constitute something of an anomaly, it is, in the end, the best evidence that the Civil Code itself has over the years enjoyed a special place in the Quebec scheme of legislative materials which sets it apart from ordinarily enacted legislation. A discussion of the distinctive manner in which the Code (not being an ordinary statute) is to be interpreted would, in this respect, have been welcome. It must be added, further, that another statement [12] in the same connection, requires a further precision in respect of Quebec. Every statute in force at the time of the compilation of Revised Statutes is *not* necessarily included therein; the whole of the legislative scheme relating to the abolition of the seigneurial system is all "living law" which has not been brought forward into the Quebec 1964 Revised Statutes.

The initiative in Canadian legal scholarship which the publication of this first volume demonstrates is a significant one. The authors are to be congratulated for breaking new ground in a country where such comparative legal scholarship must, surely, in the years to come, have an increasingly important role to play not only in the general academic training of law students but in the actual practice of Canadian law and the reform of law in Canada. It is important progress to be able to place in the hands of future generations of students a series of texts which will open the perspectives which comparative studies really do offer. We look forward with not a little eagerness to the subsequent volumes promised.

JOHN E. C. BRIERLEY*

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A COMMENTARY ON THE FOREIGN INVESTMENT REVIEW ACT. By Graeme C. Hughes. Toronto: Carswell Company Limited. 1975. Pp. vii, 214. $22.50.

Graeme C. Hughes is a Barrister-at-Law of the Supreme Court of New South Wales and the Director, Legislation, Taxation and Technical, of the Canadian Manufacturer's Association. The Commentary on the Foreign Investment Review Act was published soon after the second part of that Act[1] (governing the establishment of new businesses by foreigners in Canada) had been proclaimed. There appears to have been little time available between proclamation (October 15, 1975) and the date of publication, with the result that only half a dozen pages [2] are devoted to analysing the impact of the Act on new businesses. They include a mere three pages on the ministerial guidelines which define a *related* business. No doubt any future edition will

[12] *Id.* ¶ 226 and somewhat qualified in ¶ 231.

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[1] Foreign Investment Review Act, Can. Stat. 1973 c. 46.

[2] G. HUGHES, A COMMENTARY ON THE FOREIGN INVESTMENT REVIEW ACT 50-52C (1975).

present a better balance between the treatment of new businesses and the provisions that affect the acquisition by foreigners of existing businesses in Canada.

The author claims that he did not set out to write a textbook. Rather, the work appears to be aimed at businessmen who could not be expected to subscribe to the more extensive and technical legal services (such as Prentice-Hall)[3] that are now available. On the other hand the commentary is the first in book form, and there is no denying its usefulness to the legal profession as well, in Canada and abroad. It contains, inter alia, the full text of the Act, the various Regulations promulgated to date and the ministerial guidelines on related business, corporate reorganisations and real estate. Facsimilies of the actual application forms issued by the Foreign Investment Review Agency are not included. Fully three-fifths of the book is taken up by the appendices, and a fair proportion of the eighty odd pages of comment paraphrases the Act. It follows that there is relatively little critical analysis to whet the reader's jurisprudential appetite.

Before discussing some such legal issues, one should however hasten to commend Mr. Hughes for his practical approach to the Act. He answers concisely the kinds of questions that are most likely to be raised by an intelligent businessman or by any person who does not have the time or inclination to become entangled in an Act which continues to reveal surprising complexities. The reader is informed forthwith that the assessment of significant benefit to Canada is not a legal (or even a fact-related?) activity, but essentially a matter for economic and political judgment. The author lists the key concepts and questions to be considered by an investor. He then elaborates in a logical sequence. One is warned that one should distinguish carefully between the concepts of *control* where they affect the definition of a non-eligible person, and where a takeover is defined. In view of the importance of the distinction, it is a little surprising that one is not also reminded that the concept of control rears its head in yet a third instance, namely, in the definition of a Canadian business.

*Critical issues*

The Introduction leads one to expect a fairly aggressive foray into the Act, which is itself described as "a massive intrusion by the federal government into business affairs".[4] In fact, one is somewhat nonplussed by a complaint that the new business provisions "could . . . have the unfortunate result of effectively discriminating"[5] between a foreign-owned company which expanded into an unrelated line of business *before* the proclamation date, and another established foreign-owned company which wanted to

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[3] P. HAYDEN & J. BURNS, FOREIGN INVESTMENT IN CANADA: A GUIDE TO THE LAW (1974-75).

[4] *Supra* note 2, at 1-2.

[5] *Id.* at 14.

expand into a similar unrelated field *after* the proclamation. How could any non-retroactive legislation fail to discriminate between the past and the future?

The groundwork for a critical approach to the legislation and its administration is also laid by the author's introductory statement that "the drafters of the Act have attempted to observe the canons of legislative drafting appropriate to the traditional rule of law approach". [6] Against this background it is perhaps not unreasonable to expect that the reader's attention should have been focused on the way in which the Act and its implementation are related to principles of administrative law. For the concerned businessman it is relevant to at least touch on the differences between a purely administrative and a quasi-judicial function, and on the incidence of the rules of natural justice.

That these are not rhetorical questions can be demonstrated by one or two pertinent issues, on which the book could have been a little more incisive. One example is the way the Agency breaches or overcomes the sixty day assessment limit imposed by the Act. The first report to Parliament [7] on the activities of the Agency has disclosed that the average processing time for applications is approximately one hundred days. Other public reports refer to individual cases that are undecided for many more months, even up to a year. The author states that "the 60 day period stops running if the Minister for any reason seeks more information and notifies the applicant of his right to make further representations". [8]

It is indeed an important question whether subsection 11(1) allows the Minister to "stop the clock" merely because he is unable to complete an assessment or make a recommendation, in the sense that he has not had enough time to consider the information supplied by the applicant or to consult other interested parties. It is also questionable whether he can rely on the insufficiency of information in the sense that the applicant's notice was not complete, because, as the author of the book states, [9] assessments do not commence (notices of receipt are not issued) until an application is complete. The Act provides clearly that the purpose of a delay beyond sixty days is to permit an applicant to make further representations. [10] The context would indicate that a right to make further representations is in the nature of a right of appeal, in response to a statement by the Minister which is in the nature of a preliminary decision or a conclusion. Thus, to permit further representations, natural justice would require that an applicant should be furnished with fairly precise information on the specific matters in respect of which he could be expected to "make further representations". Could this process merely be a request for more information?

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[6] *Id.* at 2.
[7] ANNUAL REPORT, FOREIGN INVESTMENT REVIEW ACT (Oct. 1975).
[8] *Supra* note 2, at 69.
[9] *Id.* at 63.
[10] Foreign Investment Review Act, Can. Stat. 1973 c. 46, § 11(1).

The reader could also reasonably look forward to a more pertinent treatment, than that offered, [11] of the basic assumptions underlying the definition of a related business. Is it not unduly simplistic to tie the definition of a business essentially to the kinds of goods or services that are produced, especially in an age that is so acutely aware of the functional aspects of business (and academically, of the theory of the firm)? The author reports, without commenting, that according to the guidelines a new business is established as soon as an existing business sells any of its output to an outside customer (in circumstances where the goods had been internally consumed before). The relatedness guidelines deserve serious scrutiny, both from a policy and a legal point of view.

Few commentators on the real estate guidelines issued by the Minister pursuant to subsection 4(2), have recognised that one of the intended purposes of the guidelines has apparently been to differentiate the Foreign Investment Review Act from the Income Tax Act. Usually practitioners are well versed in the National Revenue interpretations of the difference between an investment and a business, particularly an "active" business. The real estate guidelines amount to more than a strong hint that policy considerations do tend to govern such distinctions, and investors are warned, in effect, that the income tax jurisprudence is not necessarily applicable. Thus the guidelines state that whether employees report for work on or in connection with real estate is not an essential factor in determining whether a business exists. [12] (Rental properties are a difficult borderline case).

In claiming, like others before him, that the guidelines are in one respect ultra vires the Act, the author appears to miss a subtle distinction that the guidelines endeavour to make. They remind students of the Act that where employees are referred to in the definitions of a Canadian business and a Canadian branch business, the Act mentions only employees of a *corporation* that carries on a business. [13] In other words, the business itself need not have employees, in order to be a business. This is at least the position in regard to takeovers; a separate provision governs the establishment of new businesses. [14]

Inevitably there are a few instances where the subtleties of the Act have tripped up the best among us—an experience that puts perspective on the author's statement that, compared with similar legislation in other countries, the Act is "a model of precision"! [15] For example, the Act deals with the ownership of shares in some instances and with the mere holding of shares in others. This distinction calls for rather precise treatment, and contrary to one statement in the book, [16] subsection 3(6)(*b*.1) refers to shares held,

[11] *Supra* note 2, at 52B.

[12] GUIDELINES CONCERNING REAL ESTATE BUSINESSES, EMPLOYEES REPORTING FOR WORK (Minister of Industry, Trade and Commerce, Canada, April 6, 1974).

[13] Foreign Investment Review Act, Can. Stat. 1973 c. 46, § 3(1).

[14] *Id.* § 3(4).

[15] *Supra* note 2, at 2.

[16] *Id.* at 21.

not shares owned. In another place,[17] it is implied that subsection 3(6)(*h*) relates to a *foreign* controlling corporation, but the Act does not say so, and the inference is not a necessary one. Slightly tighter editing would have removed the rider that the new business part of the legislation "will come into force on a date to be proclaimed",[18] as well as a number of misprints.[19] Footnote 4 on page 13 would be strengthened by a cross-reference to footnote 15 on page 42. Given the nervousness of foreign investors (at least in some circles), it might have been better not to give the impression that the Prime Minister had said that the government "is considering" screening the expansion of existing foreign-controlled firms into *related* lines of activity.[20] The Prime Minister's actual statement[21] was considerably more circumspect.

Whilst the Commentary identifies a number of shortcomings in the Foreign Investment Review Act, it would be useful if a later edition were also to mention a rather surprising omission among the provisions governing the acquisition of control. The Act provides that control of a business *may* be acquired either through the acquisition of shares, or of all or substantially all of the property used in carrying on the business. Subsequently the Act imposes presumptions that control has been acquired, but the presumptions are confined to share acquisitions. Nowhere is it provided that control of a business is, or is presumed to have been, acquired where all or substantially all of the property used in carrying on the business has been acquired.

A final quibble concerns the rather skimpy index, which conveys only twice as much information as the table of contents.

To produce a reference book to meet the needs of a businessman, as well as of a busy practitioner, is not an easy assignment. Mr. Hughes has made a head start, and he should be commended for the result.

DIRK J. DE VOS*

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[17] *Id.* at 34.
[18] *Id.* at 13.
[19] *Id.* at 18 line 9, 36 line 14, and 44 line 11.
[20] *Id.* at 13.
[21] *Id.* at 3 n.3.

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