

CANADA \*THE INVESTMENT CANADA BILL

## Key features of the New Bill

The Investment Canada Bill recognizes that investment is central to economic growth and new employment opportunities and the key to technological advancement. For this reason, investment in Canada by both Canadians and non-Canadians is assumed to be likely to bring benefit to Canada.

The Bill establishes a new Agency, Investment Canada, with a mandate to encourage and facilitate investment. At the same time it provides for a review of large acquisitions in Canada by non-Canadians to ensure that the assumption of benefit is justified. For small acquisitions and the establishment of new businesses, non-Canadian investors need only notify the Agency of their investment intentions.

Responsibilities of the Minister and Agency

Part I of the Bill (Sections 4 - 9) describes the responsibilities of the Minister, and thereby of the Agency, to carry out activities that encourage investment and ensure benefit. The Minister will:

- encourage business investment by appropriate means;
- assist Canadian businesses to exploit opportunities for investment and technological advancement;
- carry out research and analysis pertaining to domestic and international investment;
- provide investment information services and other investment services to facilitate economic growth in Canada;
- assist in the development of industrial and economic policies that affect investment in Canada;
- ensure that the notification and the review of investments are carried out as required by legislation.

The Bill envisages that the Minister will seek the co-operation of other federal Government departments, the provinces and the private sector with a view to improving the investment climate and providing services that will assist Canadians to exploit new investment opportunities.

Specific exemptions from both notification and review

Some transactions by non-Canadians are not intended to be affected by the legislation. These are described at an early stage in the Bill (Part II) so that potential investors can readily identify them. They include:

- certain temporary or involuntary acquisitions of control of a Canadian business;
  - by security dealers or traders or venture capitalists in the normal course of their business;
  - as a result of realization on security granted for a loan or to facilitate the financing of the Canadian business;
  - by inheritance;
- the acquisition of control of a Canadian business by reason of an amalgamation, a merger, a consolidation or corporate reorganization where the ultimate control of the business remains unchanged;
- acquisition of control of a business of a crown corporation or of a provincial or municipal corporation;
- investments regulated under the Bank Act;
- certain real estate investments;
- investments by life insurance companies for the benefit of their Canadian policyholders.

Definitions, Rules and Presumptions

Section 3 provides definitions and Part V (Sections 26 - 32) provides rules and presumptions to assist in interpreting the remaining sections of the Bill relating to the notification and review procedures for investments by non-Canadians. They are intended to provide greater certainty as to the applicability of the legislation. They include:

"business" includes any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit;

"Canadian" means

- (a) a Canadian citizen or permanent resident within the meaning of the Immigration Act, 1976, except a permanent resident who has not taken out Canadian citizenship within one year of the date of eligibility to do so;
- (b) a Canadian government, whether federal, provincial or local, or an agency of such governments; or
- (c) a Canadian-controlled entity (corporation, partnership, trust or joint venture) or one that is deemed to be a Canadian.

Rules for determining whether a corporation or other entity is Canadian or non-Canadian

- If one Canadian or two or more Canadian members of a voting group own a majority of the voting interests of an entity, it is Canadian-controlled;
- If one non-Canadian or two or more non-Canadian members of a voting group own a majority of the voting interests of an entity, it is not Canadian-controlled;
- If Canadians own a majority of the voting interests of an entity it is a Canadian-controlled entity if it can be established that the entity is not in fact controlled by a non-Canadian or by a majority-non-Canadian voting group;
- If two persons, one of whom is a non-Canadian, own equally all of the voting shares of a corporation, the corporation is not Canadian-controlled;
- 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 it can be established that:
  - the entity is in fact controlled by Canadians through the ownership of voting interests by a Canadian or by a majority-Canadian voting group; or
  - the entity is not controlled in fact by any shareholder or voting group and that 2/3 of the members of the board of directors of a corporation or, in the case of a limited partnership, 2/3 of the general partners are Canadians.

In the above rules a Canadian or non-Canadian includes only individuals, governments or their agencies or corporations.

- In the case of a corporation incorporated in Canada whose voting shares are publicly traded in the open market, if at least 2/3 of the voting shares are owned by individual Canadians, Canadian corporations that are wholly-owned, directly or indirectly, by individual Canadians or a combination of those individuals and corporations, the corporation is deemed to be a Canadian, irrespective of de facto control. Voting shares owned by wholly-owned crown corporations or agencies would "count" towards the 2/3 share.

The Bill provides for the Minister, on the basis of information submitted by an individual or entity, to give a written opinion as to whether or not that individual or entity is a Canadian.

"non-Canadian" means an individual, a government or government agency or an entity that is not a Canadian;

"Canadian business" means a business carried on in Canada and having;

- (a) a place of business in Canada
- (b) an individual or individuals in Canada employed or self-employed in connection with the business, and
- (c) assets in Canada used in carrying on the business;

"new Canadian business", in relation to a non-Canadian, means a business not previously carried on in Canada by the non-Canadian and that, at the time of its establishment

- (a) is unrelated to any other business being carried on in Canada by that non-Canadian; or
- (b) is related to another business being carried on in Canada by that non-Canadian but falls within a specific type of business activity related to Canada's cultural heritage or national identity that has been prescribed by the regulations.

"Canada" includes the territorial sea of Canada as determined in accordance with the Territorial Sea and Fishing Zones Act, its seabed and subsoil and all other areas beyond the territorial sea of Canada where Canada has or claims jurisdiction;

"joint venture" means an association of two or more persons or entities, where the relationship among those associated persons or entities does not, under the laws in force in Canada, constitute a corporation, a partnership or a trust and where all the undivided ownership interests in the assets of the Canadian business to which this Bill applies are or will be owned by all the persons or entities that are so associated;

"voting share" means a share in the capital of a corporation to which is attached

- (a) a voting right ordinarily exercisable at meetings of shareholders of the corporation and
- (b) a right to receive a share of the profits or to share in the assets of the corporation on dissolution or both;

"voting interest", with respect to

- (a) a corporation with share capital, means a voting share;
- (b) a corporation without share capital, means an ownership interest in the assets that entitles the owner to rights similar to those enjoyed by the owner of a voting share; and
- (c) a partnership, trust or joint venture, means 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.

"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, 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;

Acquisition of Control Rules (Sections 28 - 31)

For the purposes of the Bill an acquisition is defined as the acquisition of control of a Canadian business by

- acquisition of all or substantially all of the assets used in carrying on a Canadian business
- acquisition of
  - 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
  - voting interests of an entity that controls, directly or indirectly, another entity carrying on a Canadian business

where the following presumptions apply:

- the acquisition of a majority of the voting interests of an entity (including a majority of the voting shares or undivided ownership interests in the voting shares of a corporation) is deemed to be acquisition of control;
- the acquisition of less than a majority but more than 1/3 of the voting shares (or an equivalent undivided ownership interest in the voting shares) of a corporation is presumed to be 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;
- the acquisition of less than a 1/3 of the voting shares of a corporation or less than a majority of the voting interests of any other entity is deemed not to be acquisition of control.

The Bill provides additional rules and presumptions concerning direct and indirect control (Subsection 28(2)), sequential transactions (Section 29) contractual rights to acquire voting interests or assets and multiple or fractional voting rights (Section 30), and application to part of a business or a business partly carried on in Canada (Section 31).

Notification of Investments

Part III (Sections 11 - 13) identifies those acquisitions of control of Canadian businesses and investments to establish new businesses in Canada by non-Canadians which are subject to notification.

Investments requiring only notification are all new Canadian businesses (regardless of size), all direct acquisitions of Canadian businesses with assets under \$5M, and most indirect acquisitions of Canadian businesses with assets under \$50M. Indirect acquisitions of Canadian businesses whose assets represent more than 50 percent of the assets involved in the total international transaction are subject to the \$5M threshold rather than the \$50M threshold which applies to all other indirect acquisitions.

Note:

In the above and in the following section concerning review, a direct acquisition is the acquisition of control of a Canadian business, either through acquisition of its voting interests or assets or through the acquisition of control of its Canadian parent in Canada. An indirect acquisition is the acquisition of control of a Canadian business through the acquisition of control of its parent outside Canada.

Notification Procedure

A brief statement of information about the investment, as described in the regulations, will be filed by the investor with the Agency at any time up to 30 days following the investment.

Generally, no further information will be required about notified investments since it is the intention of the legislation that these will proceed without government intervention.

However, provision is made for the identification in regulations of specific types of business activity that are related to Canada's cultural heritage or national identity, such as the publication and/or distribution of books and periodicals and the production and distribution of films. Only for these identified activities may review be required in exceptional cases. By thus confining the use of the reserve review power to types of business activity that are precisely defined, investors in all other activities are assured that their notified investments cannot be reviewed. Moreover, a notified investment of a type that has been identified in the regulations will be reviewed only if the Minister considers the public interest to warrant review and if the Governor-in-Council issues an Order to that effect within 21 days of the date when a completed notification of the investment was filed. If such an order is not made within that period, the investment is deemed not to be reviewable.

#### Investments subject to Review

Part IV (Sections 14 - 25) describes the investments that are subject to review and the procedures to be followed.

Investments requiring review are all direct acquisitions of Canadian businesses with assets of \$5M or more, all indirect acquisitions of Canadian businesses with assets of \$50M or more, and indirect acquisitions of Canadian businesses with assets between \$5M and \$50M which represent more than 50 percent of the value of the total international transaction. In addition specific acquisitions or new businesses in designated types of business activities related to Canada's cultural heritage or national identity, which would normally only be notifiable, could be reviewed if the Governor in Council had authorized it in the public interest.

#### Review procedure

If an investment is reviewable, an application for review in the form prescribed by regulations is to be filed with the Agency prior to the investment taking place (or, in the case of an indirect acquisition within 30 days after the investment).

The Agency will then submit the application to the Minister, together with any other information or written undertakings given by the investor and any representations submitted to the Agency by a province that is likely to be significantly affected by the investment.

The Minister will then determine whether the investment is likely to be of net benefit to Canada, taking into account the information provided and having regard to the following factors of assessment, where they are relevant:

#### Factors of Assessment

- a) The effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
- b) The degree and significance of participation by Canadians in the Canadian business and in any industry in Canada of which it forms a part;
- c) The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- d) The effect of the investment on competition within any industry or industries in Canada;
- e) The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment;
- f) The contribution of the investment to Canada's ability to compete in world markets.

To ensure prompt review and decision the Act sets certain time limits for the Agency and the Minister.

Within 45 days after a complete application has been received the Minister must notify the investor that (a) he is satisfied that the investment is likely to be of net benefit to Canada, or (b) he is unable to complete his review, in which case he shall have 30 further days to complete his review (unless the applicant agrees to a longer period), or (c) he is not satisfied that the investment is likely to be of net benefit to Canada.

If 45 days have elapsed from completion date without such a notice, or if 30 further days (or the number of further days agreed) have elapsed after notice that the Minister is unable to complete his review and no decision has been taken, then the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada.

Where the Minister has advised the applicant that he is not satisfied that the investment is likely to be of net benefit to Canada, the applicant has the right to make representations and submit undertakings within 30 days of the date of the notice (or any further period that is agreed between the applicant and the Minister). On the expiration of the 30-day period (or agreed extension) the Minister must quickly notify the applicant (a) that he is now satisfied that the investment is likely to be of net benefit to Canada or (b) confirming that he is not satisfied that the investment is likely to be of net benefit to Canada. In the latter case the applicant may not proceed with the investment or, if the investment has already been implemented, must relinquish control of the Canadian business.

#### Regulations (Section 35)

Regulations may be issued by the Governor-in-Council as provided in the Bill or as required to carry out the purposes and provisions of the Bill, but regulations prescribing business activities related to Canada's cultural heritage or national identity shall be laid before Parliament as quickly as possible after they are made and shall not come into force until 60 days after they are made (except those that are prescribed at the time the Act comes into effect).

#### Confidentiality (Section 36)

All information that is obtained in the course of the administration of the proposed Act is considered to be confidential.

#### Opinions, Guidelines and Interpretation Notes (Section 37 & 38)

The Bill authorizes the Minister to give written opinions, binding on the Minister, on the application of the Act or regulations to the person seeking the opinion and the Minister may delegate the authority to give opinions to the Agency or a designated official. The Bill also authorizes the Minister to issue guidelines and interpretation notes with respect to the application and administration of any provision of the Bill or the regulations.

#### Penalties (Part VII - Sections 39 - 43)

The proposed Act provides for civil penalties for non-compliance with any provision except breach of confidentiality or provision of false information, for which there are criminal penalties.

#### Report to Parliament (Part VIII - Section 44)

The Bill requires the Minister to prepare each year a report to Parliament on operations under the Act within six months of the end of the fiscal year.

Transitional, Consequential  
Amendments and Commencement (Part IX - Sections 45 - 52)

The Foreign Investment Review Act is repealed upon the coming into force of the Investment Canada Act.

An investment notice that had been filed under the FIR Act will be deemed to be a complete notice or a complete application for review under the Investment Canada Act as of the day that Act comes into force. Terms and conditions of investments decided under the FIR Act will remain enforceable, and any legal proceedings commenced under that Act may proceed, under the Investment Canada Act.

Provisions in other Acts that relate to the Foreign Investment Review Act are amended in consequence of the repeal of that Act.

The Investment Canada Act will come into force on a day fixed by proclamation.

\* (This document was provided by the High Commission of Canada, Canberra).