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Was the Sigh of Relief Premature? The Investment Canada Act

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I. INTRODUCTION

On June 30, 1985 the Canadian Government enacted the Investment Canada Act[1] (ICA), evoking a sigh of relief from the United States in-

1. Investment Canada Act, Bill C-15, 1st Sess., 33rd Parliament, 33-34 Eliz. II, 1984-85, [hereinafter ICA], *reprinted in* 1 DOING BUSINESS IN CANADA app. 3-1 (H. Stikeman & R. Elliott eds. (1985)) [hereinafter DOING BUSINESS IN CANADA 1985].

vestment community.[2] ICA replaced the Foreign Investment Review Act (FIRA)[3]. Burdensome Canadian regulations have impeded foreign investment in Canada throughout the last two decades. FIRA, in particular, blocked the free flow of foreign investment into Canada. In contrast, ICA's primary goal is "to encourage an inflow of capital and technology into Canada."[4] As a result, United States investors have openly embraced ICA's arrival.

Once the initial euphoria wanes, however, and the United States investment community encounters ICA regulations, the advantage over FIRA may prove minimal for the foreign investor.[5] Both of these legislative barriers to foreign investment originated from a "historical context as a uniquely Canadian type of nationalist program"[6] which some commentators call "ultranationalism."[7] Specifically, "Canadian nationalist[s] [were concerned] about the impact that direct investment by United States firms was having on the Canadian economy."[8] This sentiment, which affects Canadian political, social, and economic policy, may ebb, but it is unlikely to disappear. A careful comparison of FIRA and ICA shows that although ICA contains less government regulation for the foreign investor, the gates of Canada are still far from open.

II. HISTORICAL BACKGROUND

There is a long history of Canadian economic nationalism. Although FIRA was not enacted until 1974, Canadian economic nationalism developed immediately after the confederation of the modern Dominion of Canada in 1867.[9] In 1879, Prime Minister Sir John A. Macdonald launched the Conservative Party's "National Policy" intended to develop Canadian manufacturing through the use of tariff barriers.[10] This tariff

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2. Wall St. J., June 6, 1985 at 4, col. 2.

3. Foreign Investment Review Act, ch. 46, 1973-1974 Can. Stat. 619.

4. Wall St. J., June 6, 1985, at 4, col. 2 (Statement by Sinclair Stevens, Canadian Industry Minister).

5. Throughout this article "foreign investor" will be used interchangeably with "United States investor in Canada." Although ICA and FIRA language focuses on the "foreign investor," each act responds to United States investment in Canada. *See* Bliss, *Founding FIRA: The Historical Background*, in FOREIGN INVESTMENT REVIEW LAW IN CANADA 1 (J. Spence & W. Rosenfeld eds. 1984).

6. Spence & Rosenfeld, *Preface* to FOREIGN INVESTMENT REVIEW LAW IN CANADA vii (J. Spence & W. Rosenfeld eds. 1984).

7. Bliss, *supra* note 5, at 10.

8. *Id.* at 1.

9. *Id.*

10. Canadians have never resolved their impression of "Growing Up in the Shadow

policy reflected a fear that goods manufactured in the United States would dominate the Canadian market.[11] The government proposed to block imports without preventing the free flow of foreign capital into Canada. From the 1880s through the 1930s Canada encouraged the influx of foreign investment. In fact, foreign capital helped finance resource extraction, railroad expansion, and national, provincial and municipal government operations.[12]

By the 1950s, however, the character of foreign investment changed. As British investment declined, the amount of United States foreign investment increased from 13.6 percent in 1900 to 75.5 percent in 1950.[13] United States investors also supplied capital for direct investment in Canadian business, including investments involving an equity position.[14] By the late 1950s, for example, United States nationals controlled the majority of Canada's oil and gas and mining and manufacturing industries.[15] The significant United States ownership of Canadian industry fostered antagonism and resentment against United States investment,[16] resulting in FIRA and, eventually, in ICA.

FIRA reflected Canada's intense economic nationalism.[17] The report

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of the U.S.A." Dan Hill, *Growing Up*, (copyright 1974 by McCareley Music, Ltd. (CAPAC)). For example, the Liberal Party preferred to foster continental free trade with a policy of continentalism that imposed reciprocal tariff reductions with the United States. Bliss, *supra* note 5, at 1.

11. Bliss, *supra* note 5, at 2.

12. *Id.*

13. *Id.*

14. *Id.*

15. For example, a Detroit-based automobile plant and signs and insignia of United States industry located along the Queens Elizabeth Expressway, which connects Buffalo and Toronto, indicate the extent of United States investment. These manufacturing operations are 100% controlled by United States investors.

Chrysler's new advertising campaign entitled "Born in America" illustrates the United States and Canadian distinction. One Canadian reporter pointed out that the "Born in America" theme could annoy Chrysler's Canadian consumers who know that some Chryslers are made in Canada. A Chrysler manager responded, "It's a born in America campaign and Canada is in North America." His superior emphasized the "Born in" meant "created in" America. Wall St. J., Sept. 20, 1985, at 29, col. 2.

16. *See* 1 DOING BUSINESS IN CANADA § 3.03, p. 3-6 (H. Stikeman & R. Eliott eds. 1984) [hereinafter DOING BUSINESS IN CANADA 1984].

17. Ironically, during the peak in nationalist fervor, the amount of actual American investment in Canada declined. FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY, REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY 395 (Privy Council Office 1968), *cited in* Bliss, *supra* note 5, at 7 & nn. 3-4. According to some, "this phenomenon . . . suggests that the new Canadian economic nationalism of the 1960s was rooted more in a revolution of rising expectations vis-a-vis

of a Federal Royal Commission on Canada's Economic Prospects explained the genesis of investment regulation:

> At the root of Canadian concern about foreign investment is undoubtedly a basic, traditional sense of insecurity vis-a-vis our friendly, albeit our much larger and more powerful neighbor, the United States. There is concern that as the position of American capital in the dynamic resource and manufacturing sectors becomes ever more dominant, our economy will inevitably become more and more integrated with that of the United States. Behind this is the fear that continuing integration might lead to economic domination by the United States and eventually to the loss of our political independence.[18]

As nationalist cries responded to United States investment, the Canadian Government's traditional "open door policy of foreign investment began to be seen . . . [as] a form of . . . selling Canada to the United States."[19] During the 1960s,[20] the Canadian Government reacted to this fear of United States intervention and to a resulting dependent Canadian economy. This new protective legislation focused on regulation of capital, rather than regulation of the flow of goods. A federally sponsored study suggested that a "*New* National Policy" be launched to regulate the flow of capital instead of the flow of goods.[21] The Canadian Government enacted a series of laws that regulated "key sectors" of the economy, principally financial institutions.[22] These regulations hindered United States investment by requiring corporations to include Canadian directors and

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capital formation than it was in rational perceptions of a real problem." Bliss, *supra* note 5, at 7.

18. ROYAL COMMISSION ON CANADA'S ECONOMIC PROSPECTS, FINAL REPORT 390 (Queen's Printer 1957), *quoted in* Bliss, *supra* note 5, at 4.

19. Bliss, *supra* note 5, at 6.

20. Two events during this decade created a deep rift between Canada and the United States: (1) United States military involvement in Vietnam; and (2) the Canadian Centennial celebration of their Confederation. These events helped to spark cultural and economic consciousness among Canadians. Bliss, *supra* note 5, at 5-6.

21. Donaldson & Jackson, *The Foreign Investment Review Act - An Analysis of the Legislation*, 53 CAN. B. REV. 171, 174 (1975) [hereinafter Donaldson].

22. Specifically, the requirements included: (1) Three-quarters of the directors be Canadians ordinarily residing in Canada; and (2) an individual nonresident of Canadian's stock ownership could not exceed 10% and a non-Canadian resident entity's stock ownership could not exceed 25%. For the incorporation of these restrictions in Canadian legislation see The Bank Act, ch. 87, §§ 10(4), 18(3), 20(2) and 52-56, 1966-67 Can. Stat. ___; The Canadian and British Insurance Companies Act, ch. 11, § 3, 1957-58 Can. Stat. ___; 1964-1965, ch. 40, § 3; The Loan Companies Act, ch. 40, § 38, 1964-65 Can. Stat. ___; The Trust Companies Act, ch. 40, § 30, 1964-65 Can. Stat. ___; and The Investment Companies Act, ch. 33, §§ 10-15, 1970-1971-1972 Can. Stat. 625, 641-50.

shareholders.[23] In addition, new provisions in the Income Tax Act required "a greater degree of Canadian ownership of the voting shares" of corporations.[24]

Between 1969 and 1971, the peak of ultranationalist sentiment, Junior Minister Herbert A. Gray produced a federally sponsored study. His study, known as the Gray Report,[25] concluded that direct foreign investment, especially by large multinational conglomerates, was not in Canada's best interest. The Gray Report described the "truncated miniature branch plant replicas"[26] of foreign corporate parents and the conglomerates' insensitivity to Canadian economic and social objectives. The report concluded that the government should control and regulate foreign direct investment[27] and suggested that the government establish a screening agency[28] to oversee foreign investment. The Canadian Government accepted the suggestions[29] and used the Gray Report as a blueprint for FIRA.[30]

FIRA, Canada's first federal foreign investment statute[31] of general application,[32] imposed investment regulations and established the For-

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23. Donaldson, *supra* note 21, at 174.

24. Bliss, *supra* note 5, at 7.

25. H. GRAY, FOREIGN DIRECT INVESTMENT IN CANADA (1972).

26. *Id.* at ___; *see, e.g.*, *supra* note 15.

27. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[1], p. 3-7.

28. The screening process suggested by the report and ultimately adopted by the Foreign Investment Review Agency (the Agency) was one of the two alternative policies recommended. The two alternative approaches were: (1) the "key sectors" policy, or the requirement for a minimum nationality input, which had been used in the early 1960s legislation, *see supra* note 22; and(2) the "fixed rules approach" which would promulgate flat quantitative tests, such as the requirement that all Canadian businesses must be 51% Canadian-owned. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[1], p. 3-7.

29. Bliss, *supra* note 5, at 9.

30. There are some "striking resemblances" between the Gray Report and FIRA. Donaldson, *supra* note 21, at 176. This resemblance carried over into the Agency as well because Gray supervised the Agency as industry minister. THE ECONOMIST, Sept. 18, 1982, at 83.

31. The Foreign Takeovers Review Act of 1972 preceded FIRA. The Foreign Takeovers Review Act focused on takeovers of Canadian business by nonresidents; however, the bill died in 1972 after much debate and criticism of its failure to effectively address the problem of direct investment. Donaldson, *supra* note 21, at 177.

32. Donaldson, *supra* note 21, at 175. Significant criticism came from the provinces which refused the option of opting-out of FIRA's application. In fact, the 1973 *Canadian Annual Review* reported that, if the provinces had received this option, "only Ontario and British Columbia would not have [opted-out]." This illustrates the lack of broad-based Canadian support for these controls on foreign investment. CANADIAN ANNUAL REVIEW OF POLITICS AND PUBLIC AFFAIRS 337 (J. Saywell ed. 1974), *quoted in* Bliss,

eign Investment Review Agency (the Agency)[33] to review acquisitions and establishment of new businesses.[34] FIRA provided a mechanism to screen certain foreign direct investment proposals in order to determine whether or not these proposed investments significantly benefitted Canada.[35] The act contained two proclamation dates: (1) "Phase I," which covered mergers and acquisitions (proclaimed on April 9, 1974); and (2) "Phase II," which covered the establishment of new businesses (proclaimed on October 25, 1975).[36]

During FIRA's eleven-year life, legislators, investors and economists criticized and debated it.[37] International business commentators reacted adversely to FIRA[38] because the review process[39] imposed inefficient administrative delays and the standards of a "significant benefit to Canada" represented a difficult and ambiguous burden. For example, *The Economist* commented that "even in Canada foreign investment may be no more safe than [it is] in the third world."[40] The Canadian Government acknowledged the controversey surrounding FIRA. One senior bureaucrat from the Ministry of State for International Trade said United States investors viewed FIRA as "a rare Canadian disease. . . . Everyone has heard of it, and no one likes it."[41] Canadian economic "ultranationalists" complained FIRA did not go far enough in protecting Can-

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supra note 5, at 10.

33. *See infra* notes 76-80 and accompanying text.

34. Donaldson, *supra* note 21, at 175.

35. *See* Bonney, *Foreign Investment Review Act*, 13 ALBERTA L. REV. 83, 83 (1975).

36. Atkey, *Foreign Investment Review Act - Paper Tiger or Sleeping Giant?*, 30 ROCKY MTN. MIN. L. INST. 22-1, 22-2 (1984).

37. For instance, the United States complained about the effects of FIRA on an international level, claiming that parts of FIRA violated the General Agreement on Tariffs and Trade (GATT). McCarney, *A Proposed Model For Dispute Settlement in North America*, 6 CAN.-U.S. L.J. 89, 90 (1983). In fact, "in late 1983 GATT confirmed that FIRA's solicitation of undertakings [i.e., contract concessions by the prospective foreign investor] to purchase goods of Canadian origin, or goods from Canadian sources" violated GATT. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[1], p. 3-8 (citing GATT Panel Report); *see Canada-Administration of the Foreign Investment Review Act* (L/5504); *see also* Glover, New & Lacourcier, *The Investment Canada Act: A New Approach to the Regulation of Foreign Investment in Canada*, 41 BUS. LAW. 83 (1985) [hereinafter Glover]. Also, by 1982 "of the 10 provincial premiers, nine [had] now condemned the Agency." THE ECONOMIST, Sept. 18, 1982 at 83

38. *See* DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[1], p. 3-8.

39. For further information concerning the review process see *infra* text accompanying notes 76-92.

40. Donaldson, *supra* note 21, at 172 n.4 (citing THE ECONOMIST, Apr. 20, 1974).

41. Atkey, *supra* note 36, p. 22-2.

ada, while proponents of a free flow of investment argued that FIRA's "very existence deterred the introduction into Canada of beneficial and much needed foreign investment capital."[42] In fact, despite the ultranationalists' concerns, the desire for foreign investment led to flexible application of FIRA.[43] In view of these criticisms and controversies and a failing Canadian economy,[44] the Canadian Government repealed FIRA and enacted the Investment Canada Act in June of 1985.[45]

III. THE FOREIGN INVESTMENT REVIEW ACT

The governnment enacted FIRA to ensure that foreign acquisition and establishment of Canadian businesses would significantly benefit the Canadian economy.[46] This section explains the legislative obstacles that FIRA imposed on foreign investors in Canada. The initial question of FIRA's application to a particular investment required an analysis of law and fact. The foreign investor faced a prolonged and convoluted screening of the proposed investment at various levels of government.[47] This inevitably resulted in frustration for the foreign investor. Although FIRA sought to secure significant benefits for Canada, it actually discouraged foreign investment and, consequently, hurt the Canadian economy.

A. *The Application of Foreign Investment Review Act*

FIRA's application depended on whether a foreign investor was a "non-eligible person"[48] and whether the proposed investment fell within the scope of the act.[49]

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42. Glover, *supra* note 37, at 83.

43. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 1.05, p. 1-9.

44. Some observers believe that Canada needs foreign investment to boost its economy. Wall St. J., May 1, 1985, at 36, col. 6. For example, advocates of foreign investment think foreign capital will help reduce Canada's current jobless rate. Wall St. J., June 6, 1985, at 4, col. 2. Others argue that, in 1982, FIRA cost Canada $36 billion ($29 billion U.S. dollars) in lost output by discouraging foreign manufacturing in Canada. THE ECONOMIST, Sept. 18, 1982, at 84.

45. *Supra* note 1.

46. Atkey, *supra* note 36, p. 22-3.

47. *See id.*

48. FIRA § 3(1)(a)-(c); Atkey, *supra* note 36, p. 22-3.

49. Atkey, *supra* note 36, p. 22-3.

1. A "Non-Eligible Person"

Section 3(1) of FIRA defined a "non-eligible person" as individuals, foreign governments and corporations. As applied to individuals, a "non-eligible person" was one who "[was] neither a Canadian citizen . . . nor a permanent resident of Canada who remained in Canada for more than one year after the waiting period to become eligible for Canadian citizenship. . . ."[50] Under this definition even a Canadian citizen was a "non-eligible person" if he did not usually reside in Canada and if he belonged to the class of persons described in the act.[51] Under section 3(1), a non-eligible person also included a foreign government, its political subdivision, or its agencies. If a foreign government nationalized a company which held Canadian investments, therefore, those investments could be reviewed under FIRA.[52] A corporation could also be a "non-eligible person," under certain conditions:

> [a] corporation incorporated in Canada or elsewhere that is controlled in any manner that result[s] in control in fact, whether directly through the ownership of shares or indirectly through a trust, a contract, the ownership of shares of any other corporation or otherwise, by a [non-eligible person] or [non-eligible government or agency] or by a group of persons any member of which [was] a [non-eligible individual] or [non-eligible government or agency hereof]. . . .[53]

The test for a corporation is "control in fact,"[54] an ambiguous standard which further complicates the definition of non-eligible corporation.[55]

A close reading of FIRA reveals the broad scope of section 3(1). Although the definition of non-eligible person speaks directly to individuals, governments and corporations,[56] sections 3 and 8 expand this definition by providing that "[e]very non-eligible person, and every group of persons any member of which is a non-eligible person" fall within the

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50. FIRA § 3(1)(a).

51. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[2](d), p. 3-10.

52. FIRA § 3(1)(b).

53. FIRA § 3(1)(c).

54. The concept of 'control in fact' means the power to control the management of a Company, which under Canadian company law is control of the board of directors of a company via majority control of voting rights. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[2], p. 3-10. *See also infra* notes 64-68 and accompanying text.

55. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[2], p. 3-9.

56. FIRA § 3(1)(a)-(c).

scope of FIRA.[57] As a result, FIRA often applied to joint ventures, partnerships and trusts,[58] as well as to individuals, governments and corporations who attempted to acquire or establish Canadian businesses. In the end, an investor could not circumvent FIRA by forming another type of business organization. If the foreign investor could not determine whether his business organization was a non-eligible person, he could apply to the Minister of Industry, Trade and Commerce for an opinion;[59] or he could go to the Trial Division of the Federal Court of Canada and seek a declaration of the entity's status.[60] Despite this recourse, the definition of "non-eligible person" led to inevitable confusion. The time-consuming procedures needed to clarify ambiguities discouraged foreign investment in Canada.

2. Investments Subject to FIRA

FIRA's application also depended on the the type of investment that the non-eligible person intended to make. FIRA originally sought to control the amount of foreign direct investment in Canada.[61] Specifically, FIRA placed limits upon those investments which constituted an acquisition of an existing business or established a new unrelated business.[62] FIRA applied, therefore, to a non-eligible person proposing one of those two types of investments.

(a) Acquisition of a Canadian Business

Under FIRA, an investor sought to acquire a "Canadian business enterprise" if such enterprise was either:

> (a) a business (Canadian business) carried on in Canada by (i) a Canadian citizen or resident (ii) a corporation incorporated in Canada that maintains an establishment in Canada to which employees of the corporation report for work; or (iii) a group of such individuals or corporation which control the conduct of the business in question; or(b) a business (Canadian branch business) carried on in Canada by a Corporation incorporated outside Canada that maintains an establishment in Canada to

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57. FIRA §§ 3(3)(f) and (8)(1).

58. FIRA § 3(3)(f).

59. FIRA § 4(1). The Minister's opinion as to whether a foreign investor met the definition of a non-eligible person was binding for two years unless material disclosed in the written application changes substantially before then. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[6][b], p. 3-36. *See also infra* note 74.

60. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[6][b], p. 3-36.

61. *See supra* notes 25-36 and accompanying text.

62. FIRA § 2(1).

which employees of the corporation report for work.[63]

FIRA governed the acquisition of voting shares of all, or substantially all, of the property used to carry on an enterprise's operations in Canada.[64] A presumption arose that a non-eligible person acquired control of a corporation if that investor held a certain percentage of voting shares.[65] Although the Foreign Investment Review Agency (Agency) believed it should be notified whenever a presumption arose, no statutory provision required notice, and the parties to the investment determined whether to provide notice.[66] These takeover rules applied to indirect as well as direct acquisitions of control, creating, therefore, a trap for foreign parent companies. If a non-Canadian company owned a Canadian subsidiary, FIRA provided for a review of any takeover of the non-Canadian parent company. In *Dow Jones & Co., Inc. v. Attorney General of Canada,*[67] a merger under United States law between Dow Jones & Co., Inc. and Richard D. Irwin, Inc. triggered FIRA review because Irwin, Inc. owned a Canadian subsidiary qualifying as a "Canadian business enterprise." The Court reasoned that:

> (1) [FIRA] makes no distinction whether the control of the Canadian business enterprise is acquired from a Canadian or non-eligible person; and (2) [FIRA] does not purport to apply extra-territorially but, rather, only to the acquisition of control of the business carried on in Canada.[68]

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63. *Id.*, § 3(1). Note that the definition concentrated on takeovers of businesses, not of real property, and included those businesses with an "actual physical presence in Canada." DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[3][a], p. 3-14. "Business" under the Act included "any undertaking or enterprise carried on in anticipation of profit." *FIRA* § 3(1).

64. *See* FIRA § 3(3)(a)(i)(A)-(B). The Act contains no definition of "substantially all" of the property used in carrying on a business.

65. Under the Act a non-eligible person has acquired control of a corporation if: (1) a single non-eligible person holds 5% or more of publicly traded voting shares; or (2) a single non-eligible person holds 20% or more of privately traded voting shares.

FIRA § 3(c)(1)-(ii).

In addition, an acquisition of control occurs when a non-eligible person acquires more than 50% of the voting shares of a company. *Id.*, § 3(d).

66. Atkey, *supra* note 36, at § 22.02[4], p. 22-8; *see also* FIRA § 8(3). When the Minister of Industry, Trade and Commerce had reasonable and probable grounds to believe the transaction was reviewable, he could require notice.

67. 11 B.L.R. 18 (1980); *see, e.g.*, THE ECONOMIST, Sept. 18, 1982, at 84. FIRA prohibited a sale of J.B. Lippincott, a Philadelphia publisher, to Harper & Row in New York until the parties proved that no Canadian buyer was available, because Lippincott had a Canadian subsidiary that published books including some by Canadian authors.

68. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[3][c], pp. 3-16 to 3-

Dow Jones illustrates the far-reaching effects of FIRA's takeover rules. In attempting to protect Canadian businesses, FIRA obstructed United States corporate investments unrelated to Canada.

(b) Establishment of a New Unrelated Business

In addition to investments in ongoing Canadian businesses, FIRA applied to the establishment of a new unrelated business. FIRA defined a new business "as a business not previously carried on by the particular non-eligible person."[69] If one or more employees reported to an establishment in Canada,[70] a business became established for purposes of this provision. Whenever a non-eligible person sought to establish a new business or diversify a pre-existing business into an "unrelated" area, therefore, the transaction was reviewable.[71]

FIRA did not, however, apply to all business expansions and reorganizations. It applied only to the establishment of a new business unrelated to a pre-existing business. If a non-eligible person sought to establish a new business in Canada that *related* to an existing business in which he was already involved, then the new business was not reviewable under FIRA. Unfortunately, FIRA did not define "unrelated." The foreign investor had to rely on the *Minister's Guidelines Concerning Related Business* (*Guidelines*) for a definition.[72] The *Guidelines* defined a business as "related" if:

> (1) there is a vertical integration in a service producing business;
> (2) there is vertical integration in a good producing business;
> (3) there is direct substitution for existing goods or services;
> (4) essentially the same technology and production processes are used;
> (5) the new business is the result of research and development carried out in Canada; or
> (6) both the new and established businesses have the same industrial classification.[73]

In other situations, if the non-eligible person perceived the business as "related," he could ask the Minister of Industry, Trade and Commerce to determine that the venture would foster more efficient operation of a

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17 (citing *Dow Jones & Co., Inc. v. Attorney General of Canada*, 11 B.L.R. 18 (1980)).

69. FIRA § 3(1).

70. FIRA § 3(4).

71. Atkey, *supra* note 36, at § 22.02[5], p. 22-8.

72. *Guidelines Concerning Related Business, reprinted in* DOING BUSINESS IN CANADA 1984, *supra* note 16, at app. 3-3.

73. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[4][b][ii], p. 3-24.

pre-existing business.[74]

FIRA governed the bulk of foreign direct investments in Canada. Those transactions outside the scope of FIRA typically were unattractive ventures which afforded low rates of return. Furthermore, as *Dow Jones* illustrates, a United States investor could be trapped unwittingly in the FIRA web. The broad definition of non-eligible person coupled with the multiple types of transactions subject to review resulted in virtually unavoidable application of FIRA. The foreign investor, therefore, faced a difficult decision: to accept the unpredictable and time-consuming mires of FIRA's screening process, or not to invest at all. Either way, FIRA presented a substantial impediment to direct foreign investment in Canada.

B. *The Review Process*

The FIRA review process involved a multitude of players who screened foreign investments and applied government policies to enhance Canadian economic development while maintaining the spirit of Canadian nationalism.[75] The multiple levels of screening and the statutory requirements presented the foreign investor with frustrating obstacles. In 1982, the legislature recognized these problems and amended FIRA. The amendments, however, proved to be inadequate and the statutory obstacles ultimately doomed FIRA. This section explains the screening process and analyzes FIRA's key flaws.

1. The Review Process in Summary

The Canadian government screened foreign investments under FIRA on a case-by-case basis. When a non-eligible person sought acquisition of a Canadian business or establishment of a new unrelated business in Canada, he gave "notice in writing to [the Foreign Investment Review Agency]."[76] This notice served as an application, because its filing initi-

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74. *Id.* at § 3.02[4][b][ii], p. 3-25. Similar to the Minister's opinions regarding non-eligible person status, the Minister's opinions with respect to whether a new venture is "related" was binding for two years, unless information disclosed in the written application materially changes prior to the expiration of the two year period.

The Minister issued guidelines on other areas, including the application of FIRA to corporate reorganizations, real estate transactions, oil and gas transactions, and venture capital investments. Atkey, *supra* note 36, at § 22.02[6], p. 22-10.

75. *See supra* notes 17-20 and accompanying text.

76. FIRA § 8(2). Although FIRA required notice of a reviewable investment the Act did not prohibit an investment that had not received government approval. Failure to give notice, however, was a crime, and the Minister of Industry, Commerce and Trade

ated the review process, resulting in either allowance or disallowance of the foreign investment.[77] After receiving notice, the Minister of Industry, Commerce and Trade made a recommendation to the Federal Cabinet, the ultimate decision-maker.[78] The Minister based his recommendation on the information provided by the Agency, including the investor's application, other information submitted by the parties to the transaction, provincial and federal government reports, and, in some cases, information provided by interested third parties.

The Agency participated in the bureaucratic review process. It "advise[d] and assist[ed] the Minister in connection with the administration of the Act."[79] Although comprised of the Assessment Branch, the Compliance Branch, and the Research and Analysis Branch, only the Agency's Assessment Branch concerned itself with the screening process.[80] It reviewed the application, solicited additional information from the parties and others, conducted contractual undertakings with the foreign investor,[81] and presented all the information to the Commissioner of the Agency.

To meet with approval, the application[82] and other collected data had to

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was authorized to petition a court to declare an investment void. The act further granted a court to other remedies to arrest or impede investments:

> (1) The revocation or suspension . . . of any voting rights attached to any shares of a corporation or of any right to control any such voting rights, (2) the disposition by any person of any shares of the corporation acquired by him, or (3) the disposition by any person of any property acquired by him that is or was used in carrying on a business . . .

FIRA § 20(2)(a)-(c). Other enforcement provisions under FIRA included section 24(1) (any person knowingly making a reviewable investment without filing notice was subject to a criminal charge and a fine not exceeding $5,000); and section 24(2) (where the Minister's demand for notice was knowingly ignored, the person would be subject to six months imprisonment and a fine not exceeding $10,000).

77. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][b], p. 3-26.

78. FIRA § 12(1).

79. FIRA § 7(1). After reviewing the application, the Commissioner of the Agency made a recommendation to the Minister.

80. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][a], p. 3-26. The Compliance Branch reviewed legal compliance with FIRA, including surveillance and enforcement. The Research and Analysis Branch focused on research and analysis concerning foreign investment. *Id.*

81. *See infra* notes 88-93 and accompanying text.

82. The application for acquisitions included information about the applicant (including disclosure of the controlling individuals), the Canadian business to be acquired, and the future plans for Canadian business once acquired. The application for new businesses included information about the applicant, including disclosure of the controlling individuals, and the proposed new business. DOING BUSINESS IN CANADA 1984 *supra*

demonstrate that the foreign investment would be "of significant benefit to Canada."[83] The Agency's press releases listed the criteria which it considered in determining whether an investment met the statutory test. These included:

> (1) increased employment [in Canada]; (2) increased investment [in Canada]; (3) increased resource processing or the use of Canadian parts and services; (4) lack of restrictions on exports in Canada; (5) additional exports from Canada; (6) degree of Canadian participation as directors and managers; (7) degree of equity participation by Canadians; (8) improved productivity and industrial efficiency; (9) enhanced technological development; (10) improved product variety and innovation; (11) beneficial impact on competition; and (12) if there are specific federal or provincial policies covering the specific business involved, *greater compliance with those policies than that provided*, in the case of a takeover, *by the Canadian business* enterprise under current ownership *of*, in the case of a new business, *by existing competitors in the area.*[84]

The foreign investor also needed to consider ancilliary investment policies of the Canadian Government. For example, in July 1985, the Canadian Government released a supplement entitled "New Principles of In-

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note 16, at § 3.02[5][b], p. 3-26; *see also* Schedules 1, 2 and 3 of the Foreign Investment Review Regulations *reprinted in* DOING BUSINESS IN CANADA 1984, *supra* note 16, app. 3-2, and Forms published by the Agency, *reprinted in* DOING BUSINESS IN CANADA 1984, *supra* note 16, app. 3-5.

83. FIRA § 12(1).

> In assessing, for the purposes of this Act, whether any acquisition of control of a Canadian business enterprise or the establishment of any new business in Canada is or is likely to be of significant benefit to Canada, the factors to be taken into account are as follows: "(a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada, "(b) the degree and significance of participation by Canadians in the business enterprise or new business and in any business enterprise or new business forms or would form a part; "(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technology development, product innovation and product variety in Canada; "(d) the effect of the acquisition on establishment on competition within any industry or industries in Canada; and "(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment."

Id., § 2(2).

84. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][c], pp. 3-29 to 3-30 (emphasis added).

ternational Conflict,"[85] detailing conduct which the federal government considered good corporate citizenship for foreign business.[86] Essentially, the foreign investor needed to "Canadianize" his investment. Specifically, the government directed foreign investors to (1) promote autonomy in their Canadian-based investments; (2) foster a Canadian outlook in management; (3) create an opportunity for substantial Canadian equity participation; (4) support Canadian objectives while resisting foreign government's measure to act otherwise; and (5) participate in Canadian cultural and social life.[87] In view of these factors, many of which involved government policies[88] rather than statutory law, the review procedure evolved into a "bargaining process"[89] between the foreign investor and the Canadian government. These negotiations, commonly referred to as "undertakings,"[90] concluded with the foreign investor making concessions, in a standard contract,[91] to the Agency in an effort to obtain approval for its investment.[92] In fact, according to one member of the Ontario Bar and author of FIRA, the likelihood of the government considering a foreign investment to be a significant benefit to Canada depended on the foreign investor's "willingness and ability to give contractual undertakings . . . and also the political sensitivity surrounding foreign ownership of the industry sector in question."[93]

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85. The materials were issued as a supplement to FIRA § 2(2). *See* DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][d], p. 3-30.

86. "Good corporate citizenship" involves obeying the Canadian business laws, contributing to Canadian culture, and adding to the Canadian economy. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][d], pp. 3-30 to 3-31.

87. "New Principles of International Business Conduct," July, 1975, *quoted in* DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5], pp. 3-30 to 3-31.

88. Because the Federal Cabinet often made policy pronouncements which were unavailable to the public, it was difficult to determine government policy. As a consequence, the various parts of the screening process did not always apply the same policy considerations. *See* DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][e], p. 3-32.

89. *Id.* at § 3.02[5][a], p. 3-30.

90. Arguably, the parties did not negotiate from equal bargaining positions. The Agency had an advantage because, as one of the parties to the contract, it had the power to recommend allowance or disallowance of the investment to the Minister of Industry, Trade and Commerce.

91. Such concessions included: Canadian board members; promises of investment in research and development in Canada; and the freedom of the new subsidiary to find its own export markets. THE ECONOMIST, Sept. 18, 1982, at 83; *see, e.g.*, DOING BUSINESS IN CANADA 1984, *supra* note 16, app. 3-14.

92. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5], p. 3-32; *see also* Atkey, *supra* note 36, at § 22.02[3], p. 22-7.

93. Atkey, *supra* note 36, at § 22.02[3], p. 22-7.

2. Practical Obstacles Within the Review Process

FIRA obstructed foreign investment. First, many levels of review[94] and numerous sources of information[95] prolonged the screening process.[96] Second, throughout the screening process the Canadian Government imposed a veil of secrecy[97] that prevented the foreign investor from ascertaining which government polices were at issue and who opposed his investment.[98] Third, although application of the standard "of a significant benefit to Canada" was often inscrutable,[99] the foreign investor did understand that he could not merely allege that his investment would

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94. The protracted process resulted from many levels of review. The Agency itself had a multitude of levels of review. Agency personnel did not limit their review to their office, rather they could visit the premises of the applicant if the applicant was in Canada, or of the Canadian business, if the applicant was not in Canada. *See* DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][b], p. 3-27.

95. Many parties submitted information to the Agency. For example, as a matter of course the Agency sent a copy of the application to the provincial government where the business premises were located. Thus, both provincial and federal governments were involved in the review. Government agencies such as the Bureau of Competition Policy also took an interest in the review. *Id.* at § 3.02[5][g], pp. 3-34 to 3-35.

Private parties also participated in the process. A prospective investor negotiating with the Agency had one personal meeting with Agency personnel person in Ottawa. *Id.* at § 3.02][5][b], p. 3-27; *see also supra* notes 88-92 and accompanying text. Third parties' interventions and representations at that meeting were encouraged. *See infra* note 97 and accompanying text.

96. The considerable delays in the review process became a major criticism of FIRA. The application process period theoretically was sixty days beginning at the time the Agency acknowledged receipt of the application; however, the Act provided that if the Agency notified the investor that more information was needed at that stage of the process, it could be extended indefinitively. FIRA § 11(1).

97. Under § 14(1) of FIRA, all the information received by the Agency was confidential, but there were a few minor exceptions. In addition, both the deliberations of the Agency and the Federal Cabinet were confidential. The foreign investor, consequently, could not access the status of his negotiations with the Agency or determine whether he had given too few or too many undertakings. This confidentiality rendered the foreign investor completely uninformed as to the status of his application until the final decision had been made. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[5][b], p. 3-28.

98. As a consequence of this policy of strict secrecy the foreign investor had no knowledge of or recourse against intervening third parties, or intervenors, such as competitors who wanted the investor out of their market and other bidders who wanted the investor out of the takeover battle. Realizing the inherent unfairness of these undertakings by intervenors, the Agency eventually began to inform the applicant of an intervention. But the Agency never disclosed the intervenor's identity nor the content of his representations. *Id.* at § 3.02[5][g], p. 3-35.

99. *Id.* at § 3.02[1], p. 3-8.

not adversely affect the Canadian economy. To the contrary, the foreign investor had the burden of proving a positive effect on Canada.[100] Finally, the foreign investor could not appeal the decision of the Federal Cabinet.[101]

In June 1983, in an attempt to quash criticism of the impracticalities of FIRA and to give the Canadian economy a boost, the Agency adopted abbreviated procedures.[102] The goal of this reform was to "avoid unnecessary delays[103] . . . and to focus in depth only on investments that have very considerable economic effects or involve important Canadian interest."[104] The government applied the new procedures to smaller transactions involving less than $5 million in assets and fewer than 200 employees. Furthermore, in an effort to prevent FIRA's adverse extraterritorial effect, as illustrated in *Dow Jones*, the amendments provided short-form procedures for small, indirect acquisitions with increased parameters of less than $15 million in assets and fewer than 600 employees.[105] As a result, eighty percent of the reviewable acquisitions and ninety-five percent of the establishments became eligible for a review period of three to four weeks.[106]

Other aids made the review process less cumbersome. The Agency produced an information kit that contained copies of FIRA, the regulations, and prescribed forms and guides for the foreign investor.[107] In addition, the Agency provided five Interpretation Notes expressing its view of reviewable investments.[108] Furthermore, in an effort to help the inves-

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100. *Id.* at § 3.02[5][e], p. 3-29.

101. A decision was absolute and the investor had no right to appeal because the bases of the decision were considerations of policy, not of law. *Id.* at § 3.02[6][a], p. 3-36. Although an investor could resubmit the application, such action was futile unless the facts had substantially changed.

102. Regulation SOR 83-493 dated June 3, 1983 (P.C. 1983-1607, dated June 2, 1983), effective July 2, 1983. The reforms had been introduced with the 1982 Budget. Atkey, *supra* note 36, at § 22.02[6], p. 22-11.

103. Despite the long wait involved, under FIRA the ratio of approval of investments to disapproval had always been high. DOING BUSINESS IN CANADA 1984, *supra* note 36, at § 3.02[1], p. 3-8.

104. Atkey, *supra* note 36, at § 22.04[1], p. 22-22.

105. *Id.* at § 22.03[1], p. 22-11.

106. *Id.* at § 22.04[2], p. 22-22. This curtailment of the review procedures influenced the average number of days per transaction. The average time for review in 1982 had been 145 days; in 1983 the average fell to 59 days. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[1], p. 3-8.

107. Atkey, *supra* note 36, at § 22.02[6], p. 22-9.

108. These five Interpretation Notes addressed the following subjects:

(a) acquisition of businesses which have ceased normal business operations; (b) performance in Canada of single or isolated contract projects by foreign-based bus-

tor determine whether to proceed with an investment opportunity, the Agency issued "no-action letters" stating whether the investment triggered FIRA review.[109] In December 1982, the Agency formalized the "no-action letter," and named them "Agency Opinions."[110] These reforms proved to be inadequate. The abbreviated procedures treated the administrative problems of the economic legislation, but failed to remove the the core nationalist concerns, including the "significant benefit" standard and the frustrating closed review process. In short, because FIRA's genesis was Canadian nationalism, increased foreign investment required altered Canadian attitudes towards foreign involvement in national industries.[111] The government had to remove the obstructions and welcome foreign investment.[112]

IV. THE INVESTMENT CANADA ACT

With the Investment Canada Act,[113] the Canadian Government intends to deliver a message to the international investment community "that, once again, Canada welcomes investment."[114] Whether ICA will ultimately convey this message remains an open question. A close look at ICA indicates that although it alleviates ultranationalism and protectionism[115] it still represents a barrier to foreign investment in Canada. In

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iness; (c) limited partnerships; (d) contractual rights to acquire or to control voting shares of a corporation or to acquire property used in carrying on a business; and (e) the meaning of certain key phrases in FIRA.

Atkey, *supra* note 36, at § 22.02[6], p. 22-10.

109. DOING BUSINESS IN CANADA 1984, *supra* note 16, at § 3.02[6][b], p. 3-37. Although the Agency's "no action letters" did not have the force of law, they were considered binding. *Id.*

110. *Id.* at § 3.02[6][c], pp. 3-36 to 3-37.

111. Canada's failing economy in the early 1980s indicated a need for foreign investment. The "very flexible applications of [FIRA]" partially responded to that need. *Id.* at § 1.05, p. 1-9. *See supra* notes 44-45 and accompanying text.

112. The editors of DOING BUSINESS IN CANADA 1984, *supra* note 16, accurately projected that "more [foreign] investment will be encouraged, and that many of the legislative and psychological obstacles to investment in Canada may be substantially reduced . . . [and FIRA] may be utilized more to welcome foreign investment than to hinder it." *Id.* at § 1.05, p. 1-9.

113. Bill C-15, 1st Sess., 33rd Parliament, 33-34 Elizabeth II, 1984-85 [hereinafter ICA], *reprinted in* 1 DOING BUSINESS IN CANADA app. 3-1 (H. Stikeman & R. Elliot eds. 1985) [hereinafter DOING BUSINESS IN CANADA 1985].

114. Statement of the Hon. Sinclair Stevens, Minister for the Dep't of Regional Industrial Expansion (Dec. 7, 1984), *quoted in* Glover, *supra* note 37, at 83-84.

115. Undoubtedly the nationalist concerns from which FIRA was created have subsided. In June 1985, the same month in which ICA was enacted, a Gallop Poll showed that Canadians preferred the government to encourage rather than discourage foreign

fact, ICA retains FIRA's policies protecting against foreign investments' detrimental effect on Canada.[116] For example, although fewer investments are subject to review, ICA ensures that significant investments adequately benefit Canada by requiring a detailed review of such investments. Because large investments account for approximately ninety percent of the transactional value of foreign investments,[117] the actual legislative effect of ICA is not that different from FIRA.[118] Arguably, the foreign investor is no better off under ICA.

The Canadian Government's positive attitude towards foreign investment, however, illustrated by ICA,[119] must not be overlooked. The enactment of ICA is a genuine attempt to put some of the Canadian economic nationalist concerns aside and encourage foreign investment in the Canadian economy.[120] The foreign investor, therefore, needs to understand the nationalist concerns behind ICA as well as the procedural rules of the new legislation.

A. *Application of the Investment Canada Act*

The application of ICA is very similar to the application of FIRA. Before a foreign national can invest in Canada,[121] he must ask whether ICA applies to his transaction and, if so, what review process is required. The application of ICA turns on whether a "non-Canadian" is involved in the transaction and upon what kind of transaction is

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investment. Wall St. J., June 6, 1985, at 4, col. 2. However, Canadians are still deeply concerned about United States economic domination. ICA reflects this concern. In addition, Canadians such as Mel Hurtig, head of the Council of Canadians, claim that heavy United States ownership of Canadian businesses is a threat to Canadian independence. Wall St. J., August 21, 1985, at 29, col. 2.

116. Glover, *supra* note 37, at 84. ICA § 2 states that part of the purpose of the Act is "to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada."

117. Glover, *supra* note 37, at 98 (citing *Guidelines Concerning Related Business, reprinted in* DOING BUSINESS IN CANADA 1984, *supra* note 16, at app. 3-3).

118. *See, e.g., infra* notes 122-128 and accompanying text.

119. ICA is considered "a major initiative of Prime Minister Brian Mulroney." Wall St. J., June 28, 1985 at 12, col. 4 (*Government-backed* law designed to encourage foreign investment) (emphasis added); Wall St. J., June 6, 1985 at 4, col. 3.

120. *See* Wall St. J., May 1, 1985, at 36, col. 6. Prime Minister Brian Mulroney of the Progressive Conservative Party wants to renew warm relations with the United States without stirring up nationalist rancor. *See* Wall St. J., June 6, 1985, at 4, col. 3. For example, the United States and Canada are negotiating the reduction of mutual trade barriers. Wall St. J., March 19, 1985, at 20, col. 2.

121. Canadian investments include direct and indirect investments. *See infra* notes 148-51 and accompanying text.

involved.

1. A "Non-Canadian"

ICA's definition of "non-Canadian," like FIRA's definition of "non-eligible person,"[122] is quite broad.[123] Under ICA, if an individual, government or entity is not Canadian, then the investor is classified as "non-Canadian"[124] and, depending on the type of transaction,[125] his investment is subject to ICA. Section 3 defines "Canadian" as:

> (a) a Canadian citizen;
> (b) a permanent resident within the meaning of the *Immigration Act, 1976* who has been ordinarily resident in Canada for not more than one year after the time at which he first became eligible for Canadian citizenship;
> (c) a Canadian government, whether federal, provincial or local, or an agency thereof; or
> (d) an entity that is Canadian-controlled [cn]. . . .[126]

ICA's definition of a "Canadian-controlled" entity further extends the class of investors subject to ICA regulation because it includes corporations, partnerships, trusts and joint ventures.[127] Therefore, ICA covers a

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122. *See supra* notes 50-60 and accompanying text.

123. ICA uses the neutral term "non-Canadian"; FIRA used "non-eligible person" which had an exclusionist connotation.

124. ICA § 3.

125. *See* ICA §§ 11, 14 and 28; *see also infra* notes 130-60 and accompanying text.

126. ICA § 3; *see also infra* note 127 ("Canadian-controlled" entity defined).

127. ICA § 3. Pursuant to section 26(1) the status of such entities can be determined as follows:

> (A) where one Canadian or two or more members of a voting group who are Canadians own a majority of the voting interests of an entity, it is a Canadian-controlled entity;(b) where paragraph (a) does not apply and 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, it is not a Canadian-controlled entity;(c) where paragraphs (a) and (b) do not apply and a majority of the voting interests of an entity are 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 of the entity owned by the voting group, it is a Canadian-controlled entity; and (d) where paragraphs (a) to (c) do not apply and 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 the contrary can be established by showing that (i) 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

broad scope of business organizations similar to that covered by FIRA.[128]

A corporation may apply to the Minister of Industry, Commerce and Trade to prove that it warrants Canadian status under ICA.[129] This favorable status is based upon evidence and information that proves a variety of detailed conditions. For example, to avoid the reach of ICA[130] the corporation must be a public Canadian-incorporated corporation; the corporation's voting shares must be traded on the open market;[131] and the corporation must provide the Minister of Industry, Commerce and Trade[132] with sufficient evidence and information to show 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; and
(f) the circumstances described in paragraphs (a) to (e) have existed not less than the twelve month period immediately preceding submission of the information and evidence.[133]

Corporations not meeting those requirements are "non-Canadian." ICA provides other equally cumbersome conditions in order to obtain Cana-

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interests of the entity owned by the voting group, or (ii) in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact though the ownership of its voting interests and two-thirds 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.

ICA § 26(1)(a)-(d).

128. *See supra* notes 56-60 and accompanying text.

129. ICA § 26.

130. To avoid ICA the foreign investor must satisfy the classification of "Canadian," and his business activity must not be of a type described by the Governor in Council as a business activity related to Canada's cultural heritage or national identity. ICA § 3.

131. ICA § 3 defines "voting group."

132. Former Minister's opinions regarding the status of investors issued under FIRA § 4 remain binding for two years provided that a material fact does not change before that time. ICA § 45(7).

133. ICA § 26(3)(a)-(f).

dian status.[134] In effect, only a corporation which is predominately managed by Canadians and principally established and controlled under Canadian law escapes the reach of ICA.[135] Notwithstanding the option of obtaining a Minister's opinion, absent a well-established Canadian origin, a foreign corporation will most likely be deemed "non-Canadian" under ICA.

2. Investments Subject to ICA

An additional factor which determines whether an investment is subject to ICA is the type of investment the non-Canadian investor proposes. As under FIRA,[136] the foreign investment is subject to ICA if a "non-Canadian" invests either (a) to acquire control of a Canadian business or (b) to establish a new unrelated Canadian business.[137] Unlike FIRA, however, ICA does not require review of all investments. Some investments trigger a "satisfactory notification" requirement,[138] while other investments necessitate the entire review process.[139] Regardless of the classification, however, both notification-type and review-type investments require provide notice to the Canadian government. Because failure to give notice results in enforcement penalties,[140] this section will categorize

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134. Widely-held corporations who want to maintain their Canadian status and whose voting shares are not publicly traded must maintain a board of directors comprised of at least two-thirds Canadians. This requirement is more restrictive than under FIRA where the status of the Canadian corporation remained unaffected even where as many as one-half of the directors were non-Canadian. Tory, Tory, DesLauriers & Binningham, Memorandum, Re: Bill C-15; The Investment Canada Act - Brief Analysis, Dec. 1984, at 15 [hereinafter Memorandum].

135. This summary of ICA's tests is similar to FIRA's "control in fact" test. *Compare* FIRA § 3(1)(c) *with supra* notes 54-55 and accompanying text. The key distinction is that under ICA the "control in fact" issue is relevant only if it arises through the ownership of voting interests; under FIRA "control in fact" could arise in any manner.

136. FIRA § 2(1).

137. ICA § (11)(a)-(b).

138. *See infra* notes 172-84 and accompanying text.

139. *See infra* notes 185-228 and accompanying text.

140. If the Minister believes that a non-Canadian has either failed to provide notice or to file an application, the Minister must demand the foreign investor prevent violation of the act, remedy the default or demonstrate that there was no violation. ICA § 39(1); *see also* Glover, *supra* note 37, at 97. If the foreign investor fails to meet the Minister's demand, the Minister may apply to a superior court for an order requiring compliance. ICA § 40(1); *see also* Glover, *supra* note 37, at 97. The superior court has discretion with respect to the type of order it may issue and the penalty it may impose, such as a fine not exceeding $10,000 for each day the non-Canadian violates the act. ICA § 40(2); *see also* Glover, *supra* note 37, at 97.

A similar enforcement process exists for other contravening conduct including imple-

the investments which fall under ICA.[141]

(a) Acquisition of Control of a Canadian Business

ICA covers a wider scope of acquisitions than FIRA[142] because, under ICA, "Canadian business"[143] is "a business carried on in Canada that (i) has a place of business in Canada; (ii) has an individual or individuals in Canada who are employed or self-employed in connection with the business; and (iii) has assets in Canada used in carrying on the business."[144] Most significantly, ICA did not adopt FIRA's requirement that the business have "an establishment in Canada to which employees of the [business] report for work."[145] Without this condition the definition encompasses more businesses. The foreign investor is, in turn, more likely to acquire a business within the scope of ICA.

There are four acquisition techniques covered by ICA.[146] These methods include:

> "(a) . . . the acquisition of voting shares [(i.e., control)] of a corporation incorporated in Canada that carries on the Canadian business;"(b) . . . the acquisition of voting interests of a [non-corporate] entity (i.e., a trust, partnership, or joint venture) where that [non-corporate] entity either carries on a Canadian business or controls another [non-corporate] entity carrying on a Canadian business;"(c) . . . the acquisition of all or substan-

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menting an investment prior to receiving approval, failing to divest control of the Canadian if disapproval has been received, and failing to comply with a written undertaking. ICA § 39(1); Glover, *supra* note 37, at 97.

141. ICA exempts a number of investors and transactions including: securities dealers, venture capitalists, realized security, financing, corporate reorganization, Government vendors, tax-exempt vendors, banks, involuntary acquisition, and real estate. ICA § 10(1)(a)-(i); *see also* DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[3][c][i]-[x]; Memorandum, *supra* note 134, at 10. The foreign investor need ascertain, however, that the requirements of these exceptions are met to assure the transaction is not subject to the act. Memorandum, *supra* note 134, at 10.

142. *Cf.* FIRA § 3(1); *see* Glover, *supra* note 137, at 87.

143. ICA § 3.

144. Glover, *supra* note 37, at 87 (quoting ICA § 3(1)).

145. FIRA § 3(1). *See supra*, note 63 and accompanying text; *see also*, Glover, *supra* note 37, at 87 (ICA's "place of business [cn]. . . does not have the same connotation of permanence of establishment").

Under both FIRA and ICA the definition of business is "any undertaking or enterprise capable of generating revenue *and* carried on in anticipation of a profit." ICA § 3(1) (emphasis added).

146. These acquisitions are all subject to ICA but the extensiveness of the review process depends on the amount of gross assets and the specific type of business involved. *See infra* notes 189-93 and accompanying text.

tially all of the assets used in carrying on a Canadian business; or"(d) . . . the acquisition of voting interests of an [entity] that controls, directly or indirectly, an entity in Canada carrying on the Canadian business, where

(i) there is no acquisition of control, directly or indirectly, [or a non-Canadian corporation] that controls, directly or indirectly a [Canadian] entity . . ., or

(ii) there is an acquisition of control described in subparagraph (i).[147]

Subsection 26(d) attempts to identify the controversial "indirect acquisitions" that arose in *Dow Jones*.[148] In *Dow Jones*, the court held that the acquisition of a United States corporation by another United States corporation which was in control of a Canadian corporation effected a change in the control of the Canadian subsidiary.[149] Subsection 26(d) notifies the foreign investors of such indirect territorial effects.[150] The act also imposes monetary thresholds to limit the review of "indirect" investments to those of a certain magnitude.[151]

Although ICA provides notice of its application to "indirect investments" and additionally limits that application, it may not achieve its goal of encouraging foreign investment. Elimination of the "indirect control" concept altogether would have more effectively encouraged invest-

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147. ICA § 28(1)(a)-(d).

148. *See supra* notes 67-68 and accompanying text.

149. *Id.*

150. In addition to identifying the indirect control problem the Act sets out a list of presumptions with respect to control of entities. These presumptions include:

(a) where one entity controls another entity, it is deemed to control indirectly any entity or entities controlled directly or indirectly by that other entity;

(b) an entity controls another directly (i) where the controlling entity owns a majority of the voting interests of the other entity, or (ii) where the other entity is a corporation, the controlling entity owns less than a majority of the voting shares of the corporation but controls the corporation in fact through the ownership of one-third or more of its voting shares;

(c) entities that are controlled, directly or indirectly, by the same entity are deemed to be associated with each other, with any other entities controlled by any one or combination of them and with the entity or entities that control them; and

(d) where entities that are associated pursuant to paragraph (c) own voting interests of the same entity, the associates entities may be treated as one entity for the purpose of establishing direct or indirect control of the entity in which they own voting interests.

ICA§ 28(2)(a)-(d).

151. *See* ICA § 14(1)-(3). "[T]here is a $50 million threshold on an indirect corporate acquisition of a Canadian business so long as that Canadian business is not the true target of the transaction." DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[5], p. 3-27; *see also infra* note 190 and accompanying text.

ment than the notice and monetary thresholds offered by ICA.

(b) The Establishment of a New Canadian Business

A second category of investment subject to ICA is the establishment of a new unrelated Canadian business.[152] Under ICA, a "new Canadian business" is one which is not already being carried on in Canada by the non-Canadian and

> that, at the time of its establishment is unrelated to any other business being carried on in Canada by the non-Canadian, or is *related to another business being carried on on Canada by that non-Canadian but falls within a prescribed specific type of business activity that in the opinion of the Governor in Council is related to Canada's cultural heritage or national identity.*[153]

After the enactment of ICA, the Investment Canada Agency (Investment Canada) issued guidelines to further define "new Canadian business."[154] Under the guidelines, a Canadian company which expands because of a geographical move, new personnel or internal reorganization is not a "new" business.[155] The guidelines further stipulate that if new activity produces goods or services substantially similar to the goods and services produced by an existing business or used in carrying on an existing business, the venture is business expansion rather than establishment of a new business.[156]

The guidelines distinguish a new business as "unrelated" to an existing business by cataloging situations which exemplify a new business as "related" to existing issues:

1. Vertical integration

A new business is related to an existing business if one business pro-

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152. ICA § 11(a). Under both FIRA and ICA an "unrelated business" is one which is not related to an existing enterprise.

153. ICA § 3 (emphasis added). Section 32(1) provides that a new Canadian business is established when it becomes a Canadian business, that is, when the new business has in Canada a place of business, an employee or self-employed person involved in the business, and assets used in the business. Glover, *supra* note 37, at 90 n. 43 (citing ICA § 32(1)).

154. Related Business Guidelines, *reprinted in* DOING BUSINESS IN CANADA 1985, *supra* note 113, at app. 3-8-2.

155. Although the legal force of these guidelines is questionable, they do provide the practitioner with an indication of Investment Canada's position. DOING BUSINESS IN CANADA 1985, *supra* note 113, at 3.02[5], p. 3-30.

156. *Id.* at § 3.02[5], p. 3-29.

duces goods or services used as inputs into or in furtherance of the activities of the other business and the goods or services so provided represented at least 50 percent of the output in value terms of the business which provides those goods or services.

2. Import substitution

A new business is related to an existing business if it is predominately engaged in the manufacture or assembly of proprietary goods (goods readily identifiable with the investor through patents, trademarks or the equivalent) which are currently being imported into Canada by the existing business.

3. Product substitution

A new business is related to an existing business if it produces a product or service which is directly substituted for an existing product or service being produced in Canada by the existing business provided that the substituted product or services represents at least 50 percent of the output in value terms of the new business.

4. Similar technology

A new business is related to an existing business if the technology and production processes used in the new business are essentially the same as those used in the existing business.

5. Research and development

A new business is related to an existing business if the products or services produced by the new business are based on research and development carried out in Canada by or on behalf of the existing business.

6. Industry sector

A new business is related to an existing business if both fall within the same industrial sector as defined at the three digit level in the Standard Industrial Classification published by Statistics Canada.

7. General principle

A new business is related to an existing business if the central purpose of the new business is the more effective carrying on of the existing business.[157]

Despite this series of situations which fall outside the scope of ICA, the last clause of the definition of "new Canadian business" results in a more inclusive definition than FIRA's version of "new business."[158] Under FIRA, the government reviewed a transaction by a non-eligible person designed to establish a new business or diversify an existing busi-

157. *Id.* at app. 3-8-1.

158. *Cf. supra* notes 69-71 and accompanying text.

ness into an unrelated area. A similar expansion into a related business was not reviewable.[159] Under ICA, however, if the new venture is related to the existing business, but also "related to Canada's cultural heritage and national identity," the government reviews the investment.[160]

The foreign investor must, therefore, determine what type of business is "related to Canada's cultural heritage and national identity." The Canadian Government issued regulatory guidelines to help answer this question.[161] For example, the regulations demark major portions of the telecommunications industry as business "related to Canada's cultural heritage and national identity," including book, magazine, and newspaper publication and distribution; film and video production, distribution, and exhibition; audio and video music recording production, distribution, and exhibition; and printed publication and distribution.[162]

Because the issue of "Canada's cultural heritage and national identity" is subject to volatile nationalist consideration, its interpretation may be unpredictable.[163] For example, if Canadian economic nationalist concerns mounted once again to the ultraprotectionist heights of the Gray Report,[164] "Canada's cultural heritage and national identity" might be interpreted to include many types of business activities. Inevitably, such expansive application of the clause would discourage foreign investment in any way related to Canada's cultural heritage and national identity. In an effort to prevent such an occurrence under ICA, the Government has authority to promulgate additional regulations after the Governor in Council gives the public sixty days of notice.[165] Foreign investors may thereby accelerate the consummation of an investment that could subsequently fall under the changed regulations.[166] Notwithstanding this notice requirement, the foreign investor must consider the impact of his investment strategy on culture and national heritage. While the Canadian attitude towards foreign investment is apparently positive at this time, the history of economic nationalism suggests that attitudes could sour, triggering a more liberal interpretation of the "cultural heritage and national identity" barrier.

Although ICA contains signs of improvement over FIRA and indicates

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159. *See supra* notes 72-74 and accompanying text.

160. ICA § 3.

161. Schedule IV, Can. Stat. O. & Regs., 85-611, June 27, 1985, *published in* Can. Gaz., art. II, July 10, 1985.

162. Glover, *supra* note 37, at 91-92.

163. *See id.* at 93. This determination's discretionary nature creates uncertainty.

164. *See supra* notes 25-30 and accompanying text.

165. ICA § 35(2).

166. Glover, *supra* note 37, at 91.

a positive change in attitude towards foreign investment, its application is as broad and complex as the application of FIRA. First, the status of "non-Canadian" is determined by a definition of "non-Canadian" that is arguably just as broad and just as complex as FIRA's "non-eligible person."[167] Second, ICA's definition of "Canadian business" is broader than FIRA's definition of "Canadian business enterprise."[168] Thus, under ICA neither the potential class of excluded foreign investors nor the class of excluded foreign investment is reduced. Third, despite statutory notice and thresholds, ICA has failed to eliminate highly controversial extraterritorial application of the investment legislation. Last, the "cultural heritage and national identity" clause of the "new Canadian business" definition leaves unresolved an important policy determination: what amount of business expansion by non-Canadians should be encouraged? In terms of application, the foreign investor is not better off under ICA than he was under FIRA. Under ICA, the foreign investor must comply with a broad-reaching statute with complex issues of fact and law. In addition, unlike under FIRA, the foreign investor must also address potentially unpredictable policy considerations.

B. *The Screening Process*

In enacting ICA, the Canadian Government intended a positive, hands-off approach to foreign investment. The screening process required by ICA, however, does not accommodate that approach.[169] The Canadian Government screens each transaction subject to ICA. Departing from FIRA's full scale review on all applicable foreign investments, ICA adopts a bifurcated review process. Some of the foreign investments merely require a notification procedure. Other foreign investments require a procedure including both an application and a full-scale review. In either situation Investment Canada[170] screens the investment to insure that foreign investments will have a positive effect on Canada. While the degrees of screening in the two procedures differ considerably, both result in obstacles similar to those found under FIRA.[171] Despite the Ca-

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167. Memorandum, *supra* note 134, at 14-15. *Compare supra* notes 50-60 and accompanying text *supra* notes 122-35 and accompanying text.

168. *See supra* notes 142-44 and accompanying text.

169. Grover, *The Investment Canada Act*, 10 CAN. BUS. L.J. 475, 482 (1985).

170. The Investment Canada Agency (Investment Canada) replaced the Foreign Investment Review Agency. Although structurally the two agencies are similar, the Investment Canada Agency holds more resources allocated to the encouragement of foreign investment.

171. *See, e.g.*, notes 206-13 and accompanying text.

nadian Government's hands-off approach, these frustrating obstacles of government intervention may prove to discourage foreign investment.

1. The Notification Procedure

Every non-Canadian who seeks to establish a new Canadian business and every non-Canadian who seeks to acquire control of a Canadian business must give notice to the Investment Canada Agency,[172] either before the investment is consummated or within thirty days thereafter.[173] Any investor who files notice should be aware that the Canadian Government may decide to review the investment. Once Investment Canada receives notice, it will acknowledge receipt of that notice.[174] The receipt informs the foreign investor that the investment is either not reviewable under ICA or that Investment Canada will within twenty-one days from the certified date inform the investor that the Minister of Regional Industrial Expansion[175] has declared the investment reviewable.[176] Gener-

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172. ICA § 11(a)-(b). If investors fail to provide notice, the Minister has enforcement tools. *See supra* note 140. However, if an acquisition is subject to review pursuant to ICA § 14, notice is not required. In that case the foreign investor must file an application with Investment Canada. *See infra* notes 193-97 and accompanying text.

173. ICA § 12. "A notice required to be given by an investor under section 12 of the Act shall be in writing, shall contain the information prescribed in Schedule I and shall be sent to the Agency [Investment Canada] at the office of the President of the Agency." *Regulations respecting investment in Canada, reprinted in* DOING BUSINESS IN CANADA 1985, *supra* note 113, at app. 3-2-2.

Pursuant to Schedule I the notice must contain information very similar to that required under the short-form notices of FIRA. Under ICA's notification process the investor must disclose information about the investor, the investment, the Canadian business, the acquisition, or the establishment of a new Canadian business, and cultural heritage or national identity. *Id.* at app. 3-2-4.

174. Although the federal government will find the foreign investment unreviewable in most cases, the investors should recognize the possibility of statutory review. *See infra* note 179.

175. The Minister has the ultimate responsibility to implement ICA. Section 5(1) of the Act states:

> The Minister shall
> (a) encourage business investment by such means and in such manner as the Minister deems appropriate;
> (b) assist Canadian businesses to exploit opportunities for investment and technological advancement;
> (c) carry out research and analysis relating to domestic and international investment;
> (d) provide investment information services and other investment services to facilitate economic growth in Canada;
> (e) assist in the development of industrial and economic policies that affect investment in Canada;

ally the Minister would review those investments in a business "related to Canada's cultural heritage and national identity."[177] Should the foreign investor receive no notice within twenty-one days, the investment is not reviewable.[178] Thus, the notification procedure is not a full-blown government review, but rather the potential trigger for a total review.

The utility of the notification procedure for the foreign investor remains to be proven. In a majority of cases the notification procedure will serve to circumvent the review process' protracted government intervention. The notification procedure does, however, afford the Canadian Government a quick review of the investment, and the opportunity to decide whether it threatens nationalist concerns. If so, the Government may invoke the "related to Canada's cultural heritage and national identity" test.[179] Although the notice requirement has a permissive nature, in actuality it is a definite intrusion and a possible delay in the foreign investor's transaction.

The Canadian Government's justifications for the notification process support the investor's concerns about delay and government intervention. One justification offered by the Minister of Regional Industrial Expansion suggests that the notification will allow the government to "monitor in-coming investment."[180] Another possible reason for the notice requirement is collection of statistics on foreign investment.[181] Also, as discussed above, this procedure affords the opportunity to screen every investment to assure that it does not conflict with the goals of Canadian economic nationalists.[182] None of the justifications for the notification process are

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(f) ensure that the notification and review of investments are carried out in accordance with this Act; and

(g) perform all other duties required by this Act to be performed by the Minister.

176. ICA § 12(1); Glover, *supra* note 37, at 92-93.

177. ICA § 15(a).

178. ICA § 13(3)(b). Nonreviewable status is contingent on the accuracy of the information submitted in the notice. Foreign investors, therefore, must ensure that the information in the notice is accurate so as not to jeopardize the nonreviewability status. *Id.*, § 13(3)(a); Glover, *supra* note 37, at 93.

Depending on the political climate and nationalist sentiment of the investment involving a business only tangentially related to the Canadian cultural roots, it is possible that the investment will be deemed reviewable.

179. Grover, *supra* note 169, at 477.

180. *Id.* at 476 n.10.

181. *Id.* at 477. A statistics collection could, however, be completed without the notification procedure.

182. Although the notification process is arguably "only for informational, and not review, purposes," DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[1], p. 3-8, the Act suggests that some review is inevitable by affording the federal government a

consistent with ICA's purpose of encouraging foreign investment. In effect, the notice requirement is an unnecessary bureaucratic intervention which will not encourage foreign investment.[183]

2. The Review Procedure

Overall, ICA's review process is much like FIRA's review process. The Canadian Government screens certain foreign investments on a case-by-case basis to determine whether the investments are allowable. The decision turns on the Minister of Regional Industrial Expansion's determination[184] that the investment is of "net benefit to Canada."[185] Like FIRA's "significant benefit" test, this determination is based primarily on policy rather than on law. Additionally, because the Minister is the ultimate decision-maker,[186] political considerations will inevitably play a major part in the decision.[187] As a result, the review process is convoluted and often unpredictable.

Generally, the review process is applicable in three situations:[188]

> 1. A direct acquisition of control by a non-Canadian of a Canadian business having assets of $5,000,000 or more;
> 2. An indirect acquisition by a non-Canadian of a Canadian business having assets of $50,000,00 or more. However, the [monetary] threshold is reduced to $5,000,000 if the assets of the Canadian business represent more than 50 percent of the total international and domestic assets; or

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21 day safe harbor in which it can declare an investment reviewable.

183. Grover, *supra* note 169, at 477.

184. ICA § 21(1).

185. *Id.*, § 21.

186. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[1], p. 3-8. The Minister of Regional Industrial Expansion is part of the federal cabinet. *Id.*

187. *Id.* at § 3.02[4], p. 3-22. For example, members of Parliament may make representations which may be persuasive. *Id.* at § 3.02[4], p. 3-28.

188. The question of when an acquisition is reviewable is a highly technical matter and as a result invites highly logistic maneuvering to avoid the review process. The two steps that may avoid the review are:

> 1. Reorganization of the Canadian business by rolling down its assets to a new subsidiary incorporated in Delaware with the result that there is then a Canadian business carried on by a corporation incorporated outside Canada. A sale of the shares of the Delaware subsidiary is not reviewable.2. Reclassification of the shares into 100 Class B which have one vote per share but a $.10 per year dividend preference over the Class A and vote with the Class A shares, and 10,000 Class C shares which voting separately as a class, have the right to elect all but one of the directors. A sale of the Class B and Class C shares to a non-Canadian is not reviewable.

Grover, *supra* note 169, at 480-81 (citing ICA §§ 10(1)(E), 30(2), and 23(3)(d)).

3. An investment (new business or acquisition) falling within specific categories of business 'related to Canada's cultural heritage or national identity.'[189]

Although this review process includes fewer investments, it is not a significant departure from FIRA.[190] Because ICA's monetary thresholds are relatively higher than FIRA's, the Government estimated that only ten percent of foreign investments will be reviewable. Like all statistics, however, accurate prediction requires an analysis of the variables. The ultimate benefit of the higher thresholds is questionable because these thresholds still assure a full review of the investments that constitute ninety percent of the transactional value of foreign investments in Canada.[191] Also, as the Gray Report[192] stated, the business "related to Canada's cultural heritage and national identity" category can be as narrow or as wide as the political climate dictates. Under ICA the scope of reviewable transactions may be narrower than under FIRA, but ICA does require review of all investment of either monetary or political significance.

Similarly, the review procedure itself is not significantly different than it was under FIRA. Every non-Canadian making one of the three types of investments[193] described above must file an application with Invest-

189. Grover, *supra* note 169, at 478 (citing ICA §§ 14, 15, 28). These assets are to be based on financial statements prepared in accordance with generally accepted accounting principles. *Regulations respecting investment in Canada, reprinted in* DOING BUSINESS IN CANADA 1985, *supra* note 113, at app. 3-2-2.

190. Glover, *supra* note 37, at 93. Under FIRA there was an exemption for the takeover of a business only if such business' gross assets did not exceed $250,000 and gross revenues did not exceed $3 million. But the exemption applied only if such business was related to a Canadian business carried on by a non-eligible person. FIRA §§ 5(1)(c), 31(3); DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[3], p. 3-18.

191. Glover, *supra* note 37, at 98.

192. *See supra* notes 163-66 and accompanying text.

193. There are three exceptions to the ICA § 16 rule that requires the filing of an application prior to implementation of the investment:

1. An application for certain reviewable indirect acquisitions of a Canadian business may be filed before or within 30 days after their implementation.

2. An application for review with respect to any investment in areas of business deemed by regulation to relate to canada's cultural heritage or national identity must, if the investment is not otherwise reviewable (i.e., an acquisition involving assets below the threshold level or a new business), be filed forthwith upon receipt of a notice for review.

3. An application may be filed before or within 30 days after its implementation if the Minister issues a notice that he is satisfied that a delay in implementation would result in undue hardship.

Grover, *supra* note 169, at 477-78.

ment Canada before the investment is implemented.[194] The application requires financial and business data regarding both the foreign investor and the target Canadian business or the new Canadian business and proposed business plans for the new or acquired business.[195] Once Investment Canada receives a completed copy[196] and sends a receipt to the applicant, the review process begins.[197]

The review process involves the analysis by Investment Canada of the application and information provided by other parties. The sources of this information include both provincial[198] and federal government[199] bodies, representatives of the target company, and other interested third parties such as competitors of the non-Canadian applicant.[200] As under FIRA,[201] the Minister bases his decision on Investment Canada's recom-

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194. FIRA did not require that the government approve the investment before implementation. As a result investors risked dismantling an acquisition in the event of disallowance of the transactions. Grover, *supra* note 169, at 478 n. 15.

Under ICA's system, however, there are a limited number of exceptions to the requirement that an application be filed prior to implementation. For example, only if the requirement results in undue hardship for the foreign investor or adverse consequences to a Canadian business will the federal government make an exception.

195. Glover, *supra* note 37, at 94. The information required for the application under ICA is similar to the information required under FIRA.

196. The review procedures require that the application be completed fully and adequately. ICA § 17. If no ICA notice is received 15 days after receipt, the application is deemed complete. *Id.*, § 18(3).

197. *Id.*, § 18(1). The receipt may certify the date on which application was received, that information required was received, or that application was deemed complete. *Id.*, § 18(1)(a)-(c).

198. Under FIRA the federal government will send a copy of the foreign investor's application to the governments of the provinces in which the target business or new business is located. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4][b], p. 3-23. The Agency gives great weight to the provincial government's opinion. This procedure usually works to the foreign investor's advantage because the provincial governments typically want further investment. *Id.* at § 3.02[4][f], p. 3-27.

199. For example, under FIRA the Agency routinely advises the Bureau of Competition Policy. Similarly, the foreign investors are encouraged to discuss their investment directly with these other officials to assure an adequate representation of their views. *Id.* at § 3.02[4][f], p. 3-28.

200. These interested third parties may make representations to the Agency and are protected by the Act's veil of secrecy. Although the Act allows the foreign investor to have knowledge of the existence of such interventions and the general content of these interventions, the identity of the intervenors remains privileged information. *Id.* at § 3.02[4][f], p. 3-28; *cf. supra* note 98.

201. Unlike FIRA, ICA has eliminated one level of bureaucracy by naming the Minister of Regional Industrial Expansion as the ultimate decision-maker. *Id.* DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[1], p. 3-8.

mendation.[202] Throughout this whole process, however, with few exceptions, all information received by Investment Canada, as well as its recommendation to the Minister, is classified.[203]

Some commentators claim that ICA has abbreviated the review process,[204] but it does not appear to have made any significant improvement over FIRA's average review period of fifty-nine days.[205] The Minister has forty-five days from the day of receipt of notice in which to review the investment and to notify the applicant whether the investment is likely to result in a "net benefit to Canada."[206] If the investor receives no notice within the forty-five day period, the Minister is deemed to be satisfied that the investment will be of net benefit to Canada.[207] But if the Minister is unable to complete the screening process,[208] he may extend the forty-five day period by thirty days or longer, with the consent of the foreign investor.[209] If the Minister decides that the investment is not to be of net benefit to Canada, he can further extend this seventy-five day period. In such an event the Minister must inform the foreign investor of his decision and advise the investor of his right to make further representations and to submit undertakings within a prescribed thirty-day pe-

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202. Investment Canada's role is very reminiscent of the Foreign Investment Review Agency's role. *See supra* notes 76-81 and accompanying text. Investment Canada assists and advises the Minister in the administration of ICA. The chief executive officer of Investment Canada is the President. The President reports directly to the Minister. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4], p. 3-22.

Conversely, in keeping with the change in attitude toward investment, the Minister has stated publicly that 75% of the staff of Investment Canada will be devoted to encouraging the development of investment opportunities while only 25% of the staff will be responsible for the review of applicable foreign investments. Grover, *supra* note 169, at 475. This deployment of resources is consistent with section 5 of ICA that gives the Minister the responsibility of encouraging and facilitating foreign investment. *See id.* at 481.

203. Pursuant to ICA § 36 all information received by Investment Canada is privileged and, with some practical exceptions, cannot be disclosed. In fact, it is a summary conviction offense to knowingly disclose such information. ICA § 42.

204. The number of players in the review process under ICA is really no different than the number under FIRA. The key difference is that the Minister, not the Federal Cabinet, makes the final decision. *See supra* note 201. However, many parties do provide information to the government, resulting in a complex reviewing process.

205. *See supra* note 106. This post-1982 figure is based on the amended FIRA process.

206. ICA § 21(1).

207. *Id.*, § 21(2).

208. This might occur, for example, if national resentment of foreign investment overshadows encouragement of foreign investment.

209. ICA § 22(1).

riod.[210] Thus, the review process can last between a minimum of forty-five days and maximum of one hundred and five days or longer, depending on the delay in the bureaucratic process and the complexity of the transaction. This offers little solace to the foreign investor who has to wait patiently while the costs of the delay lessen the attractiveness of his proposed investment.

An additional but related obstacle for the investor is the burden of proving the difficult standard of "likely to be of net benefit to Canada." The Canadian Government will allow only those foreign investments supported by an application and supplemental information[211] indicating that the investment is "likely to be of net benefit to Canada."[212] ICA's net benefit test replaces FIRA's significant benefit test, deliberately lightening the foreign investor's burden of proof.[213] It is arguable that this reduction of the foreign investor's task is significant. Instead of proving the subjective and often inscrutable standard of *very positive* beneficial effect on Canada, ICA requires the foreign investor to prove that his investment will have a positive beneficial effect on Canada.[214]

The statutory criteria for determining a net benefit are rather ambiguous policy considerations.[215] Section 20 of ICA provides that the Minister's determination of net benefit will be based on the following considerations:

> (a) the effect of this 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 or new Canadian business and any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part; (c) the effect of the investment on productivity, industrial efficiency, technological

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210. *Id.*, § 23; Grover, *supra* note 169, at 478-79.

211. In addition to all the government bodies and interested third parties supplying information under FIRA, *see supra* note 95, the investor must also meet with Investment Canada personnel at least once in Ottawa. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4], pp. 3-23 to 3-24. Also, Investment Canada officials may visit the premises of the Canadian business or the applicant's premises in Canada. *Id.* at § 3.02[4], p. 3-24.

212. ICA § 16(1).

213. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4][c], 3-25; *see also* Grover, *supra* note 169, at 480 (the "net benefit to Canada test" imposes a lesser standard than FIRA's "significant benefits test").

214. *See* DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4][c], p. 3-25 ("at least some benefit to Canada").

215. *Id.*

> 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; and (f) the contribution of the investment to Canada's ability to compete in world markets.[216]

These criteria, with the exception of subsections (e) and (f), parallel FIRA.[217] The foreign investor must disclose a variety of business and market information including: the number of jobs that the investment will create; the increase in exports or replacement of imports; the extent of participation by Canadians as directors, officers or managers in the new business; the aggregate amount of expenditures planned for development and manufacturing; and the use of Canadian parts and services.[218] Subsection (e), the contribution to Canada's ability to compete in world markets, reflects the influence of Canada's increasing international economy. The addition of subsection (f), the requirement of compatibility with federal and provincial cultural policies, codifies the supplement released by the Canadian Government in July, 1975, entitled the "New Principles of International Conduct."[219] This latter requirement goes beyond FIRA and demands that the foreign investor "Canadianize" his investment to placate Canadian nationalist concerns.[220]

The number and variety of policy considerations may hinder the foreign investor who attempts to determine how to meet his burden of proof.[221] In fact, the review process "may resolve itself into a bargaining process between the foreign investor and the Federal Government."[222] The foreign investor's bargaining power, however, is limited because (1)

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216. ICA § 20.

217. *See* DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4][c], p. 3-26; Grover, *supra* note 169, at 479; *see also supra* notes 83-84 and accompanying text.

218. Grover, *supra* note 169, at 479.

219. *See supra* notes 85-86 and accompanying text.

220. This requirement of compatibility with federal and provincial cultural policies forces the foreign investor not only to adhere to the rules and regulations of ICA but also to understand the nationalist concerns from which it originated and to recognize those concerns when transacting business in Canada.

221. Administrative aids are available. The foreign investor may seek the Minister or the Investment Canada's written opinion, and the Minister may issue guidelines and interpretation notes with respect to the application and administration of ICA. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[6][c], p. 3-31.

222. *Id.* at § 3.02[4][a], p. 3-22. Undertakings are written contracts between foreign investor and the federal government. *Id.* at § 3.02[4], pp. 3-26 to 3-27.

he is negotiating with the decision-maker; (2) he cannot possibly understand all of the policy issues as they are applied in this highly politicized setting; and (3) he does not have full information from which to negotiate because Investment Canada's decisions and decision-making process are classified.[223] Therefore, despite ICA's guidelines and statutory considerations, the foreign investor with a reviewable investment is left in a quandary.

Finally, the screening process language under ICA is very similar to that found in FIRA.[224] This similarity in language necessitates a similar result. The foreign investor will be equally as frustrated by government intervention under ICA as under FIRA. First, he must determine whether the investment is subject to the notification or the review procedure. Second, in either case he must be prepared for a prolonged screening that will delay the transaction and increase the costs. Third, throughout the screening process a veil of secrecy precludes the investor from knowing who and what argue against the investment. Fourth, he must be prepared to meet the inscrutable burden of proof that the investment will procure Canada with a net benefit. Last, the foreign investor is unable to appeal the Minister's final decision.[225] ICA alters but does not remove the FIRA obstacle course.

V. CONCLUSION

The Investment Canada Act indicates an improved attitude toward foreign investment, but there is little substantive change from the Foreign Investment Review Act. The new statute retains nationalist over-

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223. *Accord* DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[4], pp. 3-24 to 3-25. There is no doubt, however, that ICA is an improvement over FIRA. For example, ICA provides that in the event the Minister concludes a disallowance is appropriate, the foreign investor has an opportunity to provide more information or submit more undertakings. *See supra* note 211 and accompanying text.

224. *See supra* notes 82-93 and accompanying text.

225. If the investment is disallowed the foreign investor may not implement the investment. If such investment is already implemented the applicant must divest himself of control of the Canadian business. ICA § 24; Glover, *supra* note 37, at 95. No time period for this divestiture is specified. Glover, *supra* note 37, at 95. A second application may be submitted, but unless significant new factors or undertakings arise, the application will most likely be futile. DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.07[6][a], p. 3-31.

If the government approves the investment, the applicant will receive a request for written confirmation that the undertakings have been complied with on the anniversary of the allowance. *See* ICA § 25. In the event of non-compliance Investment Canada will hear reasonable explanations and may renegotiate undertakings. *See* DOING BUSINESS IN CANADA 1985, *supra* note 113, at § 3.02[7], pp. 3-31 to 3-32.

tones and potentially frustrating instances of government intervention. ICA is, however, a political compromise.[226] The Canadians want and need foreign investment, but their ultranationalism precludes them from adopting a real hands-off approach. In addition to familiarizing himself with new rules, the foreign investor should be aware of Canada's nationalist concerns because they directly affect the investment climate.

Susan D. Romer

226. Grover, *supra* note 169, at 482.