmen charging that "it is a kind of manipulation of FIRA's role."  

(e) Energy Policy

The articulated Canadian ownership objectives of the National Energy Program (NEP), the federal government's energy policy, had a dramatic effect on the survival rate for applicants in the review process. The NEP did not indicate what was expected of foreign firms in the review process, but it clearly indicated a preference for Canadian ownership, and FIRA became an obvious instrument for the implementation of these ownership objectives. Three points are evident from an analysis of those applications that survive the review process. First, the survival rate for oil and gas companies is generally lower than average. Second, the rate of acquisitions allowed is significantly lower than the rate allowed for new businesses, standing in 1982 at 18 percent and 70 percent, respectively. Third, the rate of approvals fell significantly in 1981; whether measured against the previous year's rate or measured against the approval rate for all applications, it fell to 43 percent for new business applications and 39 percent for acquisitions, only 67%

61. "Fox Throws Spanner into Coca-Cola Application", in Hayden and Burns, eds., Foreign Investment in Canada (Scarborough, Ontario: Prentice-Hall, 30 September 1982) at para. 95-5 (hereafter "Hayden and Burns"). It was viewed by the department as representing "a vital opportunity for [the minister] to . . . demonstrate the firmness of his articulated intention."

62. Ibid, at para. 95-5. "The Opposition did not criticize Mr. Fox on account of his cultural policy but for using FIRA as a backdoor means to promote that policy. An N.D.P. spokesman said that if the government had a cultural policy in place already, there would be a policy, which FIRA could take into consideration in the case."

63. The category most nearly that of the oil and gas industry is that of mines, minerals, fuels and incidental services. The approval rate overstates the actual survival rate due to the tendency for applicants to drop out of the process prior to being certified as reviewable. Withdrawals, for applicants in all sectors, appear to be generally equal to or greater than withdrawals after certification.
and 53 percent of the rate for all applications, and was down from 84 percent and 68 percent, respectively, in the previous year. Informed observers, critical of the government's Canadian ownership policy for oil and gas, focused their criticism on the NEP, not solely on FIRA.

The transfer of responsibility for foreign investment policymaking did not replace the need for agency guidelines with respect to the significant benefit test criterion. However, the adoption of such a departmental Canadian ownership policy should, in fact, aid in the articulation of the policy in the form of FIRA guidelines.  

III. Failure to Survive the Review Process

The need for guidelines to give the review process greater transparency is better appreciated through a consideration of the applicants that failed to survive the review process. FIRA Commissioner Howarth has forcefully argued that "all the FIRA process does is sort out the 90 percent of foreign investment that's good for the country from the 10 percent than isn't good." The Toronto Star, in an editorial of 29 July 1982, again used these commonly accepted statistics in developing its reason for supporting the review process: "FIRA does not block foreign investment nor does it even present a major obstacle; the agency approves nearly 90 percent of the applications it receives." If 90 percent of all applications were approved, where then is the uncertainty? Are articulated guidelines likely to make more than a marginal improvement in consistency and predictability?

(a) Withdrawals

The 90-percent approval rate reflects a partial analysis of the review process' output. A different perspective emerges when all applications or inputs are considered in relation to the approvals or outputs, because an applicant may withdraw a notice at any point in the review process. A withdrawal is likely to occur where an

64. "Guidelines concerning acquisitions of interests in oil and gas rights" were issued in 1978, but concentrate, as their titles implies, on the acquisition of control.
66. Although the Review Act does not contain any specific section which provides for the withdrawal of a notice, in practice the review agency will recognize an applicant's request that its notice under s.8 will be withdrawn. There are likely to
applicant has determined, often as a result of discussion with the agency’s Assessment Branch, that an acquisition or new business application will ultimately not be allowed. In 1982, some 793 applications were received\textsuperscript{67} and some 456 applications were carried forward from previous years, for a total of 1,249 applications under consideration by the review agency. Of this total, some 229 were withdrawn before final determination by Cabinet, 81 were formally disallowed, and 513 were allowed. Thus, only 513 of those 1,249 under consideration in 1982 were allowed, or some 41 percent. A third approval rate that reflects a middle ground is available. It expresses the number of applications that are approved as a percentage of the total of “resolved” cases plus those withdrawn prior to certification — that is, the applicants leaving the review process. In 1982, the approval rate, using this third method, was some 62 percent. Each approval or survival rate reflects varying views of the agency. Perhaps the least acceptable method of computing the rate is that used by the agency itself when it claims an approval rate of 90 percent. It provides a false impression of the work of the agency and the many applications it considers, for many are considered, but relatively few are allowed.

In a properly functioning system of foreign investment review where applicants are aware of the rules of the game, the survival rate should be much higher than either 41 or 62 percent. Applicants in such a system could estimate their chances of succeeding on the basis of publicly articulated guidelines. The low survival rate, with its corresponding high rate of cases that are withdrawn or carried forward, reflects the confusion inherent in the system, which creates a test more accurately called an endurance test than a significant benefit test. An efficient review system would respond quickly, or, in economic terms, would “clear” with little carry forward from year to year, and would do so with a transparent enough mechanism that investors would be aware of the foreign ownership rules at all times.

\begin{itemize}
\item[(b)] \textit{Sensitive Industry Sectors}
\end{itemize}

The lowest survival rates appear to be concentrated in sensitive

\textsuperscript{67} This excludes those applications received by the review agency and returned as nonreviewable.
industry sectors. Such applicants face a more stringent section 2(2) significant benefit test in cases involving natural resource and energy-related industries; certain service industries, particularly consulting, importation and distribution of manufactured goods, and insurance and finance; the cultural industries, particularly book publishing; and the computer-communications-high technology industries. In the oil and gas industry, which had a take-over approval rate in 1982 of 18 percent when expressed as a percentage of resolved cases, it is difficult to identify "the reasons for allowance or disallowance." In the period of 1982 from January to June, for example, there were three decisions involving oil and gas exploration, development, and production: on March 4th and April 26th, the Cabinet rejected applications, while on June 4th it allowed an application from Pool Petrol GmbH, a wholly owned subsidiary of a German firm.

The significant benefit test, it is generally conceded, was designed to apply "mainly to manufacturing and resource industries." The minister's response to the CBA's brief acknowledged that some of the criteria "may have more relevance to proposals in certain sectors than in others." Foreign manufacturers, for example, that wish merely to establish a business here to distribute their products are in a near impossible situation, for such manufacturers are expected to undertake to manufacture some of their product here, or to enter into a partnership with Canadians, or both. Kero-Sun Inc. of the United States, which

68. Donaldson, supra, note 6 at 507, indicated that "sensitivity is usually a function of government policy." Hayden and Burns, supra, note 61 at para. 2, 0113-3, state further: "Applications . . . in critical areas are bound to run into trouble. Applications in the area of culture are critical. The policy . . . at present seems to be one of extreme vigilance regarding further control over Canadian cultural industries by foreigners. The other area in which FIRA applications may run into trouble . . . are: oil and gas, uranium, construction materials, any acquisition of a business in a Canadian industry which is already extensively controlled by foreigners; and any application which is significant in its business sector."

69. Donaldson, supra, note 6 at 494, 506-509.
70. Ibid, at 508.
71. Rejecting Internationaler Energie Fonds GmbH (Calgary) and Jorcan Exploration Ltd. (Bonnyville, Alberta).
73. Ibid, at 4.
74. Hayden and Burns, supra, note 61 at para 2,020. Critics of this approach consider it is of questionable benefit to Canada's industrial structure to have foreign
sought to establish a distributorship arrangement in Canada, was twice rejected under the act, and the Attorney General has moved in the Federal Court of Canada to nullify its distributorship arrangement.\(^7\) Investment applications to establish new businesses to import products are refused unless the owner undertakes to "eventually be engaged in the assembly and/or manufacture of the products to be initially imported."\(^8\) In the consulting and management service sectors, the number of applications that are approved equals the number that are disapproved (or resolved).\(^7\)

During 1981, new business applications involved in providing management counselling services relating to the analysis of costs associated with specific management positions, executive search services, and management consulting services provided to private and public consumers of telecommunication services were disallowed, while applications to provide management consulting services to the securities industry and engineering consulting services for petroleum projects were allowed.

Investors in sensitive industry sectors are more likely to withdraw, rather than face their application not being allowed. Only in the oil and gas industry has the government provided a coherent view of what its objectives are and what it demands of the industry. An industrial strategy which concentrated on the sensitive sectors might prove advantageous to the review process, both for the applicant and for the decision-maker. Without such direction and grounding, the review process is akin to a domed stadium with no walls — a roof floating precariously in each new breeze.

(c) Small Business Procedure

The Gray Report\(^7\) had recommended that the review process should only consider the "relatively small proportion of foreign investments which are the greatest concern to Canada at any point in

\(^{75}\) Ibid, at 94-4 and 95-8.

\(^{76}\) Donaldson, supra, note 6 at 508, further states that, "unless the applicant is prepared to commit to assemble and/or manufacture in Canada, there is a good chance that the application, all other things being equal, will be rejected."

\(^{77}\) Ibid, at 508. The FIRA Annual Report, using the roughly comparable category of community, business, and personal services, indicates that some 62 of the resolved new business applications were allowed in 1981 (or about 78 percent of the average), falling to 44 percent in 1982.

\(^{78}\) The Gray Report at 453 and 491.
time." Unfortunately, the threshold specified by ss. 5(1)(c) — namely, assets under $250,000 and revenues under $3 million — is too low to be of any such value and is not available for the acquisition by a noneligible person of an unrelated business. The system of comprehensive review threatens to overwhelm the agency, and Cabinet spends more time on the review process than on any other single agency of government.

In 1977, a small business procedure was instituted, under s. 6 of the Foreign Investment Review Regulations, whereby those investments involving less than $2 million in assets and fewer than 100 employees were eligible to use a short-form notice. Approximately 78 percent of all investment proposals fall under these small business thresholds. Fast-track procedures have also been adopted whereby such short-form applications are received by a special small business unit, which processes and sends the applications directly to the minister for referral to the Special Committee of Council (Cabinet) for Order-in-Council approval. However, falling under the threshold has not guaranteed the fast track procedures. Prior to 1980, some one third of all small business applications were bumped. Under the regulations to the act, a request for further information could cause the business to be bumped, although the investor was required to comply with the section 5 notice requirements as provided for under section 6(4). During the first two years after the Trudeau government came to office in 1980 with its more stringent significant benefit test requirements, the number of applications that were bumped is believed to have increased dramatically.

A variety of explanations has developed to account for the high number of bumped applications that fall in the small business category. The CBA’s brief to the minister, mentioned above, 79. Working Paper No. 6, supra, note 56 at 28, asserts that the "absence of a significant threshold is partly explainable by the opposition of the N.D.P. to anything less than total review... and partly... to the statutory drafting then in vogue at the Department of Justice."
80. Ibid, at 79, indicates that the time taken by Cabinet (especially the Economic Development Committee) in reviewing individual cases accounts "for the failure to produce policy guidance". Goar, in "The Watchdog Is Hurt by Barks of His Critics", supra, note 65, quotes Commissioner Howarth as stating that "this little agency accounts for one in every seven Cabinet memoranda."
81. Working Paper No. 6, supra, note 56 at 58.
82. Ibid, at 74.
83. Ibid, at 58.
asserted that, in some cases, the provinces most affected by the FIRA applications requested that "a long form of notice be filed because of the Review Agency's inability to condense the application into a short telex for transmission to the provinces." 84 Applications are bumped, it is generally agreed, when a provincial government or federal department expresses concern. Expressions of concern or requests for clarification of investment intentions pose a politically convenient method, particularly for a provincial government not wishing to be seen as causing the disapproval of a firm's application, to delay an application and ultimately cause its withdrawal. Bumpings occur most often when applications fall in the sensitive industry category. 85 Thus Donaldson counsels that: "It may be prudent" to include in the short-form notice "more detailed particulars respecting employment, exports, capital expenditures, research and development, etc. This may have the effect of eliminating the need for the Agency to require that a long form of notice be filed." 86

Whatever the shortcomings of the small business procedure, 87 it reflects a realization that such applicants are not well served by the standard review process. New small business thresholds 88 were announced by the Finance Minister in the 1982 budget, and the FIRA Minister announced the following threshold on 30 June 1982: "thresholds for review . . . will be raised from $2 million and 100 employees to $5 million and 200 employees for new investment or direct acquisition." With the higher thresholds, the minister indicated, approximately 95 percent of new business

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84. CBA brief to minister, supra, note 53 at 22.
85. CBA brief to minister, supra, note 53 at 22. Donaldson, supra, note 6 at 496, cautions that the longest way around may be the shortest way home. "It may . . . be to your advantage if you have a difficult application, one in a sensitive sector or one where you wish to submit relatively complete data and background in the form of commitments so as to assist in giving approval. Filing the long form may ultimately save time. . . ."
86. Donaldson, supra, note 6 at 497.
87. Hayden, "Providing More Certainty for Foreign Investors", in Hayden and Burns, supra, note 61 at para 2,014 (31 March 1980). Hayden stated that: "The use of the short form procedure is too restricted . . . The discretion vested in the Agency to request long form applications has in some cases been abused . . . It is too easy . . . to require a long form application when they have not been able to finish assessing a short form application within the 10-day period."
88. The new small-business thresholds and procedures, without a s. 28 foundation, sound remarkably similar to the "intermediary procedure" used prior to May 1979. See Working Paper No. 6, supra, note 56 at 76.
applications and 80 percent of direct acquisitions will be eligible for consideration under the shortened procedures, compared with 92 and 67 percent, respectively, under the 1977 thresholds.\textsuperscript{89} A second aspect of the changes to the small business procedure involves a change of ownership "where . . . a company is acquired in the course of the acquisition of its parent." About 80 percent of indirect acquisitions will qualify for the shortened procedures, compared with about 40 percent under the 1977 thresholds. These two changes will make about 85 percent of all reviewable investments eligible for consideration under the small business procedures.

Small business investors above the old threshold used the standard or long form until the s. 6 regulations were amended in June 1983 to reflect the new higher thresholds, together with a new expanded short-form notice. It was not until almost twelve months had elapsed after the new administrative procedures were put in place that regulations and notice forms regularizing the procedure were issued. Such a lapse in administrative and legal niceties is symptomatic of the Review Act’s administration. Its procedures have an “Alice in Wonderland” quality; they mean exactly what FIRA or its minister deem them to mean at any point in time.

According to the June 1982 announcement, the minister planned to maintain the right to bump applications “where the investment appear[ed] to contain important policy issues.”\textsuperscript{90} This could have largely negated the new, higher thresholds, particularly for applicants in sensitive industry sectors where bumping occurred so frequently that prudent solicitors normally advised the investor to use the long form, as it might be less time-consuming. The new regulations, gazetted on 22 June 1983, indicate a relaxation in this area, for they contain no provision equivalent to s. 6(4). The new, coloured short form is deceptively short. It no longer provides room for the response to the important significant benefit question; in the future, the question will be answered through the use of attachments. The applicant is required in his answer to “describe in some detail the plans for changes in the conduct” of the enterprise’s operations, “to attach any additional information” where it would be helpful in assessing the merits of the investment, and “to the

\textsuperscript{89} FIRA News Release F-46, “Foreign Investment Review Changes” (Ottawa: 30 June 1982) at 2-3.

\textsuperscript{90} Ibid, at 4.
fullest extent possible, [to] describe plans in terms of the assessment
criteria.’’ The apparent assumption is that careful applicants in
sensitive sectors will include information in detail equivalent to that
required in the longer form. Proper implementation and administra-
tion of these small business notice procedures and associated
changes may allow the review process to concentrate mainly on the
economically significant decisions.

Commentators have recommended that these new thresholds be
made absolute, so as to leave the agency to concentrate on the
significant decisions.91 The CBA’s brief to the minister recom-
mended an innovative pre-notification procedure, similar to that
used under the Hart-Scott-Rodino Antitrust Improvement Act of
1976 in the United States, as the preferred course in addressing the
threshold dilemma. “An appropriate pre-notification procedure
period for the purposes of the Act would be ten days. If the
applicant did not hear from the government within the stipulated
period, an application would be deemed to have been allowed.’’92
A “pre-notification would permit the elimination of much of the
detail presently required to be included in both short and long
forms . . . while retaining in the Review Agency the ability to
obtain such information where . . . required.” This, of course,
differs from the current s. 13 procedures, whereby if, after 60 days,
the minister has not notified the applicant, the Cabinet “shall be
deemed . . . to have allowed the investment.” The minister’s
response to the CBA stated that the “recommendation will be
considered when the government decides to amend the Act.’’

IV. Relations Between Canada and the United States

As the dominant foreign investor, the United States is the major
recipient of Canada’s foreign investment policy and is often its most
outspoken critic. As a “dirigiste” policy instrument, designed to
respond to the truncation and lack of technological innovation
evident in foreign-owned enterprises, FIRA accepts from the

91. Atkey’s recommendation, in “What Ottawa Needs To Do With FIRA”
(Financial Post, 24 July 1982), that the government “eliminate any review for
investments under the thresholds announced on June 28th . . . frees agency
officials to concentrate on the larger, more significant transaction” and deserves
consideration. Like Atkey, the CBA brief to the minister, supra, note 53 at 23,
argued the desirability of introducing “meaningful and sharply increased
thresholds before which a notice would not be required.”
92. CBA brief to the minister, supra, note 53 at 22-24.
American investor undertakings to engage in product development, marketing, manufacturing, and exporting from their Canadian operations. Medium-sized American corporations, traditionally more binational than multinational, are often structurally unsuited to such demands. Prior to 1980, American academic writers viewed the Review Act as a natural response to Canadian economic and political needs. "FIRA is Canada's answer to the overcrowding of the Canadian economy by foreign, primarily American, investment... American investors should not assume... that FIRA's barriers are insuperable or its controls necessarily daunting. An enlightened investor with something special to offer to the Canadian economy, guided by knowledgeable legal advice, may still expect to do business within the framework of FIRA; he may even expect, once over its hurdle, to be afforded FIRA's protection against unproductive competition or takeover."93 Thomas Enders, U.S. Ambassador to Canada, said in a 1979 speech at Stanford University that he could "understand how Canada, relying as heavily as it does on outside investment, feels the need for having such a mechanism to ensure that its interests are identified and met."94 A former Assistant Secretary of State described FIRA as "a good thing, it has clarified the rules of the game."95 Barrons, the widely respected American business magazine, observed that "one has the impression that the only U.S. business which wouldn't be cordially welcomed to Canada would be Murder Inc."96 And, when the Senate Committee was in Washington studying


94. Howarth, from a speech by the FIRA commissioner at a forum on "Canadian Regulation and Restriction of American Investment" at the Law School of Boston University on 22 January 1982.

95. Ibid.

Canada-United States relations, its members were told "that FIRA was of no more concern than a California zoning law." 97

When the Review Act’s post-1980 administration instituted a more rigorous significant benefit test, the American investor was hard hit. Certain aspects of the resultant government and business criticism of the new test reflected uniquely American concerns in regard to publicly articulated guidelines and rule-making, the political nature of both the review process and agency, the lack of exacting administrative procedures, the lack of a broadly based right of appeal, possible trade-distorting effects of performance requirements, and the extraterritorial effects of FIRA decisions.

(a) Nature of the Agency

Much American criticism of the Review Act and its administration reflects confusion over the nature of the regulator, often based on experience with American regulatory boards. 98 The review agency is not administered (as its name might imply) as a quasi-judicial and seemingly independent regulatory tribunal, comparable to the CRTC and the National Energy Board or to any number of fully developed and often highly independent American regulator agencies. Instead, it is structured and administered more as if it were a department of government under a responsible minister, somewhat akin to the Treasury Board secretariat. Secretary of Commerce Balderidge and U.S. Trade Representative Brock revealed, in a letter to FIRA Minister Gray, their lack of understanding of the review agency’s independence and structure when they requested contact with someone in the Canadian government who would “have some independence from FIRA, [who] could provide assurances of confidentiality on specific complaints from U.S. investors.” 99 FIRA Minister Gray pointed out, in response, the difficulty of isolating the agency from any such discussions, saying, “the Agency is not an independent regulatory body, but is rather an integral part of the Canadian Government and

97. Senate, Canada-United States Relations (Volume III, Canada’s Trade Relations with the United States).
98. See Janisch, The Role of the Independent Regulatory Agency in Canada (1978), 27 U.N.B.L.J. 83. At 87, Janisch states that “Canada has never adopted the American model of an independent regulatory agency, although it has . . . gone far in that direction”, and that “hesitation is of central importance for an understanding of current regulatory issues in this country.”
is fully accountable to me in regard to all matters relating to the Administration of the Act.' 100 The Brock-Baldrige letter also made reference to the desirability of ‘the establishment of clearer policy guidelines which could be made available to businessmen’ to replace the use of ‘unstated industrial policies’ in the agency’s decision-making. Minister Gray identified an aspect of the problem, pointing out that FIRA’s mandate is that of a regulator and an ‘independent’ regulatory tribunal is often better suited to developing the required publicly articulated guidelines, rule-making, and freedom from political intervention. 101 Under the existing procedures and, indeed, under the Review Act, the political executive — the Cabinet — acts as the regulator. By tradition, decision-making in Cabinet is shrouded in secrecy and its decisions are not appealable to the courts in any meaningful way. Indeed, Hughes J. of the Ontario Supreme Court recently described the review agency as ‘employing today in the ninth decade of the 20th century the same methods as the Holy Office in the 17th century.’ 102 The CBA’s brief to the minister added its criticism to what is essentially a structural problem: ‘At present, the review process is the worst of all possible systems: political control without meaningful effect and decision-making without answerability.’ 103 The Economic Council’s Working Paper No. 6 addressed this same structural issue: ‘We do not know, and . . . cannot know, if Cabinet has been consistent, prudent, honest, or indeed lawful in its implementations of the law. We do not know if Cabinet has been arbitrary or capricious in its decision-making. We do not know if Cabinet has been subject to, and a participant in, manipulation by politically effective groups or individuals. We do not know if the process is a meaningful attempt to address a perceived public problem or a ‘cosmetic symbol’, a fraud to delude the public. . . ’

100. Ibid.
102. Donaldson, supra, note 6 at 517, note 149. The case under discussion is Re Gowling and Henderson and the Queen, [1982] 67 C.C.C. (2d) 327.
103. CBA brief to the minister, supra, note 53 at 49.
(b) **Indirect Acquisitions and Extraterritoriality**

The extraterritorial application of U.S. Antitrust and Trading with the Enemy legislation helped to trigger the demand for greater control of foreign investment which culminated in the Foreign Investment Review Act.\(^{104}\) Considering Canadian sensitivities on the matter of extraterritoriality, it is ironic that Americans view the Canadian Review Act as having an extraterritorial effect and it "is precisely the kind of interference which the Canadian government would resent were a foreign government to attempt to legislate in what would be regarded as a domestic transaction in Canada."\(^{105}\)

Any transaction which transfers a business enterprise to a "non-eligible person," even though it occurs entirely within a foreign country and the transferor and transferee are foreign corporations, is, under the act, reviewable as far as the Canadian interests are affected. From the outset, the Canadian government has striven to distinguish between the extraterritorial effect and the application of the law: "It applies only to the acquisition or establishment of new businesses within Canada . . . [T]he Act can have an effect on transactions taking place outside Canada, for example, when one foreign corporation acquires control of another foreign corporation and in the process acquires control of the latter's Canadian subsidiary. But . . . there is a whole world of difference between extra-territorial application of law and extra-territorial effects of law or policy . . ."\(^{106}\)

The United States has expressed concern that, through the Review Act, "Canada extends its jurisdiction beyond its borders" when "the agency's jurisdiction has been interpreted as applying with extra-territorial effect."\(^{107}\) Ultimately, Canada may need to be more concerned with American sensibilities as to the perceived patent unfairness of FIRA actions in regard to such indirect acquisitions than with the general issue of extraterritoriality. Although the regulation of indirect acquisitions with extraterritorial effect can strain relations with both the United States and the business community, it provides a remarkably powerful tool with

\(^{104}\) O'Sullivan, *supra*, note 93 at 179.


which to maintain competition. Considering the level and importance of foreign ownership in this country, FIRA is capable of being an effective "Competition Board", in that it can refuse to allow mergers and acquisitions that reduce or impair competition. Keeping in mind the perennial American sensitivities concerning anti-competitive mergers and acquisitions, Canada ought to consider defending such FIRA regulation on the basis of comparisons with the objectives of American anti-trust legislation.

The facts of *Dow Jones v. Attorney General of Canada* set out the inherent difficulty of reviewing indirect acquisitions. Between 1965 and 1975, Dow Jones increased its holdings in Richard D. Irwin Inc. (U.S.) to 22 percent. In 1967, Irwin incorporated a Canadian subsidiary under the name of Irwin-Dorsey and, in 1975, Irwin merged with Dow Jones to effect certain tax savings. At that time, the review agency sought the opinion of the courts as to whether the merger constituted an acquisition of control, under ss. 3(6)(h), by a noneligible person. Grant D.J. of the Federal Court, trial division, found that the U.S. merger constituted an acquisition of control under the act. Dow Jones had argued that the merger did not directly involve the shares or assets of a Canadian business enterprise and that the transfer of Irwin-Dorsey shares was only incidental (its business operations being unaffected by the merger). This issue was raised while the act was in Committee and, at the time, the government's view was "that such a transaction presented Canada with the same opportunity for furthering Canadian interests as would a foreign takeover of a 100 percent Canadian business." As to the issue of extraterritoriality, the Federal Court held that: "The Act does not regulate the merger... It is only the acquisition of control of a business carried on in Canada which is subject to review by s. 8...It, therefore, does not seek to effect extraterritorial activities but is enforced only in relation to the Canadian business."
Such indirect acquisitions constitute about 30 percent of all acquisition proposals. On average, indirect acquisitions involve assets valued at nearly two and one-half times the value of the assets involved in direct take-overs. It is generally agreed that the applicants in transactions such as the Dow Jones-Irwin merger, having as they do little direct connection with Canada, find great difficulty under the section 2(2) significant benefit test. In fact, the transaction is often completed before the applicant submits a notice to the review agency. Americans are particularly annoyed when FIRA requires specific performance undertakings so as to establish that an indirect acquisition brings "new" benefits to Canada, "although no increase in foreign ownership [has] occurred." Minister Gray’s response outlined Canadian concerns over the effect of foreign investments on the structure of Canadian industry, but failed to take cognizance of the particular difficulty of demonstrating that "new" benefits would result from indirect acquisitions. He stated, "it was intended that the Act would apply equally to [all] transfers of control . . . if that were not the case, a very large part of the Canadian economy would be excluded from the scope of the Act, and the ability of Canadians to gain and maintain effective control over their economic environment would be greatly diminished."

The minister overstated his difficulty, however. The government need not exempt indirect acquisitions from the act, but it could show an understanding of the predicament of those making such applications, for they are not seeking to invest directly in Canada in the generally accepted sense. Indeed, under the guise of small business procedural modifications, the government partially responded to the problem of indirect acquisitions by creating a separate small business category for those acquisitions "where a foreign controlled Canadian company is acquired in the course of the acquisition of its parent or another foreign controlled

111. Minister's response to CBA brief, at 11.
112. Infra, note 118.
113. The case comment, Dow Jones and Co. Inc. v. Attorney General of Canada: The Canadian Foreign Investment Act (1982), 14 Law and Pol'y Int'l Bus. 505, provides a practical understanding of the s. 2(2) test: "[T]he 'significant benefit' test is not equivalent to a 'non-detriment' test. In practice, the government apparently substitutes 'new' for 'significant' which could mean that a foreign investor's attempt merely to maintain the status quo would be unacceptable."
115. Ibid.
company". This category was created so as to prevent the review process from unnecessarily complicating investment transactions which are largely concerned with the acquisition of businesses outside of Canada. Under the new procedures, indirect acquisitions of businesses whose gross assets do not exceed $15 million and which have fewer than 600 employees will be treated the same way as direct acquisitions of small businesses. Firms in Canada with 599 employees are not, in any real sense, small businesses. The new category for indirect acquisitions will permit about 80 percent of such applications to use the new shortened procedures, or so-called fast-track review process. The development of this option reflects a sensitivity to American concerns and an appreciation of the nature of the transaction. The small business description may have been politically convenient in light of American criticism, but may, unfortunately, perpetuate the illusion that indirect acquisitions are of the same order as direct acquisitions with respect to foreign control of the Canadian economy.

The CBA's brief to the minister recommended that the significant benefit test be interpreted as a no-detriment test in situations involving an indirect transfer of control, "at least in business sectors not regarded as sensitive." However, the minister rejected the no-detriment test, feeling that it "would involve a major change in the Act because it would impose a new and quite different standard for the assessment and allowance of a particular type of reviewable foreign investment." The use of a no-detriment test for indirect acquisition may involve a major shift from the rigorous application of the ss. 2(2) test that was used from 1981 to 1982, but that is essentially a political and administrative, rather than a legal, change (and requires legislative amendment). Grover argues that the agency already employs the no-detriment test for small business applications. Others, while not necessarily agreeing with Grover, argue that "significant benefit has been misconstrued by the Cabinet and the Agency . . . if foreign

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117. If Irwin-Dorsey had not incorporated a subsidiary, but had only maintained a branch business in Canada, the Review Act would not have extended to its Canadian operations. Where there is no Canadian incorporated enterprise, the reference in ss. 3(6)(h) to "controlled in any manner" does not apply. The Bar Association, as part of their recommendation on indirect acquisition, recommended an extension of the act to cover such unincorporated operations.
118. Minister's response to CBA brief, supra, note 111.
119. See note 48.
investors are willing to operate businesses here efficiently and profitably, that is significant benefit." In effect, they are asserting that the section 2(2) test is capable of a no-detriment interpretation. Similarly, economists argue for what is essentially a no-detriment interpretation, asserting that "any potential investment would be likely to qualify." Certainly, in the case of an indirect acquisition that occurs relatively soon after another one, equity may demand a no-detriment test, as the subsequent purchaser may indeed have little room in which to attempt new undertakings in order to meet a "new" benefits test while still maintaining an economically attractive operation.

(c) Trade Related Performance Requirements and the GATT

On 5 January 1982, the United States initiated an action alleging that the review agency obliges nonresident investors to undertake certain commitments, the effect of which is to distort the flow of international trade. Such undertakings, it was alleged, were in conflict with Canada's national treatment obligations under the General Agreement on Tariffs and Trade (the GATT). A senior American trade official explained that "a reduced tariff on an item, agreed to by Canada in a multilateral trade negotiation, would have little value to us if an agency of the Canadian Government were to tell companies that to operate in Canada they would have to agree to buy such items from Canadian sources. This would impair our right under the GATT." The undertakings complained of normally include trade commitments, such as the undertakings by Bally and Apple Computer, to purchase local products, rather than to import, or they might include undertakings to export some percentage of production.

120. Hayden, "Can FIRA Be Suspended", in Hayden and Burns, supra, note 61 at para 2,020 (August 31, 1982).
121. Rugman, Multinationals in Canada: Theory, Performance, and Economic Impact (Boston: Martinus Nijhoff Publishing, 1980) at 136. Professor Rugman, in a CBC Radio commentary in August 1982, on the FIRA position taken by the provincial premiers, stated that: "What is a surprise is why any cases are rejected at all. That they are indicates that FIRA is not simply applying benefit-cost analysis in an objective and disinterested scientific manner. . . ."
122. Laurence S. Eagleburger, Speech before the Center for Inter-American Relations in New York City on 1 October 1981. Ambassador Eagleburger was, at the time, Assistant Secretary for European Affairs at the State Department. Reprinted in the United States Department of State Bulletin (December 1981) at 34.
Trade-related performance requirements may be in conflict with a variety of GATT provisions, specifically those governing national treatment, elimination of quantitative restrictions, and state trading enterprises. More importantly, where a performance requirement restricts trade in an item covered by a tariff concession, the practice might be considered to be an impairment of that concession. Fundamental to the United States’ position is the allegation that performance requirements are being used to restrict trade in a manner inconsistent with Canada’s trade obligations under the GATT. It was over this point that the United States resorted to the dispute settlement provisions of Articles XXII and XXIII.

The undertakings amount to a prima facie breach of the spirit of the GATT. In giving nonresident firms the right to invest in Canada, the undertakings purport to prevent the firms, through quantitative restrictions, from importing those products they might otherwise use in their production process, thereby guaranteeing that a certain percentage of local goods or services be either purchased or exported. The GATT panel working on the complaint must decide if the undertakings breach Canadian tariff concessions either through the use of discriminatory treatment under Article III, quantitative restrictions under Article XI, or state trading provisions under Article XVII. Through its negotiated undertakings or trade-related performance requirements, the review agency is seeking to encourage foreign-based firms to end practices that have helped lead to what was called by the Gray Report the “truncation” of Canadian industry, and by the Science Council, “technological

123. The national treatment principle is stated in paragraph 1 of Article III, as follows: “Laws, regulations and requirements affecting the internal sale, offering for sale, purchase, . . . distribution or use of products, and internal quantitative regulations requiring the mixtures, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products.”

124. Article XI strengthens Article III, providing that “no prohibitions, or restrictions other than duties, taxes or other charges, whether made effective through quotas . . . or other measures shall be maintained by any contracting party on the importation . . . or on the exportation or sale for export . . . of any product.”

125. The basic state trading provision is found in Article XVII, paragraph 1(a): “Each contracting party undertakes that if it establishes . . . a state enterprise or grants to any enterprise . . . privileges, such enterprise shall, in its purchase or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment . . . for governmental measures affecting imports or exports by private traders.”
underdevelopment".126 "[I]t is . . . well known . . . that foreign
investment can . . . involve costs for the host country, for example,
restraints on export freedom, a low level of research and
development. The intention of Parliament in enacting the FIRA Act
was to ensure that for the future, the benefits to Canada would
outweigh the costs of new foreign direct investment. . . ."127

V. Into the Second Decade

The Foreign Investment Review Act has provided a framework for a
remarkably flexible policy instrument. The significant benefit test
under section 2(2) and the performance requirements have varied
with the mood of the FIRA minister and his Cabinet colleagues. The
agency does not make industrial policy, but relies on experts in
other areas of the government. In some respects, the agency acts as
a type of clearinghouse, bringing together the various sectoral and
provincial inputs and moving them up to the minister. Where
policies are not enunciated, the agency’s job becomes quite
difficult. In 1980, the approval rate for the oil and gas industry’s
new business applications stood at 84 percent. Within twelve
months, it had fallen to 53 percent. The decisive factor in this
dramatic drop was a change in government and, hence, in oil and
gas ownership policy, rather than a change in the quality of the
investor application or the structure of the agency.

During the 1980 election campaign, the Liberal party committed
itself to a decidedly nationalistic stance in regard to foreign
investment and ownership: "We want to expand and strengthen
FIRA not weaken it. FIRA’s mandate will be broadened to include
periodic review of all foreign firms . . . to assess the performance
of these companies . . . FIRA will be required to publicize
proposed foreign take-overs . . . FIRA will help provide financial
assistance to Canadian companies that want to compete for foreign
takeovers or repatriate foreign owned assets."128 The post-election
Speech from the Throne reiterated the Liberal election platform:
"The Foreign Investment Review Act will be amended to provide
for performance reviews . . . As well, amendments will be
introduced to ensure that major acquisition proposals by foreign

126. See note 21.
127. Minister’s response to CBA brief, supra, note 111 at 3.
128. Pierre Trudeau, in a February 12th pre-election speech to the Toronto
Advertising and Sales Club in Toronto.
companies will be publicized...’’ However, no such amendments were enacted; instead, the government was able to use the existing act’s section 2(2) significant benefit test to reduce reviewable foreign direct investment in the oil and gas industry to a trickle. The NEP, although it was developed outside of the review agency, promised a key role for FIRA when it stated that ‘‘the Foreign Investment Review Agency will vigorously enforce its investment criteria in the energy sector.’’

The United States government expressed extraordinary criticism of the frequent use of sophisticated performance requirements in the form of undertakings to export, manufacture, purchase locally or develop and market products; the extraterritorial effect of the review of indirect acquisitions; the more stringent significant benefit test; and certain of the more onerous aspects of the NEP. The action under the GATT against the so-called trade-related performance requirements was but one example of the priority that the Reagan administration gave to rolling back these nationalistic policy initiatives. ‘‘Canadians should know,’’ Canadian Ambassador Gotlieb warned, ‘‘that there is a growing mood in this country that the U.S. is not getting a fair shake.’’ The United States government cannot take all the credit for stopping the amendments, although the American criticism was articulate and effective — and FIRA administrative procedures were indeed poorly developed, without effective guidelines, and the review process often reflected short-term political needs more than the legal or economic requirements of the act. Some of the proposed amendments may have been unwise, particularly in light of the world-wide recession. The experience of the NEP indicated that an aggressive Canadianization program targeted at a single industry might frighten off Canadian, as well as foreign, investors.

The November 1982 budget gave formal recognition to the shelving of the previous year’s election commitments to strengthen FIRA, stating that ‘‘no legislative action is intended on these measures until programs on the major initiatives already undertaken . . . [have] been assessed.’’ By March 1982, the reversal was almost complete — the promised performance reviews of foreign-owned firms had become a commitment to consult with

130. Minister’s response to CBA brief, supra, note 111.
all large firms so as to “exchange specific information about government and corporate plans which will be helpful . . . in promoting the best interests of Canada’s economic development.” The FIRA minister indicated that “it would not be appropriate for this [new] process to be administered by the Agency” and that “an amendment to the Act [would] not be required.”

Even though the government reneged on its commitment to strengthen FIRA legislatively, certain administrative reforms were made, namely, an expansion of the small business procedures and the issuance of Interpretation Notes as to the reviewability of an investment. In August 1980, FIRA Minister Gray indicated a desire for administrative reforms “aimed at providing the public with greater insight into factors behind the allowance of proposals” and to “make it possible for the public to understand better what is meant by benefits to Canada.” The minister also indicated a desire to “improve the effectiveness” and efficiency of the agency and the “way it is administered”. Although the agency’s annual report for 1983 has yet to be tabled in Parliament (thereby providing accurate statistical data), there are early indications that the approval rate has improved, the number of cases that are withdrawn has declined, and the processing time has been markedly reduced. Such initiatives were more in keeping with actions taken by the previous Clark government than with Liberal election promises.

The Progressive Conservative FIRA minister had issued a special supplement with the act’s 1979 Annual Report, outlining in summary form what the significant benefit test had come to mean. The Clark government conducted an interdepartmental task force review of FIRA operations and established a special House of Commons Committee to inquire into the extent to which the act was achieving its purpose, to recommend changes to improve the efficiency and effectiveness of the act, and to examine the scope and method of the review process under the act. The final act of retrenchment by the Trudeau government was the replacement of FIRA Minister Gray by Trade Minister Lumley, and Commissioner Howarth by a senior Treasury Board official. The new commissioner is expected to use his Treasury Board expertise to develop more structured administrative procedures. The June 1982

131. Quoted in CBA brief to minister, supra, note 53.
132. See Valpy, “Sore Thumb No More”, Globe and Mail, 31 August 1982: “[I]t is hoped that he will be inventive with the agency and know how to make it blend in
budget stated that efforts would "be made to avoid red tape and extended delays." Minister Lumley has announced the formation of a private sector advisory group to provide a sounding board on any and all matters concerning the act and its administration.\textsuperscript{133} However, Lumley, a businessman, displays none of Gray's passion for dealing with foreign investment issues.

Pundits and pollsters speculate that the current Liberal government will be replaced at the next general election by the Progressive Conservatives. In Parliament, the Progressive Conservatives have often been critical of the Liberal government's foreign investment legislation and policy. The current emphasis of the P.C. Party is on efficient and responsible government and the avoidance of radical commitments. A recent Party Working Paper on foreign investment policy expresses some support for the concept of review, stating that "within bounds, and considering the track record of many multinationals... this quid pro quo appears legitimate if the approval process were swift and efficient, if there was not the 'lack of transparency' in FIRA's goals and methods, and if there was no political interference...."\textsuperscript{134} The paper goes on to "advocate keeping FIRA in place." Investor applications, it states, "should be processed quickly and efficiently, and the secrecy surrounding...goals and methods should be eliminated.' Somewhat hopefully, it concludes that, "with these improvements in place...criticism of the operation of FIRA would rapidly fade away.'

The interpretation notes\textsuperscript{135} may prove to be the forerunner of proper guidelines to assist the investor in regard to the section 2(2) significant benefit test. In addition, the increased small business thresholds will help the review process be more selective.\textsuperscript{136} By

\textsuperscript{smoothly with whatever economic policy the Government wants to follow. The Government would like to end FIRA's days as a sore thumb.''}

\textsuperscript{133. Such an advisory group is yet to be created.}

\textsuperscript{134. The Hon. Sinclair Stevens, P.C. Caucus Critic for Industry and Trade (responsible for the party's foreign investment policy), February 1983.}

\textsuperscript{135. Supra, note 54.}

\textsuperscript{136. Minister Gray's announcement of "further foreign investment review changes" on 23 August 1982 included the following statement by the minister: "These initiatives show that we want to make Canada's policy on foreign investment and its administration as clear and as efficient as possible without straying from the objectives set by Parliament or the commitments made by the Government."}
steadying its course, the Foreign Investment Review Agency (and the act) have helped still criticism in Parliament and in the United States. However, it is unlikely that FIRA will ever be everybody's friend; indeed, if that should happen, there might be cause for worry. Managing the agency will always demand diplomacy, judgment, and a thick skin. Nevertheless, foreign investment review is here to stay and the act will continue to be a principal instrument in the implementation of foreign investment policy.