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Discussion

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Discussion Following The Remarks of Mr. Gordon Dewhirst and Mr. James Spence*

QUESTION, Professor King: Mr. Spence, if you are going to strip it down like this, why do it at all? I suppose that there must be some good reasons. Yours is a very positive approach; but in terms of the impact, as you pointed out, it doesn't affect very many cases. Is this something that you want to comment on? In other words, you got a lot of the brush out of the way. Why not all?

ANSWER, Mr. Spence: My own view is that, as a political factor, it was very important for our government to find a middle point, that would accommodate both its own determination to let market forces operate and to allow some room for nationalist concerns about excessive or unregulated foreign investment in our economy. To achieve this middle ground, the government narrowed the territory covered by the act. It raised the thresholds and said aid for the more limited sector of our economy that there would still be a review process, but administered in a very moderate way.

QUESTION, Professor King: We are evaluating here today the impact of FIRA on technology transfer. Now, you said that United Technologies had been doing some R & D in Canada in the Otis case. Will FIRA still have some impact on Canada if there are not corporations, such as United Technologies, making type of commitment?

ANSWER, Mr. Spence: A large part of that question should more properly be directed to an economist. I would suppose that it will have some impact since in situations where people under FIRA might have been persuaded to get commitments, the effort to persuade them now simply may not occur.

From a lawyer's point of view, those commitments that were given in the past under FIRA are, under Investment Canada, still binding upon those parties, even though the legislation has changed. Now, that doesn't necessarily mean that they are stuck with them. I believe that there is room to deal with the government on the nature, ordering, and scheduling of compliance with those commitments and I equally believe that the present government would be prepared to entertain representations if it could be shown that some commitments are no longer appropriate.

QUESTION, Mr. Knopf: It is often observed that culturally sensitive industries are perhaps more than normally linked with some of the

* Due to illness, Mr. Gordon Dewhirst was unable to attend the Conference. Mr. Sydney G. Harris delivered Mr. Dewhirst's paper and joined Mr. James Spence in this discussion session.

things that we have been talking about in the last day or two in terms of intellectual property without copyright. You have mentioned that there will be a special regime for culturally sensitive industries under the new act. It is undoubtedly too early to tell how it is going to work out. We have only had, I believe, one major prominent case so far.

I was just wondering what the perception is from the private sector about how this is going to pan out in the future on these culturally sensitive industries? For example, are we going to see a continuity of the approach that FIRA would have taken in that kind of a situation? Are we going to see something tougher and more nationalistic than we ever have? What are the possibilities that are currently perceived from the private sector on that front?

ANSWER, Mr. Spence: Well, I think you are quite right to emphasize the cultural industries' aspect of the matter. I touched on it only briefly. The government has reserved the power to review investments, whether they are new or acquisitions in the cultural area. My own perception is that the commitments that could prove to be a sort of Achilles' heel of the government's pretty relaxed approach to foreign investment. Specifically, I am referring to the policy statement made by Mr. Masse, the Minister of Communications, about foreign ownership in book publishing.

So far the government has managed to deal with the cases they have reviewed in book publishing with approvals; but in approving the fairly high profile case of Prentice, Hall, Gulf & Western, the government made it very clear that they were approving it under the old FIRA rules which do not spell out a specific and rigorous policy as the one introduced by Mr. Masse a year ago. Furthermore, the government stated that their approval of the Gulf & Western transaction was not to be taken as any withdrawal from their new policy on limiting foreign ownership in book publishing, thus finding a way to deal with that case on a special, but quite natural, basis of not changing the rules retroactively. However, I don't know what happens when the next difficult case comes along where the government does not have available to it the argument that it will not apply the new policy retroactively. It may then have to come to grips with applying the new policy. I think that could be a tough time for the government.

QUESTION, Mr. Knopf: If I may just follow-up for a second, I'm not too familiar with that legislation. Do you see any particular problem with the definition of the culturally sensitive industry or however it is phrased?

ANSWER, Mr. Spence: I took the precaution of not bringing the Act and regulations with me. My recollection is that the phrase, "culturally sensitive," in the Act is to be determined by regulation, and the regulation or reads something like, "engaging in the business of book publishing and distribution." It's basically a layman's description and I have already encountered situations where I'm not clear whether that

description applies to what my client is doing; I expect others have encountered similar situations. The agency endeavors to be very helpful in expressing what their interpretation would be, but, of course, one's client might not be happy with the agency's interpretation.

QUESTION, Professor King: What about the effect of Investment Canada, if any, on the free-trade agreement? Will this affect the free-trade agreement, or do you see anything that has to be covered in the free-trade agreement?

ANSWER, Mr. Spence: Well, again, speaking from a private sector prospective, it seems to me that it is clearly an open opportunity for the people on the other side of the table to say that they consider Canada's foreign investment review laws to be a type of interference with trade flows and, therefore, Canada's foreign investment review laws should be on the table.

I take it that one of the ideas is that everything is on the table at the beginning and things are only taken off as the process goes along. If it's an "everything-is-on-the-table" approach, I can imagine that the position taken would be that "everything" includes Canada's Investment Canada legislation. Indeed, since others and I first anticipated that that might happen, it has happened.

I think there have been some statements from officials in the administration saying that they certainly want to have a look at Investment Canada during the course of the trade negotiation, so I would not be surprised if that is what happens.

QUESTION, Mr. Bradley: My question is directed to the chairman, in regard to Investment Canada. It strikes me, on recollection, that the big furor over Investment Canada was during the first major oil crisis and the creation of what we call, "Pet Patrol." I vaguely recollect the U.S. administration at the time talking about doing something about foreign investment in the U.S. and that there were several restrictions. Would you comment on that?

ANSWER, Professor King: Generally, it is a reporting situation: you report or supply information. There are some specific areas, such as state laws addressing banks in California. The U.S. does have some spot restrictions. We were not as generous as Canada because we did very little comparatively in terms of restrictions. Canada ate the whole meal and maybe it proved indigestible. In terms of our situation, we do have spot restrictions, but it is the exception rather than the rule.

COMMENT, Mr. Harris: We always look at the United States as being completely free of all of these sorts of reviews. But take a look at Alcan, Inc., located here in Cleveland, and how they bought out the Arco facilities. They didn't go to the foreign investment review agency in the U.S. and, as a result, they got caught up under the antitrust laws. The end result was a review of that whole process which forced Alcan to

divest themselves of certain parts of that industry because those parts were felt not to be in the American interest.

When you get into the cultural side of things, you should understand that no foreigner may own a radio station in this country. We have an example, here in Cleveland we have a new radio station that was promoted and fought over for seven years, through all of the legal battles, by a lady that happened to be a Canadian and married to an American lawyer; at the end of the day, she could not be chairman of that organization because she was a Canadian. This is a typical example of protection in your cultural industries.

There is another famous Australian, Mr. Murdock, who is trying to buy out ABC, NBC or one of those BC's. His remedy to the foreseeable problem caused by the restrictions is he would take out an American citizenship; nevertheless, the restriction is there and it applies. It's not under the rule book of foreign investment review, but it is there and every bit as alive as a lot of the things that we have in FIRA.

COMMENT, Professor King: We sort of threw away the antitrust book under the current rules and I think one of the results is that the antitrust area is much freer than it was. We are very specific. We pinpoint our restrictions. "You can't buy that radio station in Cleveland." Frequently, we don't look at our own situation, but, instead, just those areas that people want to get into.

QUESTION, Mr. Fyfe: Once I get past FIRA or Investment Canada and I have made my undertaking, what is the enforcement experience to the extent that I have made an undertaking and perhaps I haven't complied?

ANSWER, Mr. Spence: First of all, the Foreign Investment Review Act said that all undertakings given to her Majesty are legally binding and enforceable in the courts. I don't think that the Investment Canada Act says that, but I'm not sure whether that makes a difference. In any event, I don't think that FIRA ever took a foreign investor to court for failure to comply with its undertakings and I'm confident that Investment Canada has not done that.

What FIRA did do where there was clear noncompliance with an undertaking was to require an explanation to be given by the foreign investor; if the explanation was not satisfactory, a process of renegotiation might be pursued. If there were reasons that indicated that the undertaking no longer made sense, there could be a renegotiation of it. This renegotiation usually amounted to maintaining the original requirements, but extending the time for compliance or substituting some other more appropriate requirement for the one that was in default.

Now, I don't think there is much experience of this type with Investment Canada. One of the questions that everybody is wondering about is, what will happen if you go to Investment Canada and say, "We gave this commitment under FIRA, and it no longer makes any sense."

Would Investment Canada say, “Fine, go ahead as free persons,” or would they use the more cautious approach and say, “We will give you a lot more time to comply”? I don’t know the answer to that.

