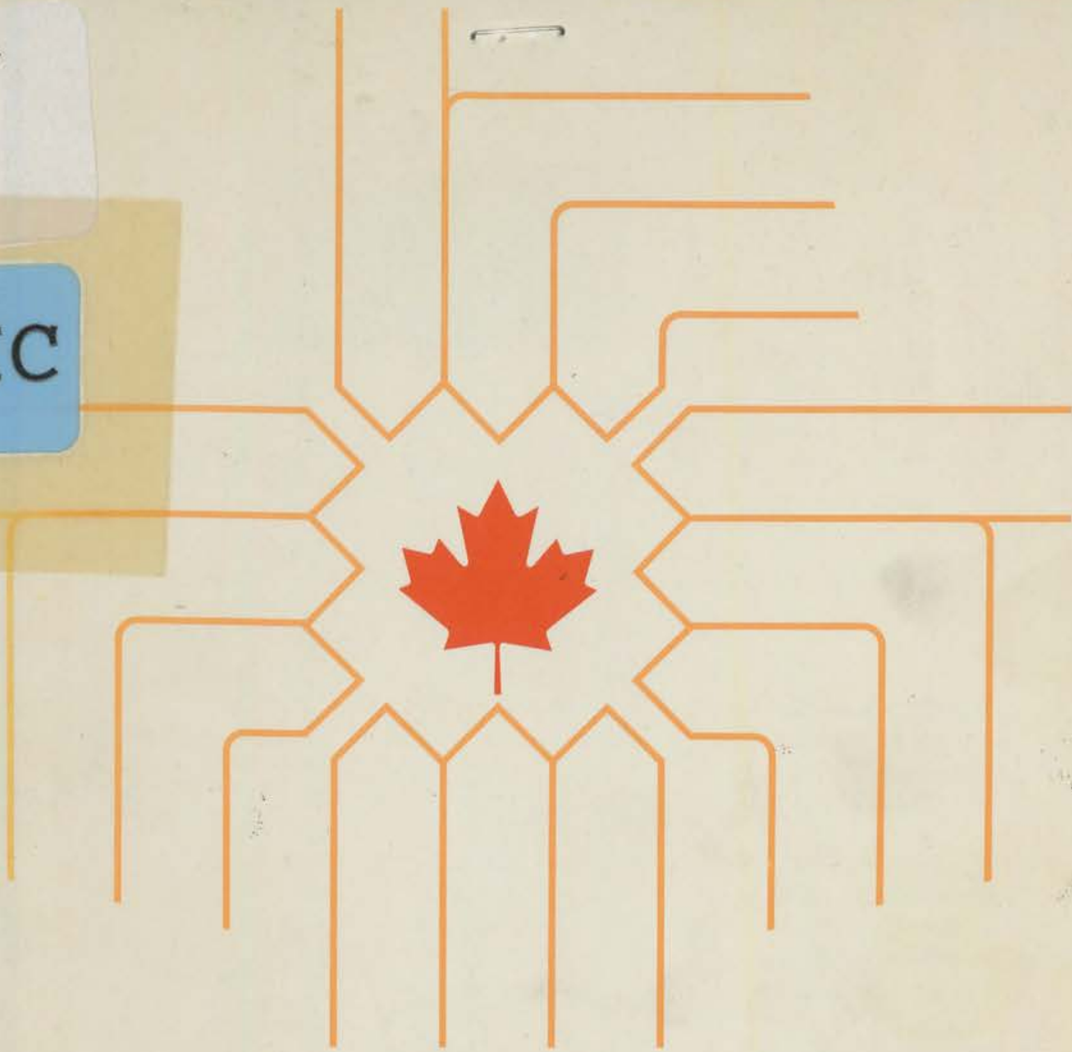

Businessman's Guide to the Foreign Investment Review Act

Government of Canada | Gouvernement du Canada
Foreign Investment Review Agency | Agence d'examen de l'investissement étranger

This booklet is designed to give investors who may be considering investments in Canada an understanding of the purpose and scope of the Foreign Investment Review Act. It should not be relied upon by persons who are proposing to submit a notice of an investment subject to the Act. Application forms and a guide to their use are available for this purpose.

CBMC

As Minister responsible for the administration of the Foreign Investment Review Act, I welcome this opportunity to explain the purpose and role of the review process to prospective investors. I trust you will find the information contained in this brochure both reassuring and helpful.

Throughout Canada's history foreign capital has made a vital contribution to the development of our industrial structure and resource industries. Frequently, foreign capital brought with it technical and managerial expertise that would not otherwise have been available to Canada. As well, it gave rise to new industrial and trading opportunities.

The prospects for the future are no less promising. The potential exists for further rapid growth of our economy and we need to attain that potential in order to provide employment opportunities for our labour force, which is the fastest growing and one of the most skilled in the western world. Domestic savings, though high, will not be sufficient to meet all our needs.

The Government, therefore, recognizes the important role that foreign capital will play in the future development of the Canadian economy. At the same time, because of the uniquely high level of foreign control of our industrial base and the effect this has on the ability of Canadians to maintain effective control over their economic environment, we feel that we must ensure that future direct investments are of benefit to Canada as well as to the investor. You will be aware that many other countries, with lower levels of foreign control of their industries, have taken steps in the same direction.

Finally, let me point out that our general recognition of the need for, and value of, foreign investment is well demonstrated by the actual results of operations under the Foreign Investment

Review Act. In more than four out of every five investment proposals considered so far we have found significant benefits to Canada as well as to the investor. I see no reason for any major departure from that pattern in the foreseeable future. Canada is still a country with a very open policy towards foreign investment.

Jean Chrétien

The Honourable Jean Chrétien
Minister of Industry, Trade and Commerce

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Investing in Canada

Canada enjoys a climate of political and economic stability which has few equals. Canada's Gross National Product is now in the order of $200 billion. Between 1960 and 1976, the Canadian economy experienced a rate of real growth of about 5% per annum, a higher rate of real growth than most industrial economies. A projected high level of capital investment is expected to provide the basis for continued favourable real growth for several years to come.

Canada is a major trading nation. Traditionally, the value of merchandise exports has been in excess of 20% of GNP. Both exports and imports reached record levels in 1976—exports increased by 14.0% over 1975 to $38,019 million and imports increased by 8.5% to $36,887 million.

The industrial structure of the Canadian economy is highly diversified. A weighting of major industrial sectors by shares of real domestic product (see table on next page) shows the relative importance of each sector in the Canadian economy.

The table indicates, contrary to a widely held view of the composition of Canadian industry, that manufacturing industries account for the largest share of total output. Evidence of the maturity of the Canadian industrial system is the high proportion of output accounted for by the service sector.

Canada has an endowment of natural resources matched by few other countries. It has vast areas of forest suitable for the production of pulp and paper and lumber and is rich in a wide variety of minerals and oil and gas. The value of mineral production in Canada totalled an estimated $13.4 billion in 1975. Exports of minerals and fabricated mineral products have led to several periods of sustained expansion in the Canadian economy in the past and have been the main force in the northward

Real domestic product by industry

Industrial Sector	% share of Real Domestic Product*
Agriculture, forestry, fishing and trapping	4.3
Mines (including milling) quarries and oil wells	3.8
Manufacturing industries	22.9
Construction	7.0
Transportation, storage and communication	9.1
Electric power, gas and water utilities	2.8
Trade	11.4
Finance, insurance and real estate	12.0
Community, business and personal services	19.3
Public administration and defense	7.4
Total	100.0

* based on 1971 industry weights.

advance of Canada's frontiers of population and economic activity. Canada leads the world in mineral exports and ranks third in mineral production behind the United States and the Soviet Union.

Today, Canada is the world's largest producer of asbestos, nickel, zinc and silver, the second largest in potash, molybdenum, gypsum and sulphur, and is among the leaders in the production of titanium concentrates, platinum, aluminum, gold, copper and iron ore. In fact, Canada produces nearly all the minerals needed for a modern industrial economy; in total some 60 different minerals are produced from domestic deposits. Only a few items such as manganese, chromium, bauxite and tin are imported from elsewhere. In view of the rapidly increasing world demand for raw materials, this sector will obviously continue to play a major role in Canadian economic development in the coming years.

The importance of the Canadian manufacturing sector is evidenced by its prominent position in the overall makeup of the Canadian industrial system. The estimated value of total shipments in manufacturing was $87.6 billion in 1975. In that year, manufactured goods accounted for some 60% of total Canadian exports, which totalled in excess of $33 billion. This high degree of reliance on export markets, coupled with the vigorous import competition that Canadian producers often face in the domestic market, encourages them to be efficient and internationally competitive. The continuing emphasis by the government on improving access for Canadian products to export markets should further increase opportunities for manufacturers in Canada.

Several sectors of the Canadian manufacturing industry are based on high technology and enjoy internationally competitive economies of scale. Some of the more significant sectors of Canadian manufacturing include the food and beverage sector, the wood industry, paper and allied products, primary metals and metal fabricating, machinery, transportation equipment, electrical products, petroleum and coal products, and chemical and chemical products.

As with all mature economies, the service sector is the largest industrial sector by a number of measures. Service-producing industries, which include transportation, storage and communication, trade, finance, insurance and real estate, community, business and personal services and public administration and defence, account for some 60% of the total domestic product. Reflecting the labour intensive nature of service industries, 65% of the labour force in 1975 was employed in that sector.

Foreign capital has played a major role in the past in the development of all of these sectors. In the decade ending 1970, net financing abroad by Canadians accounted for 4.2% of total funds available for investment. Much of the inflow of capital is accounted for by portfolio investment, including debt securities of governments and their agencies, but foreign direct investment has also been substantial. Most of the foreign direct investment in Canada occurred in the last quarter century. The table below illustrates the cumulative growth of direct investment during this period.

Direct Investment in Canada
($ billions of book value)

1950	1960	1970	1974
4.0	12.9	26.4	36.2

At the end of 1974 foreign direct investment in manufacturing accounted for the largest component—$14.8 billion or 41% of total foreign direct investment. Foreign direct investment in the petroleum and natural gas industry accounted for a further $8.9

billion or 25% of the total, and the financial and the mining and smelting sectors accounted for 12% and 11% respectively. The diverse nature of foreign investment in Canada testifies to the wide range of attractive investment opportunities that have been available. The future promises equally attractive and challenging opportunities.

Various public and private projections indicate capital requirements in the order of $750 billion over the next decade. This implies a savings rate equal to approximately 25% of GNP. Although domestic savings are high, it is acknowledged that Canada will continue to rely very heavily on foreign capital to meet these capital requirements.

Due to high levels of natural growth and immigration there has been a sharp increase in the Canadian population in the post-war period. Total population was approximately 23 million at the end of 1975. An acceleration of the rate of new entrants into the labour force as a result of a high level of net immigration, the coming of age of the post-war "baby boom" children and a higher participation rate among the working age population, particularly women, were the major factors which contributed to a large increase in the labour force.

As a result of policy measures instituted in the previous decade, the educational attainment of new entrants into the labour market is now comparable to that in the United States. Education projections indicate that by 1985 half of the young people leaving school to take permanent jobs will have at least some postsecondary education. As well, there are a number of training programs provided by both federal and provincial governments which enable thousands of Canadians already in the work force to renew or upgrade their skills.

The importance of industrialization to Canada's overall economic growth is well recognized by all levels of government. Incentives and other financial assistance are provided in support of research and development in industry and export marketing. Other federal programs, include incentives to industry to locate in slower growth regions of the country. The provinces and municipalities have a number of programs designed to meet regional or local needs and objectives.

Another obviously important element of the environment is the tax system. As a matter of tax policy one of the criteria used in assessing tax measures involves comparison with taxation in other countries, particularly those countries with which Canada competes for markets and investments. The Government recognizes the need to ensure that the overall tax burden is more or less comparative.

Canada's strategic location provides many attractive bases from which industry can penetrate North American and, indeed, world markets. Sophisticated transportation and communiation networks facilitate trade and commercial activity in Canada and abroad. From almost anywhere in Canada there are alternate transportation and communication facilities competing to meet the needs of business.

In spite of Canada's historical reliance on foreign capital most of our requirements are raised domestically. Canada's financial system has earned the confidence and respect of residents and international investors alike. Relative to the size of the market, Canadian financial markets are among the most efficient anywhere in their ability to raise large sums of capital through both debt and equity securities.

Foreign Investment Policy

Canada's policies towards foreign investment seek to reconcile two realities. On the one hand, there is the uniquely high degree of existing foreign ownership and control of Canadian industry as a result of heavy foreign direct investment in the past. On the other hand, there is a continuing need for foreign investment, both direct and portfolio, to supplement Canadian savings in financing the future development of the Canadian economy. Canadian policy therefore welcomes foreign investment, provided that, in the case of foreign direct investment, it is likely to yield benefits to Canada as well as to the investor.

The fabric of Canadian Government policies and measures relating to foreign direct investment contains a number of strands. There is a group of measures that might be called safeguards; like similar measures in other industrialized countries, they are aimed at ensuring that certain vital national interests are protected and maintained. They include legislation covering key sectors of the economy, requiring that most or all of the sector will be Canadian-owned and controlled. They apply to such sectors as banking, other financial institutions, broadcasting and newspapers. Direct government participation in broadcasting, rail and air transportation, nuclear energy, and Arctic oil and gas exploration is another means of maintaining a Canadian "presence" in the more crucial areas of activity.

A second group of measures is designed to encourage the growth of strong Canadian-controlled enterprises and to encourage the investment of Canadian savings in Canada. They include measures in support of small businesses, measures to retain more pension fund savings in Canada, and the creation of the Canada Development Corporation to attract Canadian savings into the development of strong Canadian-controlled businesses.

The Foreign Investment Review Act

The centre-piece, however, of Canada's legislative approach is the Foreign Investment Review Act. The Act provides a mechanism to screen certain foreign direct investment proposals to determine whether or not those investments are likely to be of significant benefit to Canada. The Foreign Investment Review Act applies to two, and only two, forms of foreign investment:

— the acquisition of control of a Canadian business enterprise by foreign individuals, corporations, governments or groups containing foreign members, through the acquisition of shares or of the property used in carrying on the business; and
— the establishment of a new business in Canada either by foreign persons who do not already have an existing business in Canada, or by foreign persons who have an existing business in Canada, if the new business or expansion is unrelated to the existing business.

With respect to acquisitions, it should be emphasized that the Act is concerned with the acquisition of control of Canadian business enterprises, not with the acquisition of shares or assets where that acquisition does not constitute control. Thus, portfolio investments are generally not subject to review.

Some of the important features of the Act need special mention. First, the Act is not retroactive. It does not seek to regulate or review investments made by non-Canadians prior to the entry into force of the legislation. Second, the Act does not provide for discrimination among investors on the basis of their country of origin. Third, the Act applies generally and is not confined to particular sectors of the economy. Finally, the emphasis of the Act is on business and economic performance standards and the Act sets out "significant benefit to Canada" criteria against which business performance is assessed.

Significant benefit is determined by taking into consideration the following factors, or as many of them as are applicable in a given case:

(a) the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;

(b) the degree and significance of participation by Canadians in the business enterprise and in the industry sector to which the enterprise belongs;

(c) the effect on productivity, industrial efficiency, technological development, innovation and product variety in Canada;

(d) the effect on competition within any industry or industries in Canada; and

(e) the compatibility of the investment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by a province likely to be significantly affected by the proposed investment.

The relative significance or weight attached to each of these factors is not, and cannot be, the same for all investment proposals. It necessarily varies with the nature of the transaction, the industry sector in which it falls, the region in which the investment is being made, and a number of other factors.

The Act provides for the establishment of an agency, the Foreign Investment Review Agency, to advise and assist the Minister responsible for the administration of the Act. The responsible Minister is the Minister of Industry, Trade and Commerce.

The Minister is empowered under the Act to issue Guidelines to clarify the intended interpretation of the various provisions of the Act. Guidelines have been issued concerning the application of the Act to *real estate transactions*, certain transactions in the *oil and gas industry*, *corporate reorganizations* and certain *venture capital investments*. The Minister has also issued Guidelines indicating how he intends to interpret the terms "*new business*" and "*related business*" for purposes of the Act.

The Minister is required by the Act to give individual opinions on two matters upon request by the investor, (i) as to whether the investor is or is not a "non-eligible person" (i.e. non-Canadian) and (ii) as to whether a proposed new business is or is not "related" to an existing business in Canada of the investor. These opinions are binding on the Minister for a period of two years so long as all the material facts were disclosed to the

Minister at the time of the request for an opinion and the facts so disclosed remain substantially unchanged.

Aside from the Guidelines and formal Ministerial opinions, a great deal of informal advice and assistance to investors is provided. Investors are encouraged to discuss the circumstances of their investments informally with Agency officials. The experience to date indicates that many questions can be disposed of quickly with consequent savings of time and expense. Informal consultations on the formulation of applications are especially helpful to investors and their advisors.

Principles of International Business Conduct

A further indication of broad government policy regarding the activities and responsibilities of foreign-controlled business enterprises in Canada is contained in the Principles of International Business Conduct issued by the Government in July, 1975. Within the general objective of encouraging corporate behaviour consistent with Canada's economic goals, the principles stress certain operating guidelines for foreign companies. Specifically, the Government asks foreign-controlled enterprises to:

(a) Pursue a high degree of autonomy in the exercise of decision-making and risk-taking functions, including innovative activity and the marketing of any resulting new products;

(b) Develop as an integral part of the Canadian operation an autonomous capability for technological innovation, including research, development, engineering, industrial design and preproduction activities; and for production, marketing, purchasing and accounting;

(c) Retain in Canada a sufficient share of earnings to give strong financial support to the growth and entrepreneurial potential of the Canadian operation, having in mind a fair return to shareholders on capital invested;

(d) Strive for a full international mandate for innovation and market development, when it will enable the Canadian company to improve its efficiency by specialization of productive operations;

(e) Aggressively pursue and develop market opportunities throughout international markets as well as in Canada;

(f) Extend the processing in Canada of natural resource products to the maximum extent feasible on an economic basis;
(g) Search out and develop economic sources of supply in Canada for domestically produced goods and for professional and other services;
(h) Foster a Canadian outlook within management, as well as enlarged career opportunities within Canada, by promoting Canadians to senior and middle management positions, by assisting this process with an effective management training program, and by including a majority of Canadians on boards of directors of all Canadian companies, in accordance with the spirit of federal legislative initiatives;
(i) Create a financial structure that provides opportunity for substantial equity participation in the Canadian enterprise by the Canadian public;
(j) Pursue a pricing policy designed to assure a fair and reasonable return to the company and to Canada for all goods and services sold abroad, including sales to parent companies and other affiliates. In respect to purchases from parent companies and affiliates abroad, pursue a pricing policy designed to assure that the terms are at least as favourable as those offered by other suppliers;
(k) Regularly publish information on the operations and financial position of the firm;
(l) Give appropriate support to recognized national objectives and established government programs, while resisting any direct or indirect pressure from foreign governments or associated companies to act in a contrary manner;
(m) Participate in Canadian social and cultural life and support those institutions that are concerned with the intellectual, social, and cultural advancement of the Canadian community; and
(n) Endeavour to ensure that access to foreign resources, including technology and know-how, is not associated with terms and conditions that restrain the firm from observing these principles.

These Principles, while not intended as a restatement of the assessment criteria of the Foreign Investment Review Act, or issued under the authority of that Act, provide an indication of the kind of performance the Canadian Government expects of foreign investors. Accordingly, investors may find them useful as a guide, where relevant, in framing their investment proposals.

How to Comply with he Foreign Investment Review Act

Who are "non-eligible persons"?

The Act uses the expression "non-eligible person" to describe those persons whose investment proposals are subject to review. Briefly, a "non-eligible person" means:

(1) an individual who is:
- (a) neither a Canadian citizen nor a landed immigrant;
- (b) a landed immigrant who has been ordinarily resident in Canada for more than one year after he first became eligible to apply for Canadian citizenship, and who is not a Canadian citizen;
- (c) a Canadian citizen ordinarily resident outside of Canada;

(2) a foreign government or agency of a foreign government;

(3) a corporation "...that is controlled in any manner that results in control in fact, whether directly through 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 as described under paragraph (1) or (2), or by a group of which one or more members is a non-eligible person as described under (1) or (2). In addition the Act presumes that a corporation is a non-eligible person if:
- (a) any one non-eligible person owns 5% or more of its voting shares;
- (b) more than one non-eligible person owns:
  - (i) 25% or more of the voting rights of a corporation whose shares are publicly traded; or
  - (ii) 40% or more of the voting rights of a corporation whose shares are not publicly traded.

Corporations may, however, rebut these presumptions where it can be established that effective control is in the hands of Canadians.

Upon request, the Minister will provide an investor with an opinion as to whether he or the business he represents is or is not a "non-eligible person". There is no form to fill in; a simple statement of relevant facts is all that is required.

What types of investments are subject to review under the Foreign Investment Review Act?

The Foreign Investment Review Act applies to:

- the acquisition of control of a Canadian business enterprise by foreign individuals, corporations, governments or groups containing foreign members,
- the establishment of a new business in Canada by foreign persons who do not already have an existing business in Canada or by foreign persons who have an existing business in Canada, if the new business is unrelated to the existing business.

What are the procedures for small business investment proposals?

A much abbreviated form of notice has been adopted for small business investment proposals. These are proposals involving the establishment or acquisition of a business with gross assets of less than $2 million and fewer than 100 employees. The Minister has announced that in most small business cases the information provided in the abbreviated form of notice will be sufficient to enable him to recommend, without delay, that the investment be allowed. In a minority of small cases the Minister may require the investor to file additional information and the proposal will be subject to more extensive review and assessment.

What types of investments by foreigners are excluded from review under the Act?

The Act does not apply to:

- purchases of shares or other securities of Canadian companies where such purchases do not involve the acquisition of control of the companies concerned;

— investments to expand a foreign-controlled business in Canada;
— the establishment of new businesses in Canada which are related to the investor's existing business in Canada;
— the acquisition of control of a Canadian business whose gross assets do not exceed $250,000 and whose gross revenues do not exceed $3,000,000 by a person who is already carrying on in Canada a business related to the one being acquired.

What is a "related business"?

The term is not defined in the Act, but the Minister has issued Guidelines Concerning Related Business setting out how relatedness may be determined. The Guidelines specify a number of alternative ways in which a new business may be considered to be related to an established business. These are:

— vertical integration (backward and forward integration) from an established business;
— the product or service of the new business is a substitute for the product or service of the established business;
— the product of the new business is produced by essentially the same technology and the same production processes as are used in the established business;
— the product, service, or new production process on which the new business is based is a result of research and development carried out in Canada by or on behalf of the established business;
— the industrial classification of the new business is the same as the industrial classification of the existing business (classifications are based on the Standard Industrial Classification Manual published by Statistics Canada).

Also, the Guidelines acknowledge that a new business may be related to an established business on the basis of some other principle.

Investors who are in doubt about the status of a business they propose to establish or acquire may apply to the Minister for an opinion on the matter. There is no form to be completed. All that is needed is a description, in writing, of the facts which are considered relevant.

Is the acquisition of the assets of a business considered to be a reviewable acquisition of control of that business?

The Act applies to the acquisition, by a non-eligible person, of control of a Canadian business enterprise that occurs either through the acquisition of voting shares or through the acquisition of all or substantially all of the property used in carrying on the business in Canada. In addition, the Act applies to the acquisition of part of a business that is capable of being carried on as a separate business.

Does the Act apply to the acquisition of less than 50% of the voting shares of a Canadian company?

In cases involving the acquisition of voting shares, the Act distinguishes between two kinds of transactions:

1. Those in which a person or group of persons acquires more than 50% of a corporation's voting shares. Such an acquisition is deemed to constitute the acquisition of control of any business carried on by the corporation unless the person or group acquiring the shares already had effective control of the business at the time the transaction occurred; and

2. Those in which a non-eligible person acquires less than 50% of the voting shares of a corporation. In those cases the principal consideration, in determining whether the transaction is a reviewable acquisition of control, is whether the investor is acquiring *de facto* control of the business concerned or is merely making a passive investment. The Act creates a presumption that control is being acquired if the acquisition involves (i) 5% or more of the voting rights in the case of a corporation whose shares are publicly traded, or (ii) 20% or more of the voting rights in the case of a corporation whose shares are not publicly traded. These presumptions are, however, rebuttable.

Does the takeover of the foreign parent of a Canadian company trigger the review process under the Act?

Yes, provided the Canadian company is a Canadian business enterprise, as defined. For the purposes of the Act it is assumed that the business of a controlled corporation (the subsidiary) in Canada is carried on by the controlling corporation (the parent) as well as by the controlled corporation. Accordingly, an acquisition of control of the parent is deemed to constitute control of the Canadian subsidiary. The transaction is therefore subject to review.

Is the purchase of land or other real estate by foreign investors subject to review under the Act?

The Act is concerned with the acquisition of control of businesses and the establishment of new businesses. Most real estate transactions do not involve the acquisition or establishment of a business and are therefore not subject to review under the Act. The Minister has issued guidelines concerning real estate transactions. Generally speaking, the Act is likely to apply only where a transaction involves substantial rental real estate properties and the activities of the investor in administering the property are significant and can be characterized as business activities. Foreign investors contemplating real estate investments may find it helpful to seek the advice of officials of the Agency concerning the status of the investment they propose to make.

What are the steps in the review process?

As soon as a notice outlining an investment proposal is received by the Foreign Investment Review Agency, it is scrutinized by the Compliance Branch to determine whether the proposal is reviewable and whether the notice is properly made out. If the proposal is deemed reviewable, it is passed on to the Assessment Branch for evaluation by reference to the benefit factors outlined in the Act. During this stage, information further to that contained in the notice is sought through contacts with the applicant and consultations with appropriate federal departments. The notice is also circulated to the province or provinces significantly affected by the proposal for their views and comment. On completion of the assessment, the Assessment Branch prepares a document which summarizes the facts of the case and contains an analysis of the benefits to Canada. This is the basic document considered by the Minister in arriving at his recommendation. On the basis of this recommendation and a summary of the case, the Governor in Council decides whether to allow or disallow the proposal.

Information Requirements

Every investment notice submitted to the Foreign Investment Review Agency must contain such information concerning the investment, as to enable the Government to assess whether the investment is likely to be of significant benefit to Canada. The kind of information required is prescribed in the "Regulations Respecting the Acquisition of Canadian Business Enterprises and the Establishment of New Business in Canada". While the amount of information that needs to be provided will vary widely depending on the size and nature of the investment and the circumstances of the investor, prompt provision of all relevant information will permit the Agency to complete the review process expeditiously.

Briefly, the notice should clearly identify the applicant and his affiliates, and where the applicant is a corporation, the persons who ultimately control the applicant and the manner in which such control is exercised. Information concerning the applicant should also include the nature and location of his business operations and such other information, including financial statements, that will permit an assessment of his ability to undertake the proposed investment. Where the investor proposes to establish a new business, the notice should describe fully the proposed business, the form of business organization, its location, the type, cost and source of plant and equipment to be used, the types of goods or services to be produced, the markets to be served, the source of materials and supplies and the investor's plans concerning the conduct and control of the business. Notices with respect to proposals to acquire control of an existing Canadian business should similarly describe fully the business to be acquired and the investor's plans concerning the operation of the business.

In the interest of speedy and efficient administration of the Foreign Investment Review Act, a much abbreviated form of notice has been adopted for small new business or acquisition proposals. Small business proposals cover investments with gross assets of less than $2 million and less than 100 employees. For most small business investments, the filing of the abbreviated form of notice will be sufficient to enable the Minister to make a recommendation to the Governor in Council, without delay, that the investment be allowed. However, the Minister reserves the right to require additional information in order to make a more complete assessment of the proposed investment if such review is deemed necessary.

As the purpose of the information is to permit the Agency to assess the proposed investment in terms of its likely benefit to Canada, particular attention should be given to the assessment criteria, referred to earlier, in the preparation of a notice to be submitted to the Agency.

Further information can be obtained from:

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or at the regional offices of the
Department of Industry, Trade and Commerce
listed below:

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