

1986

Foreign Investment in Canada: The New Investment Canada Act

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Recommended Citation

W. Brian Rose, *Foreign Investment in Canada: The New Investment Canada Act*, 20 INT'L L. 19 (1986)
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Foreign Investment in Canada: The New Investment Canada Act[†]

I. Introduction	20
II. The FIR Act	21
III. The IC Act	22
A. Purpose	22
B. Organization and Mandate	22
IV. Determination of Canadian Status	23
A. Status of Individuals and Governments	23
B. Status of Entities	24
1. Canadian—controlled	24
2. Trusts and Public Corporations	25
3. Ancillary Rules	26
C. Definition of Business, Canadian Business and New Canadian Business	27
1. Business	27
2. Canadian Business	28
3. New Canadian Business	28
V. Notification	29
VI. Reviewable Transactions	30
A. Introduction	30

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†This article is largely based on two papers by the author: "Bill C-15—The Investment Canada Act," prepared for the midyear meeting of the American Bar Association Section of International Law and Practice (February 15, 1985), and "Review of Differences Between the Foreign Investment Review Act and the Investment Canada Act," prepared for the Continuing Legal Education Program of the Law Society of Upper Canada (May 3, 1985).

B. Acquisition of Control	30
1. Manner of Acquiring Control	30
2. Presumptions	31
C. Monetary Thresholds	33
1. Reviewable Investments	33
2. Valuation of Assets	34
D. Cultural Heritage and National Identity	35
E. Exemptions	36
VII. Review Process	37
A. Application	37
B. Timing	37
C. Procedure	38
D. Statutory Criteria	40
E. Compliance	41
F. Appeals	42
VIII. Miscellany	42
A. Opinions, Guidelines and Interpretation Notes and Privileged Information	42
B. Remedies, Offenses and Penalties	42
C. Transitional Provisions	43
IX. Summary	44

I. Introduction

The Investment Canada Act (IC Act) was introduced by the Conservative government of Canada in December of 1984 and was proclaimed in force on June 30, 1985.¹ The IC Act repealed the Foreign Investment Review Act (FIR Act),² and replaced it with a law which substantially limits the investments that are reviewable,³ provides for the encouragement and facilitation of investment in Canada⁴ and establishes an agency, Investment Canada (Agency), to advise and assist in the administration of the IC Act.⁵ The purpose of this article is to review briefly the background of the IC Act, how the IC Act works, which investments are reviewable, and whether there has been a change in the attitude of the Canadian government towards investment in Canada.

1. CAN. STAT. c. 20 1985, [hereinafter cited as the IC Act].

2. CAN. STAT. c. 46, 1973-74, amended CAN. STAT. 1976-77, c. 52 [hereinafter cited as the FIR Act].

3. IC Act ss. 14(1).

4. *Id.* s. 2.

5. *Id.* s. 6.

II. The FIR Act

In response to a rising tide of nationalism in Canada, especially over foreign control of the Canadian economy,⁶ the FIR Act was introduced by the Liberal government in 1973 and was proclaimed in force on April 9, 1974. The FIR Act provided that all acquisitions of control of Canadian businesses⁷ and all establishments of new businesses, except those related to an already established business,⁸ by noneligible persons⁹ were subject to review to determine whether they were of significant benefit to Canada.¹⁰

The administration of the FIR Act, particularly the determination of whether an investment was of significant benefit to Canada, enabled the government to implement policies respecting foreign investment. In the period 1980–1982, in reflection of the government's policies to seek increased Canadian ownership and control of the economy, the review process became markedly more onerous.

In 1982 the Canadian recession occasioned a change in the government's policies and foreign investment became an objective. In an effort to defuse criticism of the FIR Act and particularly its administration, both the Minister responsible for the administration of the FIR Act and the Commissioner of the Foreign Investment Review Agency (the FIR Agency) were replaced.¹¹ Further, procedural changes were made which expedited the review process, in most instances, for smaller transactions.¹²

Notwithstanding these changes and the high rate of allowance of investments by the Governor in Council,¹³ the FIR Act continued to be branded part of a nationalistic, protectionist Canadian mentality which frightened off investment.¹⁴ There were many criticisms of the review process established under the FIR Act,¹⁵ including criticisms of: the extended delays in processing notices (in some instances in excess of one year), particularly for large or

6. See House of Commons Debates, March 30, 1983, at 2777—the Honorable Alistair Gillespie, Minister of Industry, Trade and Commerce:

“Nearly 60 percent of the manufacturing industry in Canada is foreign controlled and in some manufacturing industries such as petroleum and rubber products foreign control exceeds 90 percent. Recent figures for Canadian mining and smelting indicate that 65 percent is controlled from abroad.”

7. FIR Act, ss. 8(1).

8. *Id.* ss. 8(2).

9. *Id.* ss. 3(1).

10. *Id.* s. 9.

11. The Honorable Herb Gray was replaced by the Honorable Edward Lumley as Minister and Mr. Gorse Howarth by Mr. Robert L. Richardson as Commissioner.

12. CAN. STAT. O. & REGS./83–493.

13. From April 9, 1974 to March 31, 1984, 92.2 percent of reviewable applications were allowed, ignoring withdrawn cases.

14. See 1983 annual survey of European Management Forum in which Canada was ranked last (out of 28 countries) in welcoming foreign investment for the fourth consecutive year.

15. See The Conference Board of Canada, Study No. 84, The Foreign Investment Review Agency: Images and Realities, (1984) at xiii.

politically sensitive investments and the attendant costs of lost opportunity and actual expenditure; the commitments sought by the FIR Agency, frequently at the request of the Minister, which were considered by some to be unreasonable and lacking in appreciation of commercial reality; the failure of the FIR Agency to recognize good corporate citizenship and previous experience in assessing subsequent notices; the lack of communication in the process attributable to there being no specific criteria for securing allowance and no reasons given for disallowance; and the lack of opportunity to respond to the input of federal and provincial governments and third party intervenors.

These criticisms were largely directed at the manner in which the FIR Act was administered and not at the FIR Act itself. The administrative changes of 1982, referred to above, did not alleviate the foreign investor's concern that the administrative practices of the 1980-1982 period could return. Rather than attempt to amend the FIR Act, in the hope of forever eliminating its specter,¹⁶ the government chose to repeal the FIR Act and to introduce the IC Act.

III. The IC Act

A. PURPOSE

The IC Act recognizes that increased capital and technology would benefit Canada. In contrast to the policies underlying the FIR Act,¹⁷ the IC Act aims to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant non-Canadian investments in Canada in order to ensure benefit to Canada.¹⁸

B. ORGANIZATION AND MANDATE

Currently, the administration of the IC Act is the responsibility of the Minister of Regional Industrial Expansion (Minister). The Minister is also responsible for the management and direction of the Agency¹⁹—the body

16. See statement of the Honorable Sinclair Stevens following tabling of Bill C-15, which became the IC Act, on December 7, 1984.

"Perceptions play a vital role in the world of investment. The words and actions of a government can tip the delicate balance underlying a country's reputation as a place to invest. That is why it is so important to change the name and mandate of the FIR Act. The FIR Act has sent negative signals to domestic and foreign investors, leading them to think that Canada is ambivalent, if not hostile, to foreign investment."

17. The FIR Act was partly enacted: "in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern."

FIR Act, ss. 2(1).

18. IC Act, s. 3.

19. *Id.* s. 4.

established to assist the Minister in exercising his powers and performing his duties under the IC Act.²⁰ The duties of the Minister include: encouraging business investment by such means and in such manner as he deems appropriate; assisting Canadian businesses to exploit opportunities for investment and technological advancement; carrying out research and analysis relating to domestic and international investment; providing investment information services and other investment services to facilitate economic growth in Canada; assisting in the development of industrial and economic policies that affect investment in Canada; ensuring that the notification and review of investments are carried out in accordance with the IC Act; and performing all other duties required of him under the IC Act.²¹

Nowhere else in the IC Act is there reference to encouraging investment, whether by Canadians or non-Canadians. However, the Investment Development Division of the Agency has been created and is responsible for a domestic and international promotional program and the provision of information and counselling services to potential investors. To date, in an effort to encourage investment, there have been extensive international advertising programs, ministerial-led business visits abroad, investment seminars organized in connection with the private sector and appointments of special investment counsellors to certain foreign posts.

IV. Determination of Canadian Status

A. STATUS OF INDIVIDUALS AND GOVERNMENTS

Only investments by non-Canadians are subject to the review or notification process of the IC Act.²² A non-Canadian is an individual, a government, an agency or an entity²³ that is not a Canadian.²⁴ An individual is a Canadian if he is either a Canadian citizen or a permanent resident (within the meaning of the Immigration Act, 1976)²⁵ who has not been ordinarily resident in Canada for more than one year after he first became eligible to

20. *Id.* s. 6.

21. *Id.* ss. 5(1). In exercising his powers and performing his duties under the IC Act, the Minister:

“(a) shall, where appropriate, make use of the services and facilities of other departments, branches or agencies of the Government of Canada; (b) may, with the approval of the Governor in Council, enter into agreements with the government of any province or any agency thereof for the purpose of [the IC Act]; and (c) may consult with and organize conferences of representatives of industry and labour, provincial and local authorities and other interested persons. IC Act ss. 5(2).”

It is arguable that this provision is sufficiently broad to permit third party intervention in the review process.

22. *Id.* ss. 14(1) and s. 11.

23. The term entity includes a corporation, a partnership, a trust or a joint venture. *Id.* s. 3.

24. *Id.*

25. CAN. STAT. c. 52, 1976-77, as amended.

apply for Canadian citizenship.²⁶ There is no other residency requirement for an individual to be a Canadian. All Canadian governments, whether federal, provincial or local, and their agencies are Canadians.²⁷

B. STATUS OF ENTITIES

1. *Canadian-controlled*

A Canadian entity is an entity that is Canadian-controlled under section 26 of the IC Act.²⁸ Section 26 provides a series of rules whereby each investment in an entity is considered through the chain of control to the point where the entity can be determined by reference only to individuals, governments or their agencies and Canadian-controlled entities. An entity is Canadian-controlled if one Canadian or two or more members of a voting group²⁹ who are Canadians own a majority of the voting interests³⁰ of the entity.³¹ An entity is *not* Canadian-controlled if one non-Canadian or two or more members of a voting group who are non-Canadians own a majority of the voting interests of an entity.³²

If the status of an entity cannot be determined under either of these provisions and if a majority of the voting interests of the entity is owned by Canadians and it can be established that the entity is not controlled in fact through the ownership of its voting interests by one non-Canadian or by a voting group in which a member or members who are non-Canadians own one-half or more of those voting interests, it is a Canadian-controlled entity.³³ If less than a majority of the voting interests of an entity are owned by Canadians, it is presumed not to be a Canadian-controlled entity unless

26. IC Act, s. 3.

27. *Id.*

28. *Id.*

29. A voting group means two or more persons who are associated with respect to the exercise of rights attached to voting interests in an entity by contract, business arrangement, personal relationship, common control in fact through the ownership of voting interest, or otherwise, in such a manner that they would ordinarily be expected to act together on a continuing basis with respect to the exercise of those rights. IC Act s. 3.

30. A voting interest means:

“a voting share in a corporation with share capital; an ownership interest in the assets, that entitles the owner to rights similar to those enjoyed by the owner of a voting share, in a corporation without share capital; an ownership interest in the assets that entitles the owner to receive a share of the profits and to share in the assets on dissolution in partnership, trust, or joint venture.”

IC Act s. 3.

A voting share is a share:

“to which is attached a voting right ordinarily exercisable at meetings of shareholders of a corporation and to which is ordinarily attached a right to receive a share of the profits, or to share in the assets of the corporation on dissolution, or both.”

IC Act, s. 3.

31. *Id.* para. 26(1)(a).

32. *Id.* para. 26(1)(b).

33. *Id.* para. 26(1)(c).

the contrary can be established by showing that: the entity is controlled in fact through the ownership of its voting interests by one Canadian or by a voting group in which a member or members who are Canadians own a majority of those voting interests, or in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact through the ownership of its voting interests and two-thirds of the members of its board of directors or, in the case of a limited partnership, two-thirds of its general partners are Canadians.³⁴ Finally, if two persons, one of whom is non-Canadian, own equally all of the shares of a corporation, the corporation is not Canadian-controlled.³⁵

2. *Trusts and Public Corporations*

Subsection 26(1), which provides the rules by which one is considered either "Canadian" or "non-Canadian," does not apply to a trust not controlled in fact through the ownership of its voting interests. In that instance, provided two-thirds of its trustees are Canadian, the trust is a Canadian-controlled entity for all purposes of the IC Act³⁶ and is deemed to be a person for the purpose of the definition of voting group.³⁷

To encourage a degree of Canadianization of certain Canadian public corporations which, because of large foreign shareholdings, would otherwise be non-Canadian, a corporation may be deemed "Canadian" by the Minister for the purpose of determining whether an investment by it is reviewable.³⁸ The Minister, however, must be satisfied about a number of circumstances relating to the degree and significance of a corporation's Canadian participation, and that those circumstances have existed for not less than twelve months, notwithstanding subsection 26(1) of the IC Act. A public corporation is not deemed Canadian for the purpose of determining whether a notice is required to be filed with respect to a new investment, or an acquisition is in an amount below the monetary thresholds for review, in determining whether another entity is Canadian under subsection 26(1), or for the purpose of making certain investments related to Canada's cultural heritage or national identity.

In making the determination whether a corporation is to be deemed a

34. *Id.* para. 26 (1)(d).

35. *Id.* ss. 26(5).

36. *Id.* ss. 26(2).

37. *Id.* para. 27(b).

38. These facts include that: (a) the majority of its voting shares are owned by Canadians; (b) four-fifths of the members of its board of directors are Canadian citizens ordinarily resident in Canada; (c) its chief executive officer and three of its four most highly remunerated officers are Canadian citizens ordinarily resident in Canada; (d) its principal place of business is located in Canada; (e) its board of directors supervises the management of its business and affairs on an autonomous basis without direction from any shareholder other than through the normal exercise of voting rights at meetings of its shareholders. IC Act ss. 26(3).

Canadian under these provisions, the Minister is to consider any information or evidence submitted by or on behalf of the corporation, and the Minister must be satisfied that the circumstances described have existed for not less than the twelve month period immediately preceding the application. A corporation which is deemed a Canadian under this provision will be a Canadian for two years, provided the material facts upon which the determination was made remain unchanged.³⁹ It is understood that, in the event there is a change in circumstance which is not material during the last twelve months during which the presumption applies, such a change will not preclude the Minister from extending the presumption for a further two years.

3. *Ancillary Rules*

Section 27 contains ancillary rules to assist in interpreting section 26 of the IC Act: where any voting interests of an entity are owned by a partnership, a trust (other than a trust which is a Canadian-controlled entity by virtue of subsection 26(2) of the IC Act) or a joint venture, they are deemed to be owned by the partners, beneficiaries or members thereof in the same proportions as their respective ownership interests therein; any voting bearer shares of a corporation are deemed to be owned by non-Canadians unless the contrary is established; and, in the absence of evidence to the contrary, any voting interests of an entity which are one percent or less of the total number of voting interests shall be accepted by the Minister as owned by individuals who are Canadians upon receipt of a signed statement from a person authorized by the entity indicating that, according to the records of the entity, the individuals who own those voting interests have addresses in Canada and that the person has no reason to believe the voting interests are owned by individuals who are non-Canadians. Thus, in assessing whether a corporation is deemed to be a Canadian, the holdings of a Canadian pension fund in that corporation will be "looked through" and the pension fund's holdings, in most instances, will be regarded as holdings of individuals who are Canadians.

In summary, save for the provisions designed to encourage increased Canadian participation in certain trusts and corporations, the relevant factor in determining whether an entity is Canadian is the ownership of its voting interests. The existence of distributorship agreements, financing arrangements and other contracts which might provide a measure of influence to a non-Canadian do not affect the determination of Canadian status.

39. *Id.* ss. 26(5).

These rules for determining whether a partnership, joint venture or other unincorporated entity is Canadian appear to remedy the unequal and disadvantageous treatment afforded such entities under the FIR Act. Under the FIR Act, such entities were treated as groups and if any member of the group was a noneligible person, any acquisition by the entity was reviewable regardless of the size of the noneligible person's interest in the entity.⁴⁰

C. DEFINITION OF BUSINESS, CANADIAN BUSINESS AND NEW CANADIAN BUSINESS

The definitions of "business," "Canadian business" and "new Canadian business" are central to the operation of the IC Act as an investment is subject to the review or notification process only if there is an acquisition of control of a Canadian business or an investment in a new Canadian business.⁴¹

1. *Business*

The term business "includes any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit."⁴² The insertion of the words "capable of generating revenue" expands the definition of the term business beyond that of the FIR Act⁴³ and it is clear that a business has to be actually established before it is subject to the provisions of the IC Act. Market research, test marketing or feasibility studies are not by themselves considered activities capable of generating revenue. If an undertaking or enterprise is carried on with a charitable or other nonprofit objective, it will not be considered to be a business. Profit-making must be a purpose, and even if a venture is being carried on at a loss, if it is in the expectation of future profit, it is considered a business. For example, oil and gas and mineral properties which are only at the exploration stage are not considered to be businesses. A producing property or a property on which drilling or development of a mine has commenced for the purpose of production is considered a business, as is a property containing recoverable reserves which has been temporarily shut-in or closed.⁴⁴

A business which has temporarily closed or suspended operations is still a business for the purposes of the IC Act. A business whose assets have been placed in the hands of a trustee in bankruptcy or a receiver will still be considered a business provided the trustee or receiver is carrying on the operations of the business with a view to disposing of the business as a going

40. FIR Act, ss. 8(1) and 8(2).

41. IC Act, s. 11 and ss. 14(1).

42. *Id.* s. 3.

43. FIR Act, ss. 3(1).

44. Interpretation Note No. 4 issued by the Minister under s. 38 of the IC Act.

concern or to reorganizing its affairs. An undertaking which has ceased normal operations and become defunct, for example, a business which has been permanently closed or permanently abandoned or discontinued for purposes unrelated to the IC Act, is not a business for the purposes of the IC Act.⁴⁵

2. *Canadian Business*

The definition of a Canadian business in the IC Act⁴⁶ has been substantially amended from that in the FIR Act.⁴⁷ No longer is it relevant who carries on the business. Instead, a Canadian business under the IC Act means a business carried on in Canada that has a place of business in Canada; an individual or individuals in Canada who are employed or self-employed in connection with the business; and assets in Canada used in carrying on the business.⁴⁸ The IC Act expands the definition of Canadian business by providing that "[A] part of a business that is capable of being carried on as a separate business is a Canadian business if the business of which it is a part is a Canadian business."⁴⁹

The following factors may be relevant to determine whether a part of a business is capable of being carried on as a separate business:

(a) Does the part have separate accounting mechanisms, management, advertising, selling, purchasing, delivery, customers, or an identifiable group of employees?

(b) Are the operations of the part carried on under a separate license, patent, or similar right?

(c) Is the part carried on in a separate premises, or are the physical assets of the part segregated from the other business operations of the vendor?

(d) Does the part supply or provide some service which is more than purely incidental or ancillary to the main business operations of the vendor?⁵⁰

3. *New Canadian Business*

Whether an investment is a new Canadian business determines whether a notification of the investment must be filed.⁵¹ A new Canadian business means a business that is not already being carried on in Canada by a non-Canadian and which, when established, is either unrelated to any other

45. *Id.* No. 1.

46. IC Act, s. 3.

47. FIR Act, ss. 3(1).

48. IC Act, s. 3.

49. *Id.* ss. 31(2).

50. Interpretation Note No. 2, issued by the Minister under s. 38 of the IC Act.

51. IC Act, para. 11(a).

business being carried on by that non-Canadian or is related to a business carried on in Canada by that non-Canadian which falls within a prescribed specific type of business activity which, in the opinion of the Governor in Council, is related to Canada's cultural heritage or national identity.⁵²

The Minister has issued guidelines which provide that an expansion of an existing business is not considered to be the establishment of a new business if the new activity produces goods or services substantially similar to the goods or services produced by the existing business or if all of the goods or services produced by the new business are used in carrying on its existing business. A new business is related to an existing business if: at least 50 percent of the value of the goods or services produced by one business are used in the other business; the new business is predominantly engaged in the manufacture or assembly of proprietary goods which are currently being imported into Canada by the existing business; at least 50 percent of the value of the goods or services produced by the new business are directly substituted for an existing product or service being produced in Canada by the existing business; the technology and production processes used in the new business are essentially the same as those used in the existing business; the products or services produced by the new business are based on research and development carried out in Canada for the existing business; both businesses fall within the same industrial sector as defined in a classification published by Statistics Canada; or the central purpose of the new business is the more effective carrying on of the existing business.⁵³

V. Notification

A non-Canadian making an investment to establish a new Canadian business or to acquire control of a Canadian business in a manner which, but for the monetary thresholds, would be reviewable, must give notice to the Agency in prescribed manner within thirty days after implementation of the investment.⁵⁴ Upon receipt of a complete notice containing either all the required information or reasons for the inability to provide any part of the required information, the Agency is required to certify the date the complete notice was received.⁵⁵ If the investment is a specific type of business activity which, in the opinion of the Governor in Council, is related to Canada's cultural heritage or national identity, and if the Governor in Council, on the recommendation of the Minister, issues an order for review of the investment and the Agency sends the non-Canadian a notice for review, all within twenty-one days after the complete notice is filed, the

52. *Id.* s. 3.

53. Related Business Guidelines, issued by the Minister under s. 38 of the IC Act.

54. IC Act s. 11 and s. 12.

55. *Id.* ss. 13(1).

investment is reviewable.⁵⁶ Unless a notice for review of such an investment is given, the investment is nonreviewable. Provided the information in the notice to the Agency is accurate and no such notice for review is sent, that concludes the requirements under the IC Act.⁵⁷

VI. Reviewable Transactions

A. INTRODUCTION

Subject to certain monetary thresholds, an acquisition of control of a Canadian business by a non-Canadian in a "manner described" is reviewable,⁵⁸ as is an investment related to Canada's cultural heritage or national identity where a notice has been filed and a notice for review issued.⁵⁹ The IC Act extends the review process beyond that in the FIR Act⁶⁰ with respect to activities related to Canada's cultural heritage or national identity as the establishment of a new Canadian business to conduct those activities may be reviewable even if a related business is carried on in Canada by that non-Canadian.

B. ACQUISITION OF CONTROL

1. *Manner of Acquiring Control*

The rules for determining whether there has been an acquisition of control of a Canadian business are found primarily in sections 28 and 29 of the IC Act. As the manner in which control is acquired may dictate whether an acquisition is reviewable, and which monetary threshold applies,⁶¹ it is important to consider each of these rules in depth.

Under section 28, a non-Canadian acquires control of a Canadian business only by acquiring: voting shares of a corporation incorporated in Canada carrying on a Canadian business; voting interests of an entity, other than a corporation, carrying on a Canadian business, or controlling, directly or indirectly, another entity, other than a corporation, carrying on a Canadian business; all or substantially all of the assets⁶² used in carrying on a

56. *Id.* s. 15.

57. *Id.* ss. 13(3).

58. *Id.* ss. 14(1).

59. *Id.* s. 15.

60. FIR Act, ss. 8(1).

61. IC Act, s. 14.

62. Interpretation Note No. 3 issued by the Minister under s. 38 of the IC Act assists in interpreting the meaning of the phrase "all or substantially all of the assets." The determination is not purely a quantitative one based solely on the proportionate value or number of assets to be acquired or retained by the vendor. Assets also have a qualitative value and this value can have a significant effect in the determination of whether the acquisition of less than all the assets of a business constitutes the acquisition of "substantially all" of the assets used in carrying on

Canadian business; or voting interests of an entity controlling, directly or indirectly, an entity in Canada carrying on a Canadian business.

It follows that an acquisition of a foreign corporation with a Canadian branch is not an acquisition of control. On the other hand, an acquisition of any other foreign entity with a branch in Canada is an acquisition of control under the IC Act. Subject to the monetary thresholds, an indirect acquisition of any entity, other than a corporation incorporated elsewhere than in Canada, carrying on a Canadian business is reviewable.

To determine whether an entity controls, directly or indirectly, another entity, subsection 28(2) has to be considered. An entity which controls another entity is deemed to control, indirectly, any entity controlled, directly or indirectly, by that entity. An entity controls another entity directly if it owns either a majority of the voting interests of the other entity, or less than a majority of the voting shares of a corporation, but controls the corporation in fact through the ownership of one-third or more of its voting shares. Entities controlled, directly or indirectly, by the same entity are deemed to be associated with each other, with any entity controlled by any one or combination of them and with the entity that controls them. Finally, entities which are deemed to be associated and own voting interests of the same entity may be treated as one entity for the purpose of establishing direct or indirect control of the entity in which they own voting interests.

2. *Presumptions*

The IC Act establishes certain presumptions regarding acquisitions of control.⁶³ An acquisition of a majority of the voting interests of an entity is deemed to be an acquisition of control of that entity.⁶⁴ An acquisition of less than one-third of the voting shares of a corporation is deemed not to be an acquisition of control of the corporation.⁶⁵ An acquisition of less than a majority but one-third or more of the voting shares of a corporation is

the business. If an asset essential to the continuance of the business is not acquired, then, notwithstanding the fact that all other assets are acquired, it cannot be said that control of the business is acquired. On the other hand, if the operating assets essential to the continuance of the business are acquired, the test of "substantially all of the assets used in carrying on the Canadian business" would probably be met.

Assets essential to the continuance of a business are those assets without which the business cannot reasonably be expected to be carried on. Accordingly, if the investor acquires sufficient assets to carry on the former business, and the vendor is left with insufficient assets to be able to continue to carry on that business, the investor can usually be said to have acquired substantially all of the assets used in carrying on that business. In most cases, liquid assets such as cash, promissory notes and investment portfolios are not considered assets essential to the continuance of a business.

63. *Id.* ss. 28(3).

64. *Id.* para. 28(3)(a).

65. *Id.* para. 28(3)(d).

presumed to be an acquisition of control unless it can be established that control in fact of the corporation, through the ownership of its voting shares or by its board of directors, is unchanged notwithstanding the acquisition.⁶⁶ An acquisition of less than a majority of the voting interests of an entity, other than a corporation, is not an acquisition of control of that entity.⁶⁷

Included within an acquisition is the cumulation of all past transactions whether or not related, and whether or not the previous transactions occurred before the IC Act came into force, subject only to the IC Act provisions.⁶⁸ As a consequence, a non-Canadian which owned 25 percent of the voting shares of a Canadian corporation carrying on a Canadian business at the time the Act came into force, and which acquires a further 30 percent of the voting shares of that corporation after the Act came into force, will acquire control of that Canadian business.

It appears the sequential transaction provision will also operate to bring within the definition of voting share⁶⁹ a share which does not have a voting right when acquired but which acquires a voting right as the result of a subsequent event or transaction. The sequential transaction provision is extended by subsection 29(2) of the IC Act which provides that where, as a result of more than one transaction or event, none of which is itself an acquisition of control within the meaning of subsection 28(1), a non-Canadian controls in fact an entity carrying on a Canadian business through the ownership of voting interests "that non-Canadian is deemed to have acquired control of the entity at the time and in the manner of the latest of such transactions or events." The use of the expression "control in fact" has raised the question whether this provision overrides the acquisition of control rules of section 28. It is understood this was not the intention behind the provision and that an opinion to that effect will be given by the Minister.

The effect of subsection 29(2) is to aggregate, for the purposes of determining what voting interests have been acquired, the direct and indirect holdings of an entity. The words "directly and indirectly" used throughout the IC Act relate to control and not to voting interests. Subsection 29(2) is necessary to ensure that, if a non-Canadian corporation, which owns 25 percent of the voting shares of a Canadian corporation carrying on a Canadian business, establishes a wholly-owned subsidiary which purchases a further 30 percent of the voting shares of the Canadian corporation, although the 30 percent acquisition is under the threshold amount, there

66. *Id.* para. 28(3)(c). In contrast, under the FIR Act, there was a presumption that control was acquired where 5 percent or more of the voting rights of a publicly traded corporation or 20 percent or more of the voting rights of a nonpublicly traded corporation were acquired. FIR Act, para. 3(3)(c).

67. *Id.* para. 28(3)(b).

68. *Id.* ss. 29(1).

69. *Id.* s. 3.

would be an acquisition of control in the manner and at the time of the subsidiary's acquisition as the non-Canadian corporation would have control in fact with its 55 percent of the voting shares.

The acquisition by any non-Canadian of any right, other than an absolute right under a written contract to acquire voting interests of an entity or assets used in carrying on a business, does not constitute an acquisition of those voting interests or assets. However, a non-Canadian which has an absolute right under a written contract to acquire voting interests of an entity or to acquire any assets used in carrying on a business may treat that right as if it had been exercised and as if the non-Canadian owned the voting interests or assets that are the subject of that right.⁷⁰

This provision would permit a non-Canadian, which is establishing, with another party, a Canadian corporation to carry on a business in Canada, to treat an absolute right to purchase the balance of the shares from the other party under an agreement between the two parties as if it had been exercised before there is any Canadian business established, thus avoiding any subsequent review or notice upon such an exercise. If there is no such absolute right, a non-Canadian should consider insisting on more than 50 percent of the voting interests in the Canadian business on its establishment so that any subsequent acquisition by the non-Canadian of the balance of the voting interests would not be reviewable.

As a result of the presumptions regarding acquisitions of control, a non-Canadian which acquires a majority of the voting interests of an entity carrying on a Canadian business is deemed to have acquired control of that business notwithstanding it may already have had control in fact of the business under the FIR Act. It is understood that the Minister does not intend to require this type of transaction to be reviewable and that an opinion to that effect will be issued upon request.

C. MONETARY THRESHOLDS

1. *Reviewable Investments*

Any transaction in which a non-Canadian acquires control of a Canadian business will be reviewable if the amount of the investment reaches the monetary threshold or if the investment is related to Canada's cultural heritage or national identity and a notice for review in respect of the investment has been issued. The monetary threshold for review is met if, where assets used in carrying on a Canadian business are acquired, the value of those assets is \$5 million (Cdn.) or more or, where an entity carrying on a Canadian business is acquired, the value of its assets and those of all the other entities in Canada the control of which is acquired, directly or indi-

70. *Id.* ss. 30(1).

rectly, is \$5 million (Cdn.) or more.⁷¹ However, if the primary subject of the acquisition is a foreign corporation, as opposed to any other foreign entity, the monetary threshold is \$50 million (Cdn.).⁷² That is, if a non-Canadian acquires control, directly or indirectly, of a corporation incorporated outside of Canada that controls, directly or indirectly, a Canadian entity carrying on a Canadian business the value of whose assets together with those of all other entities in Canada, the control of which is being acquired, directly or indirectly, is \$50 million (Cdn.) or more, the transaction is not reviewable unless the value of the assets of the Canadian entity and those of all other entities in Canada, the control of which is being acquired, amounts to more than 50 percent of the value of the assets of all entities being acquired in the transaction, including the foreign corporation.⁷³

Assets include tangible and intangible assets⁷⁴ and the manner of calculating the value of the assets is prescribed in the Regulations to the IC Act.⁷⁵ Essentially, the value of the assets is determined from the audited financial statements, if available, and otherwise the unaudited statements, for the fiscal year immediately preceding the implementation of the investment.

The monetary amounts of each transaction are considered separately for the purposes of assessing whether an investment is reviewable.⁷⁶ Thus the value of any assets of any entity previously acquired in Canada or acquired concurrent to the investment being considered, but not in the same transaction, is irrelevant to the determination of the value of the assets being acquired.

2. *Valuation of Assets*

In determining the value of the assets of the entity carrying on the Canadian business and of all other entities in Canada the control of which is acquired, directly or indirectly, in the transaction, those entities which are included within the investment but which are exempt from the provisions of the IC Act are not included in the calculation.⁷⁷

Where both assets and voting interests are acquired in a transaction, there is no provision in the IC Act to aggregate the value of the assets with the value of the assets of the entities. Thus, an acquisition of control of assets with a value of \$4 million (Cdn.) and of entities carrying on a Canadian business with assets with a value of \$4 million (Cdn.), provided the acquisition does not fall within a prescribed specific type of business activity that is

71. *Id.* ss. 14(3).

72. *Id.* ss. 14(4).

73. *Id.* ss. 14(2).

74. *Id.* s. 3.

75. CAN. STAT. O. & REGS./85-116, s. 3.

76. IC Act, ss. 14(3).

77. *Id.* ss. 10(1).

related to Canada's cultural heritage or national identity, would not be reviewable even though the value of the assets acquired, directly and indirectly, exceeds the \$5 million (Cdn.) threshold.

Finally, where control in fact is acquired through the ownership of voting interests as a result of a series of nonreviewable transactions, it is the latest of such transactions which determines which monetary threshold is relevant.⁷⁸ For example, if a non-Canadian, which owns 30 percent of the voting shares of a corporation carrying on a Canadian business and having assets of \$10 million (Cdn.), acquires control of that corporation by virtue of the acquisition of a United States corporation owning another 10 percent of the voting shares of that Canadian corporation, provided the value of the assets of the United States corporation is at least \$20 million (Cdn.) (i.e., at least twice the value of the Canadian assets), the non-Canadian's acquisition will not be reviewable notwithstanding the non-Canadian's direct shareholding. If the transactions occur in the reverse order the last acquisition would be reviewable.

D. CULTURAL HERITAGE AND NATIONAL IDENTITY

As set out above,⁷⁹ certain investments made to establish a new business or to acquire control of a Canadian business which, in the opinion of the Governor in Council, are related to Canada's cultural heritage or national identity may be reviewable.⁸⁰ The provision in subsection 26(3) deeming certain public corporations to be Canadian does not apply to exempt such corporations from review with respect to such investments.

The only specific types of business activities prescribed to date as relating to Canada's cultural heritage or national identity are: publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form; production, distribution, sale or exhibition of film or video products; production, distribution, sale or exhibition of audio or video music recordings; and publication, distribution or sale of music in print or machine-readable form.⁸¹

Any future regulations prescribing that an activity relates to Canada's cultural heritage or national identity must be laid before each House of Parliament on any of the first five days that House is sitting after such regulations are made and shall not come into force before sixty days after they are made.⁸² Consequently, any such restrictions on investment under the IC Act will be known to the public and will not be subject to arbitrary or secretive application.

78. *Id.* ss. 29(2).

79. *See supra* note 60, and accompanying text.

80. IC Act, s. 15.

81. CAN. STAT. O. & REGS./85-116, s. 8.

82. *Id.* ss. 35(2).

E. EXEMPTIONS

Under section 10 of the IC Act, the provisions of the IC Act do not apply to an acquisition of: voting interests by a trader or dealer in securities in the ordinary course of its business; voting interests by a person in the ordinary course of a business of providing venture capital in Canada on certain conditions;⁸³ control of a Canadian business in connection with the realization of security granted for a loan or other financial assistance; control of a Canadian business for the purpose of facilitating its financing, provided the acquirer divests itself of control within two years or such longer period as is approved by the Minister; control of a Canadian business by reason of an amalgamation, merger, consolidation or corporate reorganization;⁸⁴ control of a Canadian business carried on by an agent of the Canadian government or a province or a Crown corporation within the meaning of the Financial Administration Act (Canada); control of a Canadian business carried on by a corporation exempt from tax by virtue of paragraph 149(1)(d) of the Income Tax Act (Canada);⁸⁵ control of a Canadian business by certain insurance companies on certain conditions;⁸⁶ and control of a Canadian business the revenue of which is generated from farming carried out on real property acquired in the same transaction. If the conditions applicable to venture capitalists or insurance companies are not met, the transaction will be subject to the provisions of the IC Act as though it had never been exempt.⁸⁷ The Act also does not apply to a transaction to which

83. The terms and conditions for the venture capital exemption fixed by the Minister pursuant to IC Act, para. 10(1)(b) are: (a) the investor has made venture capital available in Canada for a minimum period of two years immediately preceding the acquisition of voting interests to which the exemption applies; (b) the investor provides venture capital substantially through the purchase of voting interests or through other unsecured investments or loans that are subordinate to all financing other than voting interests; (c) no single venture capital investment at original cost normally constitutes more than 20 percent of the investor's total venture capital portfolio; (d) the investor's investments are made for the purpose of eventual resale and not for the purpose of acquiring permanent control of businesses in which it invests and in anticipation of realizing a capital gain on the resale; and (e) the investor normally sells the voting interests of any entity that the investor has purchased within ten years of their acquisition.

84. IC Act, para. 10(1)(e)—provided ultimate direct or indirect control in fact of the Canadian business, through the ownership of voting interests, remains unchanged.

85. CAN. REV. STAT. c. 148, 1952, as amended. Para. 149(1)(d) applies to a corporation, at least 90 percent of the shares or capital of which is owned by the government, a province, a Canadian municipality or a wholly-owned corporation subsidiary to such a corporation or to a commission or association not less than 90 percent of whose shares or capital are owned by the government, a province or a Canadian municipality.

86. IC Act, para. 10(1)(j). The conditions include, *inter alia*, a requirement that the gross investment revenue from the Canadian business be included in the taxable income of such insurer from carrying on business in Canada.

87. *Id.* ss. 10(2).

section 307 of the Bank Act (Canada) applies;⁸⁸ or an involuntary acquisition of control of a Canadian business on the devolution of an estate or by operation of law.⁸⁹

Aside from the farming exemption set out above, there is no specific exemption in the IC Act for acquisitions of real property. Whether an investment of \$5 million (Cdn.) or more by a non-Canadian in real property is reviewable depends upon whether there is an acquisition of control of a Canadian business. For example, an acquisition of control of a shopping center or an apartment building having a value in excess of \$5 million (Cdn.) would normally be reviewable as the shopping center or apartment building would be a Canadian business; *i.e.*, it would have a place of business in Canada, an individual employed or self-employed in connection therewith and an asset used in carrying on the business in Canada.

VII. Review Process

A. APPLICATION

A non-Canadian making a reviewable investment is required to file an application with the Agency.⁹⁰ The manner of filing and the information which the application is to contain are set out in the Regulations.⁹¹ The information required will vary depending upon whether the investment is an acquisition reviewable under section 14 of the IC Act or pursuant to a notice for review under section 15 of the IC Act. The forms provided as Schedules II and III to those Regulations may, but need not, be used for the purpose of the application.⁹²

B. TIMING

The timing of the filing of an application is dependent upon the type of

88. Bank Act, CAN. STAT. 1980-81-82-83, c. 40, s. 307. That section excludes from application of the IC Act (i) proposals to acquire control or acquisitions of control of a bank or foreign bank subsidiary; (ii) proposals to establish or the establishment of a new Canadian business that is a bank or a foreign bank subsidiary; (iii) proposals to acquire control or the acquisition of control of a corporation by a foreign bank and proposals to establish, or the establishment of, a new Canadian business by a foreign bank whose principal activity in Canada is (a) the provision of any service that a bank is permitted by the Bank Act to provide in Canada, (b) fiduciary services, (c) performing the functions of an investment dealer, stockbroker or investment counsellor, (d) conducting the business of insurance (including the function of an insurance agent or broker), or (e) any combination of activities described in items (a) to (d); (iv) proposals to acquire control, or the acquisition of control, by a foreign bank subsidiary of a Canadian corporation; and (v) proposals to establish, or the establishment of, a representative office under the Bank Act.

89. IC Act, para. 10(1)(i).

90. *Id.*

91. CAN. STAT. O & REGS./85-116, s. 6.

92. *Id.*

investment. An application for an investment which is reviewable only because it falls within a prescribed type of business activity that is related to Canada's cultural heritage or national identity and with respect to which a notice for review has been sent is to be filed upon receipt of the notice.⁹³ An application with respect to either an investment to acquire control, directly or indirectly, of a corporation incorporated outside of Canada that controls, directly or indirectly, an entity in Canada carrying on Canadian business, or an investment for which the Minister has sent a notice to the non-Canadian investor stating that he is satisfied that a delay in implementing the investment would result in undue hardship to the non-Canadian or would jeopardize the operations of the Canadian business, is to be filed at any time prior to the implementation of the investment or within thirty days thereafter.⁹⁴ Any other investment which is reviewable is not to be implemented until the application is filed and the Minister is satisfied or is deemed to be satisfied that the investment is likely to be of net benefit to Canada.⁹⁵

As a consequence, a non-Canadian seeking to acquire control of a Canadian business in a reviewable transaction, other than by way of an acquisition of a corporation incorporated outside of Canada, will be required to make any offer, including a public take-over offer, conditional upon the satisfaction of the Minister having been received, unless the Minister has waived the requirement. To meet the problem of an applicant being required to file an application before the transaction is completed where insufficient information is known by the applicant about the Canadian business to properly complete the notice, an application which contains reasons for the inability to provide any missing information will be dealt with as complete.⁹⁶

C. PROCEDURE

The Agency is required to send a receipt to the applicant certifying the filing date if a completed application containing all the required information or the reasons for the inability to provide any part of the information is received by the Agency.⁹⁷ If the application is incomplete, the Agency is required to send a notice specifying the information still outstanding.⁹⁸ If the Agency does not send either a receipt or a notice within fifteen days after an application is received by the Agency, the application is deemed to be

93. IC Act, para. 17(2)(c).

94. *Id.* para. 17(2)(b).

95. *Id.* para. 17(2)(a).

96. *Id.* ss. 18(1).

97. *Id.*

98. *Id.* ss. 18(2).

complete as of the date the application was received by the Agency, and the Agency is required to send a receipt certifying the date on which the application was deemed to be complete.⁹⁹

Once the application has been filed and a certificate that the application is complete has been received, the review process commences. The Agency reviews the application and seeks the views of other interested parties, particularly other federal government departments and any relevant provincial governments. Consequently, it may be advantageous for the applicant to consult independently with such federal departments and provincial governments to ensure the applicant's position is best presented and to meet any concerns which they might express. The Agency may contact the applicant and meetings with the Agency may be required. In sensitive cases it may be advisable to enlist the aid of the vendor, the management of the business, labor unions, local business organizations and elected officials in support of the application.

Other parties, including competitors and other potential acquirers, may also make representations directly to the Agency. The Agency will normally advise the applicant of the nature of any third party intervention but not the identity of the intervener or the specifics of the intervention and the applicant should be prepared to meet any criticisms of the investment. None of these parties is entitled to any information received by the Agency, but their comments may influence the Agency. Third party interventions raise a number of administrative law issues and it may be that consideration by the Minister of submissions made by such interveners would be challengeable.¹⁰⁰

The purpose of the review process is to permit the Minister to determine whether the investment is likely to be of net benefit to Canada within the meaning of the statutory criteria. Ultimately, the Agency makes a recommendation to the Minister, which may be based in part on legally enforceable undertakings given by the applicant, and in so doing refers to him all information submitted by the applicant, any information submitted by the vendor of the business, any undertakings and any representations submitted by a Province.¹⁰¹

The Minister has forty-five days from the certified date to advise the applicant that he is satisfied the investment is likely to be of net benefit to Canada.¹⁰² If the Minister is not satisfied within the forty-five days, he is required by notice to so advise the applicant and within thirty days after the

99. *Id.* ss. 18(3) and para. 18(1)(c).

100. See Arnett, Rueter & Mendes, *FIRA and the Rule of Law*, 62 CAN. BAR REV. 121 (1984).

101. IC Act, s. 19.

102. *Id.* ss. 21(1).

sending of that notice or such longer period as is agreed between the applicant and the Minister, he must complete his consideration of the investment.¹⁰³ If, within this thirty day period or such longer period as is agreed, the Minister is satisfied the investment is of net benefit to Canada, he is to send a notice thereof within that period to the applicant.¹⁰⁴

If the Minister is not satisfied that an investment is likely to be of net benefit to Canada within the initial forty-five days or any applicable extension period, the Minister must notify the applicant within the relevant period, advising the applicant of his right to make representations and to submit undertakings within thirty days of the date of the notice or such further period as may be agreed between the Minister and the applicant.¹⁰⁵

If the applicant advises the Minister that he wishes to make representations or submit undertakings, the Minister is required to provide the applicant a reasonable opportunity, within that thirty days or such further period as is agreed.¹⁰⁶ At the end of the period, the Minister shall advise the applicant that he is either satisfied or not satisfied the investment is likely to be of net benefit to Canada.¹⁰⁷

If the Minister does not send a notice within the initial forty-five day period and within the additional thirty day or such longer period as is agreed with the applicant, the Minister is deemed to be satisfied the investment is likely to be of net benefit to Canada and shall send a notice to that effect to the applicant.¹⁰⁸ If a notice is sent to an applicant confirming the Minister is not satisfied the investment is likely to be of net benefit to Canada, the applicant must either not implement the investment or, if implemented, must divest itself of the investment.¹⁰⁹

D. STATUTORY CRITERIA

The statutory test an applicant must meet is whether the Minister is satisfied "the investment is likely to be of net benefit to Canada,"¹¹⁰ whereas the FIR Act test was whether the Governor in Council concluded that the investment was or was likely to be of significant benefit to Canada.¹¹¹ The substitution of the Minister for the Governor in Council removes an entire decision level and should not only expedite the process but also facilitate communications with the investor.

103. *Id.* ss. 22(1).

104. *Id.* ss. 22(2).

105. *Id.* ss. 23(1).

106. *Id.* ss. 23(2).

107. *Id.* ss. 23(3).

108. *Id.* ss. 21(2) and 22(3).

109. *Id.* s. 24.

110. *Id.* s. 21, 22 and 23.

111. FIR Act, ss. 12(1).

In addition to the information, undertakings and representations given by the investor, the Minister is to take into account specific statutory factors in determining whether there is net benefit to Canada.¹¹² These factors are: the investment's effect on the level and nature of economic activity in Canada, including, *inter alia*, the effect on employment, resource processing, utilization of parts, components and services and exports; the degree and significance of participation by Canadians in the Canadian business and its industry; the investment's effect on productivity, industrial efficiency, technological development, product innovation and product variety; the investment's effect on competition; the compatibility of the investment with industrial, economic and cultural policies of the federal and relevant provincial governments; and the investment's contribution to Canada's ability to compete in world markets.

The factors in assessing an investment may be given different weight in different circumstances and there is no statutory prescription of what constitutes "net benefit." Clearly, today, the Government's intention is to encourage foreign investment.¹¹³ Net benefit is a less onerous criterion than significant benefit and, in practice, it appears the requirement is to demonstrate there is, on balance, no detriment plus, at least, some marginal benefit. However, in determining whether there is no detriment the Minister is required to consider the specific statutory criteria set out above, including Canadian government policy, for example, Canadian ownership in the energy and arts sectors. As a consequence, the manner in which the IC Act is administered may change, from time to time, in response to changing policies of the Government.¹¹⁴

E. COMPLIANCE

The IC Act provides for a monitoring process whereby the Agency can require information from time to time from the non-Canadian in order to determine whether the investment is being carried out according to the application and the representations and undertakings made or given.¹¹⁵ Normally, on the anniversary of the allowance of the investment, the Agency will request a written confirmation of compliance with the undertakings. If the undertakings have not been complied with, the Agency will

112. IC Act, s. 20.

113. It is understood for example, that no foreign investment has been disallowed since the Conservative government came into power.

114. See statement by the Honorable Sinclair Stevens following the tabling of Bill C-15: "At the same time we believe that Canada requires the means to safeguard its national interests. Industrialized countries do not simply throw their doors open and invite others to take over the components of their economic, cultural and political sovereignty. It is for that reason that we have retained a review mechanism."

115. *Id.* s. 25.

usually listen to reasonable explanations and may be prepared to enter into renegotiations.

F. APPEALS

A decision by the Minister that he is not satisfied an investment is likely to be of net benefit to Canada is not appealable. An applicant can always resubmit an application.

VIII. Miscellany

A. OPINIONS, GUIDELINES AND INTERPRETATION NOTES AND PRIVILEGED INFORMATION

The Minister is required, on receipt of an application with sufficient information and evidence, to provide an opinion as to whether an individual or an entity is a Canadian.¹¹⁶ The IC Act also provides that the Minister may, rather than shall, provide an opinion on the applicability of any other provision of the IC Act or the Regulations.¹¹⁷ An opinion of the Minister is binding so long as the material facts on which the opinion is based remain substantially unchanged.¹¹⁸ Finally, the IC Act authorizes the Minister to delegate to the Agency or any other person the authority to provide written opinions.¹¹⁹

The IC Act provides authority for the Minister to issue and publish guidelines and interpretation notes with respect to the application and administration of any provision of the IC Act or the Regulations.¹²⁰

All information provided under the IC Act with respect to the business or the applicant is privileged and may only be communicated or disclosed in very limited circumstances.¹²¹ Where the Minister is satisfied or deemed to be satisfied an investment is likely to be of net benefit to Canada, disclosure of any undertakings is authorized,¹²² but in practice such undertakings are only published with the consent of the applicant.

B. REMEDIES, OFFENSES AND PENALTIES

While the IC Act contains provisions permitting the Minister to ensure the IC Act is not contravened, including the right to issue demands with

116. *Id.* ss. 37(1).

117. *Id.* ss. 37(2).

118. *Id.* ss. 37(3).

119. *Id.* ss. 37(4).

120. *Id.* s. 38.

121. *Id.* s. 36.

122. *Id.* para. 36(4)(b).

respect to noncompliance¹²³ and the right to apply for court orders,¹²⁴ the IC Act dispenses with the search and seizure provisions of the FIR Act.¹²⁵ The FIR Act remedy of rendering an investment nugatory¹²⁶ has been eliminated and the penalties under the IC Act include orders to divest¹²⁷ and penalties of up to \$10 thousand (Cdn.) per day.¹²⁸

C. TRANSITIONAL PROVISIONS

The IC Act contains transitional provisions such that undertakings given in connection with, and all terms and conditions of, an investment allowed under the FIR Act are enforceable.¹²⁹ Legal proceedings pending under the FIR Act upon its repeal may be continued¹³⁰ and legal proceedings may be taken under the IC Act regarding an investment which was the subject of any deemed allowance or order under the FIR Act.¹³¹

There has been significant criticism of the IC Act's provisions which compel foreign investors to perform undertakings given under the FIR Act regarding investments which would not have been reviewable had they been made under the IC Act. This provision appears to conflict with the provision, discussed below, which provides that investments made before the IC Act came into force and which were reviewable under the FIR Act, but are not reviewable under the IC Act and which were not disposed of under the FIR Act, are not reviewable under the Act.

Investors who filed notices under the FIR Act which had not been allowed, deemed allowed or disallowed on the coming into force of the IC Act, were not required to refile under the IC Act and were deemed to have filed a complete application or notice the day the IC Act came into force.¹³² Hence, such investments were governed by the generally more favorable provisions of the IC Act, notwithstanding they were made at a time when the FIR Act was in force.

Any investment for which a notice should have been filed under the FIR Act, but was not, was deemed to be implemented on the day the IC Act came into force.¹³³ Again, if such an investment is not reviewable under the IC Act the review provisions will not apply even though it would have been reviewable under the FIR Act.

123. *Id.* ss. 39(1).

124. *Id.* ss. 40(1).

125. FIR Act, s. 16.

126. *Id.* ss. 20(1).

127. IC Act, para. 40(2)(a).

128. *Id.* para. 40(2)(d).

129. *Id.* ss. 45(1).

130. *Id.* ss. 45(2).

131. *Id.* ss. 45(3).

132. *Id.* ss. 45(5).

133. *Id.* ss. 45(6).

The repeal of the FIR Act did not eliminate its offense provisions¹³⁴ and any person who knowingly failed to file under the FIR Act may be subject to those offense provisions even after its repeal.

The transitional provisions also provide that information privileged under the FIR Act is accorded the same privilege as is provided information privileged under the IC Act.¹³⁵

IX. Summary

The IC Act represents a significant positive change for foreign investors wishing to invest in Canada. In particular, it provides for the elimination from review of most new investments, the substantial threshold below which acquisitions will not be reviewed and the time prescription within which applications must be dealt. The requirement to file a notice will undoubtedly be an irritant to foreign investors but it should not deter them from investment. The IC Act resolves many of the technical issues which arose under the FIR Act, particularly in the treatment of partnerships, trusts and joint ventures. The real issue is whether the goodwill of the present Government towards foreign investors who propose substantial acquisitions in Canada will continue to be reflected in the Minister's administration of the IC Act.

134. Interpretation Act, CAN. REV. STAT. c. I-23, 1970, s. 35.

135. IC Act, ss. 45(4).