HG
5152
.A24962
c.1

IC

Industry, Trade and Commerce
Industrie et Commerce
JAN 18 1988
Bibliothèque
Library

interpretation
NOTES
explicatives

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Information circular concerning Agency opinions

General

As part of its policy of providing assistance and guidance to investors, it has been the Agency's practice to consider written requests for Agency opinions on the application to particular investments of the Foreign Investment Review Act (the Act) and the Regulations and Guidelines issued under it. Moreover, in the case of a corporate reorganization, the Minister has instructed the Agency to provide its view, in appropriate circumstances, as to whether a reorganization involving a Canadian business enterprise would constitute an acquisition of control that is subject to review under the Act.

The Minister has now authorized the Agency to formalize and publish, for the guidance of investors, the terms and conditions upon which it will continue to give opinions in response to requests made by or on behalf of a party to an investment (the "applicant"). Requests for opinions may be declined in certain circumstances, some of which are outlined below. All opinions given will be binding upon the Agency but not upon the Minister and will be subject to any limitations, qualifications and conditions that are contained in the opinion and in this Information Circular.

Applicants are encouraged to consult the Interpretation Notes issued by the Agency as well as the Guidelines issued pursuant to subsection 4(2) of the Act prior to making any request for an opinion. In some instances, applicants will find that their questions are answered by the explanations and examples contained therein.

Distinction between Agency opinions and Ministerial opinions

Under subsection 4(1) of the Act, the Minister may give an opinion, upon request, with respect to (i) whether a person is a "non-eligible person", or (ii) whether a particular business is or, if it were to be established, would be a business "unrelated" to any other business carried on by a person or group of persons. The Agency cannot give an opinion when the principal matter in question is one which is properly the subject of a Ministerial opinion. However, if the request only incidentally involves a question on which a Ministerial opinion may be requested, the Agency will consider the request for an opinion upon the main issue, but any opinion given by the Agency will neither bind the Minister nor will it constitute an opinion of the Minister under subsection 4(1) of the Act.

Coverage of Agency opinions

Agency opinions may be given on different types of issues. Some examples are:

- whether the acquisition of certain assets would constitute the acquisition of control of a Canadian business enterprise;
- whether the acquisition of a particular number of voting shares of a corporation would be subject to review;
- whether the proposed establishment of a new business by a limited partnership would be reviewable;
- whether the establishment of a representative office in Canada or the performance in Canada of a single or isolated contract would constitute the establishment of a new business.

Agency opinions will be given only with respect to transactions which have been consummated or which are seriously contemplated. Opinions cannot be given with respect to hypothetical situations.

The Agency will not consider a request which contains alternative courses of action or which asks for advice on how to structure a transaction so as to avoid reviewability.

Generally, the Agency will not give an opinion where the facts of the case and the applicable law, including any relevant Guidelines or Interpretation Notes, make it patently clear that a transaction is or is not reviewable, such that the Agency would, in effect, merely be certifying an opinion already reached by the applicant.

There may be occasions where the Agency cannot give an opinion because it is unable to conclude positively for or against reviewability. Additional circumstances where the Agency may decline to give an opinion are:

- where the main issue involves a matter which is before the courts or, if a judgment has been issued, the time for appeal has not yet expired;
- where the applicant is unwilling or unable to provide the Agency with all relevant facts, or to confirm that the Agency has been provided with all relevant facts.

Limitations on the effect of Agency opinions

An opinion will apply only to the specific investment described in the request for an opinion. Where the transaction in respect of which the opinion was given is not completed substantially in the manner specified in the request for the opinion or where there is a material change in the facts upon which the opinion is based, the Agency will not consider itself bound by the opinion. In such or similar circumstances, applicants should request a new opinion. For example, an investor who purchases certain assets of a business may receive an opinion of non-reviewability on the basis that these assets do not constitute all or substantially all of the assets of the business or all or substantially all the assets of a part of the business that is capable of being carried on as a separate business. Should the applicant subsequently acquire additional assets from the same business, or should the applicant's subsequent activities demonstrate that the assets can be used to carry on a separate business, the Agency may consider that it is no longer bound by the opinion.

An opinion is of no effect where the applicant fails to disclose or misrepresents information which is material to the opinion.

Where an opinion was issued in error, it may be revoked. A notice will be sent to the applicant and the opinion will cease to be binding on the Agency effective from the date of receipt of the notice.

Where there is any change in the law upon which an opinion was based, the opinion automatically ceases to have application from the effective date of the change in the law.

Procedure for requesting Agency opinions

A request for an opinion should be submitted in writing to:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

The request must contain a clear statement of the issues on which the opinion is requested and a clear, complete and detailed statement of all relevant facts pertaining to the proposed or actual investment. All persons connected with the investment must be clearly identified and a copy of each relevant document should be included.

Applicants are invited to consult Agency officials when preparing their requests for an opinion. Applicants may also wish to discuss their proposals after submission of their written request and, if they see fit, submit further information in the light of these consultations.

Special information required in the case of statutory presumptions

Where the Act contains presumptions, there is a greater onus on the applicant to provide sufficient facts to establish that the presumptions are rebutted. For example, the Act presumes that the acquisition of 5 percent of the voting shares of a publicly traded corporation constitutes the acquisition of control of the business carried on by that corporation, unless the contrary is established. The applicant must demonstrate conclusively that control of that corporation will not change as a result of the acquisition of the voting shares.

Reconsideration

Generally, the Agency will not reconsider an opinion unless there is new information or the applicant can show that there was a misunderstanding of information previously submitted.

Timing

Requests for Agency opinions will be generally dealt with in the order received and every effort will be made to deal with them as expeditiously as possible.

Charges

The Agency will initially provide opinions free of charge, but reserves the right to modify this practice at any time.

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Interpretation Note No. 1

The Foreign Investment Review Agency has prepared interpretation notes in order to assist the foreign investor to determine whether or not a proposed or actual investment is subject to review under the Foreign Investment Review Act. They outline the Agency's interpretation of certain provisions and expressions in the Act relating to reviewability, and reflect the judicial interpretation of words and phrases found in similar statutes considered to be relevant. It is, of course, recognized that the judiciary has the ultimate responsibility for interpreting statutes. These notes, therefore, are presented only to inform foreign investors of the interpretation placed on these provisions and expressions and should not be considered as a legal opinion. Consequently, they are not legally binding on the Minister or the Government. In addition, the Agency believes that the application of any provision of the Act is subject to the facts of each case and, therefore, each case will be judged in light of its own particular facts.

Acquisition of businesses which have ceased normal business operations

Defunct businesses

The concept of a Canadian business enterprise in the Foreign Investment Review Act (the Act), is one which implies the existence (at the time of the acquisition or the proposal to acquire) of economic activity carried on by the enterprise in anticipation of profit. A business which is defunct is not being carried on in anticipation of profit and is not, therefore, a Canadian business enterprise. Accordingly, its acquisition by a non-eligible person is not considered by the Agency to be reviewable under the Act. Whether or not a business is defunct or has merely closed temporarily is a question of fact to be determined by the circumstances of each case.

Liquidation sale

A business is not considered defunct by reason only of its having been placed in the hands of a trustee in bankruptcy pursuant to the provisions of the Bankruptcy Act (Canada). On the other hand, a business whose assets are sold by a trustee in bankruptcy for the sole purpose of liquidating the business is considered to be a defunct business, even though the trustee (or liquidator) may have carried on the business for a period of time after taking possession of the assets. Consequently, the acquisition of those assets by a non-eligible person is not considered reviewable under the Act since it is not the acquisition of a Canadian business enterprise.

Receivership

A business in receivership for any reason (for example a default under a Trust Deed) is not considered defunct by reason only of the fact that it is in receivership. Where it is being carried on by the receiver with a view to disposing of it as a going concern, or to reorganizing its affairs, it is viewed as a Canadian business enterprise. However, a business which is in receivership, in circumstances where the business is incapable of being continued due to the debtor's severe financial position, or where the future prospects of the business do not warrant an attempt to continue it in operation, is ordinarily considered defunct, if the business is being wound up by the receiver with a view to its liquidation on a piecemeal basis.

Other permanent closures

Defunct businesses also include businesses which have permanently ceased operations for reasons other than bankruptcy or being placed in receivership, provided the closure did not occur for any purpose related to the Act. Businesses which have permanently closed due to their unprofitability or have been permanently abandoned due to the depletion of their reserves, or have been discontinued because of obsolete plant, machinery, equipment, technological processes or product lines, or because of the lack of markets or inadequate financing, or any combination thereof, are considered to fall within this class.

Temporary closures

A business which, at the time of acquisition or when a proposal to acquire it is made, has only temporarily ceased or suspended operations is not a defunct business and is considered by the Agency to constitute a Canadian business enterprise. Some examples of temporary closures are businesses suspended or closed temporarily by reason of a labour dispute, shortages of raw materials, the price at which their principal products can be marketed, periodic fluctuations in the business cycle or temporary financial difficulties.

Establishment of a new business

The acquisition by a non-eligible person of assets of a defunct business is not considered to be reviewable under the Act. However if the non-eligible person proposes to use the acquired assets as the basis for establishing a new business in Canada, the establishment of that new business is subject to review under subsection 8(2) of the Act unless the new business would be related to a business already being carried on by the non-eligible person in Canada.

Readers are encouraged to consult the Foreign Investment Review Agency for further details and advice on the application of the Act to their particular investment plans by contacting:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Interpretation Note No. 2

The Foreign Investment Review Agency has prepared interpretation notes in order to assist the foreign investor to determine whether or not a proposed or actual investment is subject to review under the Foreign Investment Review Act. They outline the Agency's interpretation of certain provisions and expressions in the Act relating to reviewability, and reflect the judicial interpretation of words and phrases found in similar statutes considered to be relevant. It is, of course, recognized that the judiciary has the ultimate responsibility for interpreting statutes. These notes, therefore, are presented only to inform foreign investors of the interpretation placed on these provisions and expressions and should not be considered as a legal opinion. Consequently, they are not legally binding on the Minister or the Government. In addition, the Agency believes that the application of any provision of the Act is subject to the facts of each case and, therefore, each case will be judged in light of its own particular facts.

Performance in Canada of single or isolated contract projects by foreign-based businesses

General

This note describes the principal criteria which the Agency has adopted and followed with respect to the application of the Foreign Investment Review Act to the performance in Canada of single or isolated contract projects by foreign-based businesses. They deal with the circumstances in which the notice requirements of section 8 of the Act, relating to the establishment of new businesses in Canada by non-eligible persons, or groups of persons, any member of which is a non-eligible person, are considered to apply in the case of single or isolated contract projects.

Concept of "business"

The term "business" is defined in the Act to include "any undertaking or enterprise *carried on* in anticipation of profit". The definitions of "Canadian business" and "Canadian branch business" both refer to, *inter alia*, a business *carried on* in Canada. The concept of "business" therefore ordinarily comtemplates a continuity of business activity. Consequently, it is the Agency's position that the performance in Canada of a single or isolated short-term contract project by employees of a foreign-based business controlled by a non-eligible person does not, as a general rule, constitute the establishment of a new business in Canada by the non-eligible person.

Time Limit

A short-term contract project is ordinarily considered by the Agency to be a project which will be completed within a period of twelve months from the date of its commencement. If, therefore, the time required to perform the contract is expected to exceed twelve months, the Agency considers that the performance of that contract will constitute the establishment of a new business. On the other hand, even though the contract is expected to be completed in less than twelve months, if there is an intention on the part of the non-eligible person to seek supplementary work or additional contracts in Canada, the performance of the first contract, coupled with that intention, takes it out of the general rule set out in the preceding paragraph. The performance of the first contract in such circumstances is not an isolated transaction, and has normally been considered to constitute the establishment of a new business.

Additional contracts

If, at the time the first short-term contract to perform work in Canada was obtained, there was no intention to seek additional contracts, but during or following the performance of that contract the non-eligible person's intention changed and supplementary work or additional contracts were sought or obtained, the non-eligible person would be considered at that later time to be establishing a new business. The performance of the first short-term contract itself would not, in such circumstances, be considered to have been a reviewable transaction, however the non-eligible person would be expected to comply with the requirements of the Act before seeking additional

work or further contracts. Where, based on the foregoing, it is considered that a business is, or will be, established, the business is established, for the purpose of the Act, at the place where the employees report for work to perform the services which are the subject matter of the contract. Such place may include: an office; a factory; a workshop; a mine, quarry, well-head, or other place of extraction of natural resources; a building site, construction or assembly project, or place of prospecting for natural resources.

Example

An example of the application of the Notes is the case of a foreign-based engineering firm which obtains a contract to design and supervise the construction of a plant or other facility in Canada. If the contract will take two years to complete, the Agency would consider the firm to be establishing a new business in Canada, and the place where the business is or will be established would be the construction site, office or other place where employees of the non-eligible person first report to work to perform the services which are the subject matter of the contract.

Readers are encouraged to consult the Foreign Investment Review Agency for further details and advice on the application of the Act to their particular investment plans by contacting:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

Interpretation Note No. 3

The Foreign Investment Review Agency has prepared interpretation notes in order to assist the foreign investor to determine whether or not a proposed or actual investment is subject to review under the Foreign Investment Review Act. They outline the Agency's interpretation of certain provisions and expressions in the Act relating to reviewability, and reflect the judicial interpretation of words and phrases found in similar statutes considered to be relevant. It is, of course, recognized that the judiciary has the ultimate responsibility for interpreting statutes. These notes, therefore, are presented only to inform foreign investors of the interpretation placed on these provisions and expressions and should not be considered as a legal opinion. Consequently, they are not legally binding on the Minister or the Government. In addition, the Agency believes that the application of any provision of the Act is subject to the facts of each case and, therefore, each case will be judged in light of its own particular facts.

Limited partnerships

Canadian partnership law and reviewability

Under partnership law in Canada governing limited partnerships, the general partners manage the partnership and have unlimited liability. The limited partners generally do not participate in the control and management of the partnership; otherwise they run the risk of thereby losing their limited liability status. It has been suggested that limited partnerships are, by their very nature, business organizations which vest *control* in the general partners and that, consequently, "investments" made by limited partnerships are not reviewable if all of the general partners are not non-eligible persons .

Identification of applicants

The proposition that limited partners never exercise, or are never in a position to exercise, control (within the meaning of the Act) over the partnership is not universally true. There may be circumstances in which a limited partner does not or will not lose his limited liability status under partnership law, but is nevertheless exercising or has the power to exercise such a degree of control within the partnership that he should be considered a member of the group of persons who control the partnership, for the purposes of the Act. Accordingly, when a limited partnership makes an "investment", it must be determined who in fact controls, or is in a position to control, the limited partnership and therefore constitutes the person or group of persons making the "investment".

Relevant factors in determining participation in control by limited partners

The following considerations may be relevant in a particular case in determining whether one or more limited partners are participants in the control of a business carried on by a limited partnership:

(a) Where the limited partnership agreement grants to any limited partner the right to vote upon any matter and thereby, to approve, prevent, or compel any action respecting the limited partnership, other than the right to vote on matters specified in the paragraphs dealing with "restrictions on and control by general partners" and the "limited right to remove general partners" below, the limited partner may be considered as a member of the group of persons making the "investment" within the meaning of section 8 of the Act.

Examples of voting rights

The following are some examples of voting rights sometimes held by limited partners which, if exercised or capable of being exercised, may make limited partners members of the group of persons making the "investment" within the meaning of the Act:

(i) except as provided in the paragraph on the "limited right to remove general partners" below, the right to remove the general partners;

(ii) the right to approve borrowings by the limited partnership in the ordinary course of business;

(iii) the right to initiate any matter and to decide the question either entirely within the group of limited partners, or within the group of limited partners and general partners together, which decisions are binding upon the limited partnership;

(iv) the right to approve the sale, exchange, lease, pledge or other transfer of any assets of the limited partnership in the ordinary course of business; or

(v) the right to approve contracts, expenditures, or other partnership matters which do not relate to fundamental or structural changes in the partnership business;

Number of limited partners

(b) The number of limited partners may be a relevant factor in determining whether a limited partner is considered a member of the group. While some partnership statutes permit the limited partners to "advise" the general partners as to the management of the partnership, where the number of limited partners is small, or where the size of a limited partner's interest is large, the weight which attaches to the "advice" of a limited partner carries may be substantial. Because control is a factual determination, this relationship may, as a practical matter, give any "advice" the colour of a command to the general partners;

Nature of interests of limited partners

(c) Where the interests of the limited partners are widely held and where no single limited partner or group of limited partners holds a substantial participating interest in the partnership, it may be appropriate to view the limited partners and the general partners as analogous to the shareholders and the Board of Directors, respectively, of a widely-held corporation, for the purposes of determining the locus of control. Thus, in the absence of any voting powers other than those referred to in the paragraph dealing with "Examples of voting rights", control of the limited partnership will ordinarily be presumed to be with the general partners;

"Advisory boards" and control

(d) In some cases where there are a large number of limited partners, however, the limited partnership agreement may provide for the creation of an "advisory board" or some other similar body, elected by the limited partners, which is to "supervise" the activities of the general partners and has, under the terms of the agreement, power to approve, restrict, prevent, or compel certain decisions of the general partners relating to the partnership business. Where such a board is created, its members may be considered members of the control group depending upon the scope of the powers given to the board.

Certain rights of limited partners and control by general partners

There are certain rights which may be granted to the limited partners and which are ordinarily considered to be not incompatible with control by the general partners for the purposes of the Act. These are:

(a) the right to examine into the state and progress of the partnership business and to inspect the partnership books;

(b) the right to demand a formal accounting of partnership affairs whenever circumstances render it just and reasonable to do so;

(c) the right to ask for dissolution of the partnership by judicial decree;

(d) the right to receive a share in the profits of the partnership or other income; and

(e) the right to assign his interest.

Restrictions on and control by general partners

In addition, there are certain *restrictions* which may be imposed upon the general partners which are ordinarily considered to be not incompatible with control by the general partners for the purposes of the Act. These are:

(a) the general partners cannot amend the limited partnership agreement without the consent of the limited partners;

(b) the general partners cannot do any act in breach of the agreement or any act which would make it impossible to carry on the ordinary business of the partnership;

(c) the general partners cannot admit a new limited partner without the consent of the limited partners, unless permitted in the agreement;

(d) the general partners cannot possess, use or deal with or assign partnership property for non-partnership purposes;

(e) the general partners cannot sell or dispose of all or substantially all of the assets of the partnership without the consent of the limited partners.

Right to remove general partners

The right to remove the general partners without cause may provide an effective means of influencing the partnership business. Where the number of limited partners is small, or where a limited partner has so substantial an interest in the limited partnership that he is in a position to remove the general partners, the position of such limited partners may be viewed as somewhat analogous to that of shareholders of a corporation who have the power to elect the Board of Directors. Thus, the possession of such a right in the hands of a small number of limited partners is clearly a factor in determining whether or not those limited partners are members of the relevant control group.

Limited right to remove general partners

However, where the right to remove the general partners is a limited one, exercisable only in circumstances such as those set out below, a control problem is not raised by reason only of the existence of such a right. Some of the circumstances referred to above are:

(a) the bankruptcy, insolvency, dissolution or winding up of a general partner;

(b) the appointment of a trustee or receiver of the affairs of a general partner;

(c) the doing of any act by a general partner which would make it impossible to carry on the business of the partnership.

The list is not exhaustive, and contingencies of a similar extraordinary nature may be considered as circumstances which would not give rise to control problems in this context.

Non-reviewable investments by limited partnerships

Where it can be shown that all of the partners who control or are in a position to control (the control group) the limited partnership are not non-eligible persons, the acquisition of control of a Canadian business enterprise or the establishment of a new business by the limited partnership is not subject to review, even though there are non-eligible person members of the limited partnership who are not members of the control group. In addition, where those members of the relevant control group who are non-eligible persons have a related business base, the establishment of a new related business by the limited partnership is not subject to review, even though there are other limited partners who are non-eligible persons. Similarly, where a limited partnership of the type described in the preceding paragraph acquires control of a related Canadian business enterprise, the gross assets of which do not exceed $250,000, and the gross revenues of which do not exceed $3,000,000 (determined in accordance with the Act and the Foreign Investment Review Regulations), the acquisition is not subject to review.

Reviewable investments

In all other cases, if a non-eligible person is a member of the control group, the acquisition or establishment is reviewable whether the non-eligible person is a general or a limited partner.

Readers are encouraged to consult the Foreign Investment Review Agency for further details and advice on the application of the Act to their particular investment plans by contacting:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Interpretation Note No. 4

The Foreign Investment Review Agency has prepared interpretation notes in order to assist the foreign investor to determine whether or not a proposed or actual investment is subject to review under the Foreign Investment Review Act. They outline the Agency's interpretation of certain provisions and expressions in the Act relating to reviewability, and reflect the judicial interpretation of words and phrases found in similar statutes considered to be relevant. It is, of course, recognized that the judiciary has the ultimate responsibility for interpreting statutes. These notes, therefore, are presented only to inform foreign investors of the interpretation placed on these provisions and expressions and should not be considered as a legal opinion. Consequently, they are not legally binding on the Minister or the Government. In addition, the Agency believes that the application of any provision of the Act is subject to the facts of each case and, therefore, each case will be judged in light of its own particular facts.

Contractual rights to acquire or to control voting shares of a corporation or to acquire property used in carrying on a business (paragraphs 3(6)(c) and (d) of the Act)

Specific matters covered

This Note applies to the ownership and acquisition of three types of rights: to acquire voting shares of a corporation; or to control the voting rights of shares of a corporation; or to acquire property used in carrying on a business.

Deemed ownership

Paragraph 3(6)(c) of the Act deals with the situation where a non-eligible person has a right, under a contract, either to acquire shares or to control the votes of shares of a corporation, or to acquire property used in carrying on a business. It provides, subject to the two exceptions referred to below, that a non-eligible person who has any such right is deemed to be in the same position in relation to control of the corporation or business as if he actually owned the shares or the property, as the case may be. For example, if a non-eligible person has an option to purchase 40 percent of the voting shares of a corporation then, even though he has not exercised that option, he is, by virtue of paragraph 3(6)(c), deemed to be in the same position as if he actually owned 40 percent of the voting shares of that corporation.

Exceptions

There are two exceptions to this rule. The rule does not apply to (1) any contract, made after the coming into force of the Act (9 April 1974), which specifically provides that the non-eligible person cannot exercise the right until a named individual dies; or (2) where the right under the contract is contingent upon Governor in Council allowance.

Deemed acquisition

Paragraph 3(6)(d) of the Act provides, subject to the exception referred to in the paragraph "exemption for lenders" below, that if a person *acquires* such a right after the coming into force of the Act, he is *deemed* to have made an acquisition of the shares or property to which the right relates, even though he has not in fact exercised that right, and may never exercise it. Thus, if a non-eligible person enters into a contract which gives him the right to acquire voting shares of a corporation or to control the voting rights of shares of a corporation or to acquire property used in carrying on a business, he will be deemed to have made, at that time, an acquisition of those shares or that property. Where the shares which the non-eligible person is deemed to have acquired would, if they were actually acquired, be sufficient to give him control of the corporation, or where the property he is deemed to have acquired constitutes all or substantially all of the property used in carrying on the business, a reviewable acquisition of control of the corporation or business will have occurred. Since the acquisition of the right will ordinarily be reviewable at the time it is acquired, the subsequent *exercise* of that right will not be reviewable.

Exemption for lenders

There is in paragraph 3(6)(d) of the Act, a specific exemption from its deeming consequences where rights to voting shares or to property are acquired *as security for loans*. There is no reviewable transaction where a non-eligible person makes a loan to a corporation or other person carrying on a business and obtains a right described in paragraph 3(6)(c) as security for his loan. The exemption also applies where the non-eligible person acquires the right from another lender (e.g. takes an assignment of a mortgage or other security). In addition, the acquisition of the shares or property in realization of such security is specifically exempted. Thus, where a borrower defaults on a loan and the non-eligible person lender realizes on his security and acquires control of the business in order to protect his interest, the transaction is not reviewable.

Three notable aspects of exemption

First, the loan must be a bona fide one. It must not be made for a purpose related to the Act, i.e. made with the intention of acquiring control of the borrower's business. If, for example, when the loan was granted, the borrower intended to default so as to permit the lender to realize on his security and to acquire control of the business, this would be a loan given for a purpose related to the Act and the exemption would not apply. Second, the word "loan" has been given a strict or literal interpretation by the Agency. The word implies "money borrowed with a promise to repay". All debtor-creditor relationships are, therefore, not automatically covered by this exemption. For example, the acquisition of a paragraph 3(6)(c) right to secure outstanding trade debts is not considered to be exempt from review. Third, generally speaking, the security must be given by the person to whom the loan is advanced. Therefore, this exemption does not apply where a lender who is a non-eligible person advances the loan to a person other than the person who gives the security except in the case of a loan to a subsidiary based upon the guarantee of its parent secured by a charge on the shares or assets of the parent. In these circumstances paragraph 3(6)(h) of the Act would apply and the Agency regards the guarantor parent as if it were the borrower.

Various kinds of rights under paragraph 3(6)(c)

The very broad language of paragraph 3(6)(c) brings many kinds of rights within its scope. Although the right must be a right under contract, it can be any kind of contract, written or oral, express or implied, in equity or otherwise. Furthermore, the right can be immediately exercisable or exercisable at some time in the future and it can be either an absolute right or a contingent one. These rights include:

(a) the acquisition of an *option* to acquire the voting shares of a corporation or property used in carrying on a business;

(b) the acquisition of a *right of first refusal* with respect to the voting shares of a corporation or property used in carrying on a business;

(c) the acquisition of *convertible debt securities* such as bonds or debentures which give the holder a right to convert or exchange them into or for voting shares of the corporation;

(d) the acquisition of *convertible non-voting preference shares* which give the holder a right to convert or exchange them into or for voting shares of the corporation. However, non-voting preferred shares often contain a provision whereby, should there be a failure to declare and pay cumulative quarterly dividends for a specified number of consecutive quarterly payments, the preferred shareholders thereupon have the right to vote for and elect a specified number of directors. This kind of right is not considered to fall within the scope of paragraph 3(6)(c) and, accordingly, does not ordinarily give rise to deemed ownership or deemed acquisition consequences;

(e) the acquisition of shares of a corporation by way of *pledge* to secure a debt arising other than by reason of a loan;

(f) the acquisition of a right to acquire all or substantially all of the property used in carrying on a business by way of a *fixed or floating charge* taken as security for a debt arising other than by reason of a loan; or

(g) the acquisition of a right *to direct the voting of shares held by another person.* An example of this might be the right to direct the voting of shares held by a trustee pursuant to the terms of a trust agreement.

Effect on the eligibility status of a corporation

A corporation does not become a non-eligible person merely because a non-eligible person has acquired a right to acquire control of the corporation. The status of a corporation is determined by reference to the status of the person or group of persons who *in fact* control it at the relevant point in time. If and when the right is actually exercised by the non-eligible person and if he thereby acquires control, the corporation *then* becomes a *non-eligible person.* A situation could arise where there is a *deemed* acquisition of control of a corporation by a non-eligible person which would be subject to review, yet at the same time the corporation could be considered not non-eligible when its eligibility status is considered, if it is controlled in fact by "eligible" persons. An example of this is the case of a corporation in which there are two shareholders, one of whom is a non-eligible person holding 40 percent of the issued voting shares. If the non-eligible person acquires an option to purchase the other shareholder's shares, then the acquisition of the option is a deemed acquisition of control of the corporation by the non-eligible person; but until such time as he actually exercises the option, the corporation itself will not be considered non-eligible so long as it is in fact controlled by the other shareholder. Thus a Ministerial eligibility opinion under subsection 4(1) of the Act is based on actual control or control in fact at the time the application for an opinion is made. A corporation is not non-eligible by reason only of a "deemed acquisition of control" under paragraph 3(6)(d).

Existence of a business at the time the right is acquired

The deeming effects of paragraphs 3(6)(c) and (d) arise only when there is in existence, at the time a right is acquired, a business to which it can apply. Paragraph 3(6)(c) has no application if, at the time a right described in that paragraph is acquired, no business is being carried on. If a non-eligible person enters into a contract with another person, prior to the establishment of a new business by them, and the contract provides that the non-eligible person has a right to acquire the shares of a corporation which is to carry on the business, or to acquire any property to be used in carrying on the business, no deemed acquisition of the business takes place at the time the contract is made because there is no business which can be acquired *at that time.* In such circumstances, a reviewable transaction will ordinarily occur only when the right to acquire the business is in fact exercised. Of course, it may be that the proposal to *establish* the business is reviewable if the non-eligible person is not already carrying on in Canada a related business. The reviewability of the proposed establishment is a separate question altogether.

Exercise of right acquired prior to April 9, 1974

Since the Act is *not* retroactive, where a non-eligible person had a right to acquire control of a Canadian business enterprise prior to April 9, 1974, the subsequent exercise of that right is not reviewable. The non-eligible person is deemed to have controlled the business when the Act came into force on April 9, 1974.

Readers are encouraged to consult the Foreign Investment Review Agency for further details and advice on the application of the Act to their particular investment plans by contacting:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Interpretation Note No. 5

The Foreign Investment Review Agency has prepared interpretation notes in order to assist the foreign investor to determine whether or not a proposed or actual investment is subject to review under the Foreign Investment Review Act. They outline the Agency's interpretation of certain provisions and expressions in the Act relating to reviewability, and reflect the judicial interpretation of words and phrases found in similar statutes considered to be relevant. It is, of course, recognized that the judiciary has the ultimate responsibility for interpreting statutes. These notes, therefore, are presented only to inform foreign investors of the interpretation placed on these provisions and expressions and should not be considered as a legal opinion. Consequently, they are not legally binding on the Minister or the Government. In addition, the Agency believes that the application of any provision of the Act is subject to the facts of each case and, therefore, each case will be judged in light of its own particular facts.

Meaning of "a part of a business capable of being carried on as a separate business" (paragraph 3(6)(g))

Definition of "Canadian business enterprise"

By virtue of paragraph 3(6)(g) of the Act, the definition of a Canadian business enterprise includes "a part of a business that is capable of being carried on as a separate business". Whether or not the acquisition of certain assets of a business constitutes an acquisition of a part of a business that is capable of being carried on as a separate business is a question of fact to be determined in the particular circumstances of each case. Consequently, the formulation of comprehensive rules, for determining when a part of a business is considered to be capable of being carried on as a separate business, is not possible.

Application of Note No. 5

Note No. 5 is, therefore, intended merely to identify factors which may indicate, either on their own or in conjunction with other factors whether property acquired by a non-eligible person relates to a part of a business that is capable of being carried on as a separate business. However, they do not, apply to the acquisition of natural resource properties, for the purposes of exploration for, or production of, oil and gas or minerals. The resource industry has several important characteristics which distinguish it from manufacturing and service sector businesses, particularly the manner in which property interests in resource industry businesses are held, acquired and disposed of, and the manner in which operations are conducted on resource properties.

Concept of "separate business"

The question as to whether, prior to the acquisition, there was a separate or separable business will normally depend upon the degree of actual and necessary interconnection, interlacing or interdependence between the part being acquired and the other business operations of the seller. There must be a capability for the part being acquired to be carried on as a separate business operation.

Certain relevant factors to be considered

In determining the degree of necessary interconnection, interlacing or interdependence between business operations, factors considered relevant may include, but are not restricted to, the following:

(a) Do separate accounting records exist for the part being acquired or are the transactions relating to the part being acquired recorded together with the other operations of the transferor as if they were all part of one business? If separate complete sets of records are maintained, the merging of the results in one statement for tax or other reporting purposes may be a factor of lesser importance;

(b) Do the operations relating to the part being acquired and the other operations of the transferor have common management, advertising, selling, purchasing, delivery, customers, etc.;

(c) Is there any goodwill attached to the part being acquired? Is there a valuable trademark or tradename being acquired? Have the transferor and the transferee entered into a non-competition agreement with regard to the part being acquired;

(d) Are the operations relating to the part being acquired carried on at separate premises? Are the physical assets or properties involved in the acquisition segregated from the other operations of the transferor;

(e) Is there a separate or identifiable group of employees who are employed in connection with the part being acquired;

(f) Does the part being acquired involve an operation with processes and products or activities sufficiently different in nature from the other operations or activities of the transferor that its sale would give rise to a qualitative contraction in the scope of the transferor's total operations;

(g) Does the part being acquired exist primarily to supply or provide some service which is purely incidental or ancillary to the main business operations of the transferor? If so, it should probably not be regarded as a separate or separable business, but rather as merely an incidental or ancillary part of the main business.

Example for paragraph (g)

An example of the situation contemplated in paragraph (g) might be a manufacturing operation which has an ancillary data processing department. The two operations would ordinarily be regarded as one business; therefore the acquisition of the part consisting of the data processing operation would not ordinarily be considered to constitute the acquisition of a separate or separable business.

Where an acquisition of property relates to a part of a business capable of being carried on as a separate business, the test of whether all or substantially all of the property used in carrying on that business, as outlined in the Notes dealing with this subject, must then be applied to determine whether the transaction is subject to review.

Readers are encouraged to consult the Foreign Investment Review Agency for further details and advice on the application of the Act to their particular investment plans by contacting:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

Government of Canada
Foreign Investment Review Agency

Gouvernement du Canada
Agence d'examen de l'investissement étranger

Interpretation Note No. 6

The Foreign Investment Review Agency has prepared interpretation notes in order to assist the foreign investor to determine whether or not a proposed or actual investment is subject to review under the Foreign Investment Review Act. They outline the Agency's interpretation of certain provisions and expressions in the Act relating to reviewability, and reflect the judicial interpretation of words and phrases found in similar statutes considered to be relevant. It is, of course, recognized that the judiciary has the ultimate responsibility for interpreting statutes. These notes, therefore, are presented only to inform foreign investors of the interpretation placed on these provisions and expressions and should not be considered as a legal opinion. Consequently, they are not legally binding on the Minister or the Government. In addition, the Agency believes that the application of any provision of the Act is subject to the facts of each case and, therefore, each case will be judged in light of its own particular facts.

Meaning of "substantially all of the property used in carrying on the business" (subsection 3(3))

Acquisition of control

The Foreign Investment Review Act provides that control of a Canadian business enterprise may only be acquired by the acquisition of shares or by the acquisition of "all or substantially all of the property used in carrying on the business" in Canada. This note is intended to outline the position which the Agency has taken with respect to the question of what constitutes "substantially all" of the property used in carrying on a business, for the purpose of the Act.

Qualitative considerations of "substantially all" of the property

The measurement of "substantially all" of the property used in carrying on a business is not a purely quantitative one. It is not based solely on the proportion between the value of the property to be conveyed and the value of the property to be retained. Rather, it also has a qualitative aspect, i.e. it takes into account the nature as well as the size of the assets to be conveyed and of those to be retained.

"Substantially all" defined

The question of what constitutes "substantially all" will, therefore, depend upon the facts and circumstances of each case rather than upon any particular quantitative rule. Where, as a result of a transaction, a non-eligible person, or group of persons any member of which is a non-eligible person, acquires all of the property *essential* to the conduct of the transferor's business enterprise, the test of "substantially all" may be met. When a non-eligible person acquires substantially all of the operating properties or assets actually used in carrying on a Canadian business enterprise, even though he does not acquire substantially all of the *total* property or assets belonging to the enterprise, the test of "substantially all" may be satisfied.

Example

If a non-eligible person acquired the operating properties or assets essential to the continuance of a Canadian business enterprise then, even if these assets amounted to less than 50 percent of the *total* properties or assets of that business (the transferor retaining its liquid assets such as cash, promissory notes, investment portfolio, etc.) the test of "substantially all" of the property used in carrying on the transferor's business would nevertheless have been met.

Readers are encouraged to consult the Foreign Investment Review Agency for further details and advice on the application of the Act to their particular investment plans by contacting:

Director, Rulings
Compliance Branch
Foreign Investment Review Agency
P.O. Box 2800, Postal Station "D"
Ottawa, Ontario
K1P 6A5

HG
5152
.A24962
Author/*Auteur*

c.1
Title/*Titre*

Date

Cau

0133-34.3 (10/70) 75:

INDUSTRY CANADA/INDUSTRIE CANADA
52939

Canada