REGULATORY AND TRADE DEVELOPMENTS

THE *INVESTMENT CANADA ACT*: A PRIMER AND RECOMMENDATION FOR IMPROVED CLARITY, CONSISTENCY AND TRANSPARENCY

By: Jason L. Gudofsky and Patrick Gay[1]
Stikeman Elliott

I. Introduction

The *Investment Canada Act*[2] (the "ICA") was enacted in 1985 to replace the *Foreign Investment Review Act*[3] (the "FIRA"). The FIRA was enacted by the Trudeau regime as a tool that limited foreign direct investment in Canada or otherwise forced behavioural constraints on foreign investors in Canada.[4] In 1984, the Honourable Prime Minister Brian Mulroney was elected under a platform that promised to make Canada "open for business".[5] Following through on that pledge, the Mulroney regime repealed the FIRA and replaced it with the ICA. Around the same time, Canada negotiated a free trade agreement with its southern neighbour, which culminated in the implementation of the *Canada-United States Free Trade Agreement* (the "FTA") in 1988. The ICA and FTA marked, in the authors' view, a paradigm shift in Canada's policy towards foreign direct investment and trade.

That the ICA is designed to promote (or at least not hinder) investment is confirmed by its purpose clause. Specifically, section 2 of the ICA provides, in part, that: "[R]ecognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities...". At the same time, section 2 provides that the ICA is designed to provide a mechanism for the review of "significant investments" by non-Canadians to ensure that such investments are of "benefit to Canada". The dual objective of the ICA, therefore, is to continue to promote foreign direct investment in Canada while, through a review process, ensuring that significant investments benefit Canada.

While the enactment of the ICA was certainly a positive step towards promoting foreign direct investment in Canada, the ICA suffers – in certain parts – from relatively poor drafting. There are numerous provisions that are excessively vague or require a "common sense" approach as the only means by which to give a particular provision practical application. Also, as discussed below, as at the date that this article was written, there is a lack of clarity in the administration of the ICA with respect to those businesses that are engaged in an activity that is prescribed by paragraph 15(a) of the ICA, and as set out in the *Investment Canada Regulations*[6] (the "IC Regulations"), as relating to Canada's cultural heritage or national identity ("Section 15 Cultural Businesses"). In particular, such activities are prescribed as follows:[7]

1. Publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form.

2. Production, distribution, sale or exhibition of film or video products.

3. Production, distribution, sale or exhibition of audio or video music recordings.

4. Publication, distribution or sale of music in print or machine readable form.

Over the past few years, the governmental departments responsible for administering the ICA have undergone significant changes. To begin, responsibility for the review of Section 15 Cultural Businesses has been transferred from the Industry Review Division of Industry Canada ("IRD") to a new division of Canadian Heritage – Cultural Sector Investment Review ("CSIR"). For the first time, the Minister of Canadian Heritage along with the CSIR officials have primary responsibility for the review of certain classes of investments.[8] Second, there has been significant turnover among the reviewing officers at IRD. Many of the present reviewing officers are relatively new to IRD, with many having left the department over the past few years. Third, the former Director of Investments and the Executive Director of Investment Canada Act, Mr. Peter Caskey, has been replaced by Ms. Suzanne McKellips. Mr. Andrei Sulzenko remains as the Director of Investment Canada Act. Finally, the Honourable Allan Rock recently replaced the Honourable Brian Tobin as the Minister of Industry – the Minister responsible for administering the ICA.

The time is ripe for the new administrations to place their footprint on the ICA. As noted, a number of the ICA's provisions remain vague and there is some uncertainty over administrative policy. Pursuant to section 38 of the ICA, the (responsible) Minister can issue guidelines and interpretation notes with respect to the application and administration of the ICA. Indeed, the Minister of Industry has taken this step with respect to certain matters that IRD thought were in need of clarification (e.g. in determining whether a business that has ceased normal operations constitutes a "business" within the meaning of the ICA). The time is now to reinvigorate that process. Further, to encourage a comprehensive approach, IRD and CSIR should solicit the views of practitioners and industry representatives who, through practical experience, can contribute in a positive way to that process. Of course, any such interpretation guidelines must be consistent with the overall purpose of the ICA, as stated at section 2, namely to promote investments in Canada and to only review significant investments. The overarching principle that should guide this initiative must be to increase the clarity, consistency and transparency of the substantive provisions of the ICA, as well as its administration.

The body of this paper is divided into three primary sections. In the first two sections that follow immediately below, we provide a general overview of – or primer on – the ICA. In our view, this is necessary since there is a general paucity of articles or other writings that provide a general overview of the ICA, particularly over the past decade. Following these two sections, in section IV, we set out an illustrative list of those matters under the ICA that could benefit from the publication of Ministerial interpretation guidelines. This discussion is divided into issues pertaining to administrative policy and to substantive provisions of the ICA. Our list of suggested interpretation guidelines is not exhaustive. Rather, it is intended to spark a debate and, hopefully, support among

practioners and regulators alike regarding the need for interpretation guidelines. In the final section we offer concluding remarks.

II. Overview of the *Investment Canada Act*

Every proposed acquisition by a non-Canadian person (described below) of control of a Canadian business, even where such business is already controlled by a non-Canadian, is subject to the ICA and triggers one of two statutory obligations: (a) an application for review; or (b) a notification. The establishment of a new Canadian business, on the other hand, only requires a notification.[9]

Pursuant to subsection 14(1) of the ICA, the following investments by non-Canadians are subject to an application for review requirement:

(a) an investment to acquire control of a Canadian business in any manner described in paragraph 28(1)(a), (b) or (c) ,where the limits set out in subsection (3) apply;

(b) an investment to acquire control of a Canadian business in the manner described in subparagraph 28(1)(d)(i), where the limits set out in subsection (3) apply;

(c) an investment to acquire control of a Canadian business in the manner described in subparagraph 28(1)(d)(ii), where the circumstances described in subsection (2) and the limits set out in subsection (3) apply; and

(d) an investment to acquire control of a Canadian business in the manner described in subparagraph 28(1)(d)(ii), where the circumstances described in subsection (2) do not apply and the limits set out in subsection (4) apply.

Thus, to be subject to review, a number of key threshold requirements must be satisfied. Where the thresholds are met, the investor must submit an application for review to the responsible governmental department(s), as explained below. Otherwise, the investor is only required to file a post-closing notification.

(a) Canadian Status

The ICA only applies to an investment by a non-Canadian(s). A "non-Canadian" is defined to be any individual, entity (which is defined to be a corporation, partnership, trust or joint venture) or governmental agency or other similar body that is not a Canadian. A Canadian, in turn, is defined to be any of the following persons: a Canadian citizen; a permanent resident under the *Immigration Act* who satisfies certain prescribed conditions; a federal or provincial Canadian government or body thereof; or a corporation that is controlled by Canadians, as defined under section 26 of the ICA.[10] Thus, for example, if a Canadian-controlled corporation is proposing an investment to acquire a Canadian business, that proposed investment would not be covered by the ICA since the investment is not being made by a non-Canadian. On the other hand, if the proposed acquisition is being made by a corporation that is controlled by a non-Canadian, then the ICA would apply to the acquisition. It then would be necessary to determine whether the remaining thresholds for review are satisfied.

(b) Acquisition of Control

According to subsection 14(1) of the ICA, to be subject to review, there must be an acquisition of "control" of a "Canadian business" in the manner described under subsection 28(1). Control is deemed to have been acquired where more than a majority of an entity's voting interests are acquired,[11] while, except for a specific class of investments,[12] control is deemed not to have been acquired where less than one-third of the voting interests of an entity are acquired.[13] A rebuttable presumption of control arises where an investor acquires between one-third and one-half of the voting interests of an entity.[14] In such case, the onus is on the investor to establish that control has not been acquired. This may be a relatively simple burden to satisfy where, for example, there remains a majority shareholder who owns more than 50 percent of the voting interests of the entity being acquired.[15] However, it is a more difficult burden to satisfy where no single investor holds a majority of the voting interests, and the voting interests are dispersed among numerous, independent investors.

(c) Canadian Business

A "Canadian business" is defined as a business carried on in Canada that has: "(a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the business". In most cases it is obvious whether a business qualifies as a Canadian business. For example, a local grocery or department store, a mining company with mines in Canada and a manufacturer with a plant or sales office in Canada would all qualify as "Canadian businesses". Ultimately, whether a business qualifies as a Canadian business is a factual issue, and must be determined based on the specific facts of a particular case.

(d) Acquisition Structure

Assuming that the proposed investment involves the acquisition of control of a Canadian business by a non-Canadian(s), it is then necessary to determine whether that proposed acquisition is being effected in the manner described under subsection 28(1) of the ICA. The following types of acquisitions are covered under that subsection:

- a direct acquisition of the voting shares of a Canadian corporation carrying on the Canadian business;[16] or
- a direct acquisition of a non-incorporated (e.g. a partnership or joint venture) Canadian business, or the acquisition of an entity, except for a corporation incorporated outside of Canada, that controls an entity that carries on a Canadian business, whether or not any of the entities being acquired are corporations;[17] or
- the acquisition of all or substantially all of the assets used in carrying on a Canadian business;[18] or
- an acquisition of a corporation incorporated outside of Canada that controls an entity in Canada that carries on a Canadian business.[19]

For the purposes of the discussion below, the first three bullets above are referred to as "Direct Acquisitions", while the final bullet is referred to as an "Indirect Acquisition".

The final test for determining whether a proposed acquisition is subject to an application for review is whether the monetary thresholds set out under section 14 have been exceeded. Except in respect of investments by a certain class of investors (described below), in the case of Direct Acquisitions, the monetary thresholds are exceeded where the non-Canadian investor proposes to acquire control of a Canadian business or businesses with assets having a book value of $5 million or more, while in the case of Indirect Acquisitions, where the Canadian business or businesses have a book value of $50 million or more. The financial determination is made on the basis of the audited financial statements for the entity carrying-on the business in the fiscal year immediately preceding the investment.[20]

The monetary thresholds described above substantially increase for both Direct and Indirect Acquisitions where the investor is a national of a country that is a member of the *World Trade Organization* (the "WTO") or, immediately prior to the implementation of the investment, the subject Canadian business is controlled by an investor of a WTO member country, other than a Canadian (collectively, a "WTO Investor").[21] For investments made in the year 2002, the applicable threshold for WTO Investors is $218 million. This monetary threshold increases annually in accordance with the formula set out under subsection 14.1(2). As well, in the case of an Indirect Acquisition that is made by a WTO Investor, where the assets of the entity carrying on the Canadian business, and of all other entities in Canada the control of which is being acquired, is less than fifty percent of the value of the assets of all entities the control of which is being acquired, directly or indirectly, then an application for review is not required (unless the Canadian business is engaged in a sensitive sector activity, as defined below) (the "50% Rule").[22]

The higher threshold applicable to an investment by a non-Canadian, WTO Investor, as well as the 50% Rule, do not apply where the Canadian business being acquired is engaged in any of the following types of activities ("Sensitive Sector Activities"):[23]

(a) engages in the production of uranium and owns an interest in a producing uranium property in Canada;

(b) provides any financial service;

(c) provides any transportation service, as that expression may be defined by the regulations; or

(d) is a cultural business.[24]

III. Administration of the *Investment Canada Act* and Notification or Review of Investments

1. Administration of the Investment Canada Act

The Minister of Industry is the Minister who has ultimate authority over the administration of the ICA, while day-to-day responsibility for the ICA resides in the IRD.[25] As noted, the Director of the IRD is Ms. Suzanne McKellips. The IRD maintains a website at http://icnet.ic.gc.ca/investcan/main.htm in which it publishes, among other things, the ICA and the regulations thereto, various notices, interpretation bulletins and guidelines and a list of investments for which notifications or applications for review have been filed.

While IRD is responsible for administering the ICA, pursuant to a 1999 Order-in-Council[26] (the "Transfer Order"), jurisdiction over the receipt of notifications and applications and the review of businesses that engage in activities related to Canada's cultural heritage or national identity, i.e., Section 15 Cultural Businesses, is now vested in the Minister of Canadian Heritage. The Transfer Order provides that the Minister of Canadian Heritage has "... the powers, duties and functions of the Minister of Industry under Parts II to VI of the Investment Canada Act as they relate to prescribed business activities under paragraph 15(a) of that Act". Parts II to VI of the ICA cover, among other things, the receiving and reviewing of notifications and applications, the issuing of net benefit rulings (as described below), and the issuing of Ministerial opinions and interpretation guidelines. The Transfer Order excludes, however, Part I of the ICA, which covers the general authority over the administration of the Act, the responsibility to ensure that the notification and review of investments are carried out in accordance with the Act and the authority to consult with other federal departments and agencies and other provincial and private interests. It also excludes Part VII of the ICA, which covers the enforcement provisions of the Act.

As explained below, based on our experience, IRD and CSIR have adopted a bifurcated process for receiving notifications and applications and reviewing investments. Although this is certainly one area that requires an interpretation guideline, the authority for that bifurcated approach appears to reside in the language of the Transfer Order. Specifically, the Transfer Order only grants to the Minister of Canadian Heritage the powers, duties and functions under the ICA as it relates to Canadian businesses engaged in activities prescribed under paragraph 15(a) of the ICA. On that basis, to the extent that a business undertakes both prescribed and non-prescribed activities, the Minister of Industry retains all of the powers, duties and functions under Parts II to VI of the ICA with respect to that business, while the Minister of Canadian Heritage is responsible for that part of the business that is engaged in the prescribed activities. Again, it would be beneficial to understand the precise basis upon which IRD and CSIR have apparently adopted a bifurcated process.

Finally, the Minister of Canadian Heritage is supported by the CSIR. The Director of Investment (as appointed by the Minister of Industry on the recommendation of the Minister of Canadian Heritage) and Assistant Deputy Minister, Cultural Development is Mr. Michael Wernick, while the Deputy Director of Investments and Director of Cultural Sector Investment Review is Ms. Carla Curran. CSIR operates a website at http://www.pch.gc.ca/culture/invest/rev in which it posts policies and interpretation guidelines applicable to Section 15 Cultural Businesses, as well as a list of the notifications and applications for review that it has received.

2. Notification or Review of Investments

As previously set out, whether an investment by a non-Canadian is subject to the requirement to file a notification or an application for review depends on a number of factors, including whether the investment involves the establishment of a new Canadian business or the acquisition of control of an existing Canadian business; whether it involves the acquisition of a business that is engaged in a Sensitive Sector Activity; and whether the acquisition of control of an existing Canadian business exceeds certain prescribed monetary thresholds.

Except for an investment involving a Section 15 Cultural Business,[27] a notification or application for review, as the case may be, is submitted only to IRD. Similarly, if the only activity that the Canadian business engages in (or will

engage in, i.e., in the case of the establishment of a new business) is an activity prescribed by paragraph 15(a), then a notification or application for review, as the case may be, is only submitted to CSIR.[28] From an investor's perspective, a difficult administrative issue arises where only a portion of the Canadian business is engaged in an activity prescribed by paragraph 15(a). This situation is not addressed by the ICA, by the Transfer Order or by an interpretation guideline. Indeed, as explained in section IV.1 below, this is one of the areas that would benefit from an interpretation guideline.

Where the activities of the Canadian business being acquired or established only partially involve (or will involve) activities prescribed by paragraph 15(a), IRD and CSIR are of the view that joint filings must be made to both government departments.[29] For purposes of illustration, assume the following facts: in 2002, a WTO Investor will acquire all of the assets of a Canadian business and approximately 20 percent of the activities of that Canadian business involve activities prescribed by paragraph 15(a) (e.g. the sale of books, periodicals, newspapers or music recordings). In such a scenario, the following are the possible filing requirements.

- If the book value of the assets of the Canadian business is below $5 million, a notification must be submitted to both IRD and CSIR.
- If the book value of the assets of the Canadian business is $5 million or more but below $218 million, a notification must be submitted to IRD in respect of the activities that are not prescribed by paragraph 15(a) and an application for review must be submitted to CSIR in respect of the prescribed activities.
- If the book value of the assets of the Canadian business is above $218 million, an application for review must be submitted to IRD in respect of the non-prescribed activities and an application for review must be submitted to CSIR in respect of the prescribed activities.

A final scenario involves a situation where the investor is of the view that a Canadian business that it is acquiring or that it is establishing is not engaged (or will not be engaged) in a Sensitive Sector Activity, but where the responsible governmental department is of a different view. Where a notification is submitted to IRD on the basis that the Canadian business is not engaged in (or will not be engaged in) a Sensitive Sector Activity, IRD retains the authority to challenge the investor's declaration in that regard. In such case, IRD may request a submission on this point from the investor (alternatively, the investor can make a submission on an unsolicited basis). Where the Canadian business being acquired or established may be a Section 15 Cultural Business, IRD will work directly with CSIR in arriving at a joint determination as to the status of the Canadian business. If IRD is of the view that the subject investment is engaged in a Sensitive Sector Activity, or if IRD and CSIR are jointly of the view that the Canadian business is a Section 15 Cultural Business, IRD will send the notification back to the investor and the investor will be required to re-submit it[30] to CSIR if it involves a Section 15 Cultural Business or otherwise to IRD, or, if the investment exceeds the monetary threshold applicable to a business that engages in a Sensitive Sector Activity, the investor will be required to submit an application for review to IRD and/or CSIR, as the case may be.[31]

In the subsections below we set out the specific requirements for submitting a notification and application for review.

(a) Notification

Any acquisition of control of a Canadian business by a non-Canadian that is not subject to an application for review must be notified to IRD or, in the case of a Section 15 Cultural Business, to CSIR.[32] A notification is also required where a non-Canadian person establishes a new Canadian business. In addition to the obvious example where a non-Canadian establishes a business for the first time, according to the IRD's *Related-Business Guidelines*, a notification must be filed where an existing business that is controlled by a non-Canadian(s) expands into an area that is not related to its existing business in Canada or where it involves a Section 15 Cultural Business.

Where a notification is required, it must be filed at any time before or within 30 days after the acquisition is made or the new Canadian business is established. A notification is a relatively straight-forward process and, except in the case of a Section 15 Cultural Business, cannot be converted into an application for review by the responsible Minister.

(b) Procedures Applicable to Investments that are Subject to Review

(i) Process and Mandatory Waiting Periods

Before completing an acquisition that exceeds the thresholds applicable to a review,[33] an investor must file an application for review to the IRD and/or CSIR in the manner prescribed by the IC Regulations. The responsible Minister will then determine whether the proposed investment should be permitted, and the proposed investment cannot proceed until such approval is received. Indeed, if a proposed investment closes prior to receiving ministerial approval, the Minister has the power to order the divestiture of the investment, although we are not aware of any instance where a divestiture remedy was ordered. The applicable test is set out in the next subsection.

The ICA provides that the Minister shall have 45 days from the date on which an application is submitted to review the proposed investment. The Minister may unilaterally extend the initial review period for an additional 30 days. Following this period, the Minister may only extend the review period with the consent of the investor.

The following is a summary of some of the procedures that a investor may expect upon filing an application under the ICA.

- An Investor must submit a filing complete with business plans ("Plans Document") for the target Canadian business.
- Upon receiving a filing, the IRD will send a copy of it to the relevant federal departments or agencies (e.g. possibly the Competition Bureau) and to every province in which the target Canadian business has employees.
- The IRD may discuss suggested changes to the Plans Document with the investor. Further, as discussed below, the IRD may discuss possible undertakings with the investor to allay any concerns that the Minister may have with the proposed investment.

(ii) Standard for Review

The ICA prescribes a net benefit test for determining whether a proposed investment should be permitted; namely, whether the Minister is "satisfied that the investment is likely to be of net benefit to Canada". In making this determination, the Minister is directed to take into account, where relevant, the following factors:[34]

- the effect of the investment on the level and nature of economic activity in Canada;
- the degree and significance of involvement by Canadians in the business;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition within any industry or industries in Canada;
- the compatibility of the investment with national (and provincial or territorial) industrial, economic and cultural policies; and
- the effect of the investment on Canada's ability to compete in world markets.

The above factors apply to every review under the ICA, regardless of whether the review involves a Section 15 Cultural Business.

IRD/CSIR[35] considers the above factors as they pertain to a particular proposed investment. Furthermore, the weight given to any single factor depends on the nature of the subject investment. Generally speaking, IRD/CSIR has adopted an *ad hoc* approach to considering the above factors, measuring each on the merits of a particular proposed investment.

(iii) Net Benefit Ruling

An investor can complete its investment upon the issuance of a net benefit ruling by the responsible Minister (i.e., the Minister of Industry and/or the Minister of Canadian Heritage, as the case may be[36]). In some cases, however, the Minister may not be satisfied that the proposed investment is likely to be of "net benefit to Canada". In such a case, the ICA provides that the investor may make representations and submit proposed undertakings to alleviate the concerns of the responsible Minister.[37] Undertakings may cover, for example, commitments regarding the maintenance of a certain number of employees in Canada; a certain amount of research and development in Canada; a certain amount of support for surrounding communities; a certain amount of re-investment in the Canadian business; and other similar types of commitments. In our experience, it appears that IRD, on behalf of the Minister, has required undertakings as a precondition to obtaining a net benefit ruling with increased frequency over the past few years.

After the proposed undertakings are submitted, the Minister must then evaluate the entire filing, including the proposed undertakings, in determining whether the proposed investment is likely to be of "net benefit to Canada". Although it is theoretically possible that even with the proposed undertakings the Minister will not be satisfied that

the proposed investment is likely of net benefit to Canada, and thus prevent the investor from completing its proposed investment, as a practical matter, it would be highly unusual (except possibly in the case of an investment involving a cultural business) that the Minister and investor could not come to a mutually satisfactory position.[38]

IV. Illustrations of Areas in Need of Clarification

There are numerous areas in which practitioners, industry representatives and, indeed, IRD and CSIR officers could benefit from the publication of interpretation guidelines. This pertains to both the substantive provisions of the ICA and the governing administrative policy. In this section we canvass certain issues that, in our view, should be addressed by interpretation guidelines. Our list of suggested topics is not exhaustive. Rather, in our view, IRD and CSIR should solicit the views of practitioners and industry representatives who can provide the benefit of their experiences in identifying both areas in need of clarification and proposals regarding interpretative matters and the administration of the ICA.

1. Clarification of Administrative Policy

(a) Determination of Whether a Business is a Section 15 Cultural Business

As indicated above, in accordance with the Transfer Order, the Minister of Canadian Heritage has been given the authority to, among other things, accept filings in respect of, and undertake reviews of, the establishment or acquisition of Canadian businesses that are engaged in activities that are prescribed by paragraph 15(a) of the ICA (i.e., Section 15 Cultural Businesses). In instances where it is obvious that a Canadian business being acquired or established is or will be a Section 15 Cultural Business, the consequences of the Transfer Order are straightforward, as set out in section III of this paper.

The Minister of Canadian Heritage's role is unclear, however, in situations where an investor has concluded that the Canadian business being acquired or established is not engaged in an activity prescribed by paragraph 15(a) of the ICA, and therefore, in the case of a notification, has not "checked" the cultural activity box in the notification form. In instances where it is unclear whether an activity qualifies as one of the prescribed activities, the investor may make a written submission to explain its rationale for not "checking" the box at the same time that it submits its notification, or it may be asked by IRD to make a submission to both IRD and CSIR at a later date.

Based on our discussions with senior officials at IRD and CSIR, where such a submission has been received or requested, IRD and CSIR will work jointly to arrive at a decision regarding the status of the Canadian business. While there is no bar to prevent IRD officials from consulting with their counterparts at CSIR,[39] the ultimate decision as to whether a Canadian business is a Section 15 Cultural Business must, in our view, reside exclusively with IRD. This is not only because it is IRD who must accept (or deny) a notification with respect to a self-declared, non-cultural business, but also because general authority over the administration of the ICA, including the responsibility to ensure that the notification and review of investments are carried out in accordance with the ICA, lies with the Minister of Industry (and thus also IRD). This is the case because these powers derive from Part I of the ICA, which was excluded from the Transfer Order to the Minister of Canadian Heritage.

For the reasons stated above, we are of the view that IRD has ultimate decision making authority regarding the status of a Canadian business as a Section 15 Cultural Business. Indeed, as a practical matter, only IRD has the power to enforce the ICA since, once again, Part VII of the ICA was not transferred to the Minister of Canadian Heritage under the Transfer Order. The position of both IRD and CSIR with respect to jurisdiction in such instances and the process followed by them in reaching a decision would be of assistance to practitioners. This should be dealt with through the publication of an interpretation guideline.

(b) Bifurcation of the Notification/Review Process

There are many examples of Canadian businesses that engage in both activities prescribed by paragraph 15(a) and activities not prescribed thereunder. This raises the issue of the bifurcation of the filing requirements with respect to these Canadian businesses in that both IRD and CSIR expect to receive filings. The possibility of such bifurcation stems directly from the language of the Transfer Order, which transfers to the Minister of Canadian Heritage authority relating to designated "business activities" rather than authority with respect to a business which is engaged in such activities as a whole.

As noted above, IRD and CSIR are of the view that, in instances where an investment is reviewable only by virtue of the fact that the Canadian business is a Section 15 Cultural Business, an investor must submit a notification to IRD in respect of the non-cultural components of the Canadian business and must submit an application for review to CSIR in respect of the business's engagement in the prescribed activities. While this strikes us as a sensible approach, it would be helpful for both IRD and CSIR to state this publicly through a guideline.

In instances where both the cultural and non-cultural aspects of a business are to be subject to an application for review (e.g. where a Section 15 Cultural Business engages in both cultural and non-cultural activities and where the business's assets exceed the monetary threshold for WTO Investors), separate applications for review must be submitted to IRD (dealing with the non-cultural activities) and to CSIR (dealing with the cultural activities). In such case, it is our understanding that both the Minister of Canadian Heritage and the Minister of Industry will use the factors set out at section 20 of the ICA to determine whether the proposed acquisition is of "net benefit to Canada". However, in such circumstances it is not immediately evident how many of the section 20 factors would be relevant to CSIR when a concurrent review is being undertaken by IRD. This may be the case, for example, where it is not easy to delineate neatly between the business's cultural activities and its non-cultural activities when considering matters like employment, degree and significance of involvement of Canadians in the Canadian business, technological development and the ability to compete in world markets. That the Minister of Canadian Heritage could refuse to issue a net benefit ruling on the basis that she perceives a lack of opportunities for Canadians to manage the cultural activities of a particular business when the investor intends, for example, to make substantial improvements to other parts of the business is problematic. This is especially so in instances where the cultural activities are a marginal component of the overall activities of the Canadian business.

The manner by which the Ministers of Canadian Heritage and Industry will address bifurcated reviews should be dealt with in an interpretation guideline. For example, do the Ministers use a balancing of weights standard (e.g. if only a marginal portion of the business's activities are prescribed activities, then would the Minister of Canadian

Heritage's potential concerns be weighted appropriately, and vice versa)? Also, when requesting undertakings, is the Minister of Canadian Heritage limited to requesting undertaking in respect of prescribed activities, and the Minister of Industry limited to requesting undertakings in respect of non-prescribed activities? Although this seems reasonable and appears to be the operating practice, it would be helpful if the Ministers could clarify their approach to such matters.

(c) The Review of a Canadian Business Engaged in a Sensitive Sector Activity

As indicated, we agree with IRD/CSIR's practice with respect to Section 15 Cultural Businesses that engage in both prescribed and non-prescribed activities, namely the adoption of a bifurcated process whereby filings must be made to both IRD and CSIR. In such case, IRD will only consider the Canadian business's non-prescribed activities, while CSIR will only consider the prescribed activities. As noted, we also presume that the Minister of Industry would limit his request for undertakings to matters that pertain to the non-prescribed activities, while the Minister of Canadian Heritage would limit her request for undertakings to matters that pertain to the prescribed activities. In our view, IRD should consider whether a similar approach should be extended to the acquisition of Canadian businesses that engage in the other Sensitive Sector Activities, albeit that the bifurcation would be internal.

In particular, take for example a hypothetical Canadian financial institution that provides a financial service and which has assets below $218 million.[40] Assuming that a WTO Investor is acquiring the financial institution, but for the fact that it provides a financial service, the acquisition of control would be subject only to a notification requirement. IRD's jurisdiction to conduct a review stems from the business's engagement in a Sensitive Sector Activity. In such a situation, we submit that IRD should adopt an approach similar to how it and CSIR divide the review of Section 15 Cultural Businesses. Specifically, IRD should restrict its review to those activities by the hypothetical financial institution that constitute a Sensitive Sector Activity, and other functions, such as, possibly, the composition of its management, whether it operates a loyalty program and so forth, should be excluded from the review. Similarly, to the extent that the investor is required to enter into undertakings, as with our suggestion regarding Section 15 Cultural Businesses, such undertakings should relate directly to the financial institution's financial services.

2. Substantive Clarification

In addition to clarifications with respect to the administration of the ICA, especially with regard to areas of joint IRD/CSIR jurisdiction, certain sections of the ICA itself could benefit from additional legislative clarity or, at the very least, public disclosure on the part of IRD/CSIR as to their view of the scope of such provisions. The discussion below sets out certain areas where interpretation guidelines would be helpful.

(a) Definition of a "Cultural Business"

Admittedly, in isolation, a cultural business is defined in very broad terms under subsection 14.1(6) of the ICA. Based on the number of decisions and notifications made to CSIR since the Transfer Order,[41] it may indicate that

IRD and CSIR have adopted a broad, likely too broad, definition of what constitutes a cultural business. In our view, a reasonable argument could be made that when Parliament drafted the ICA, it only intended to cover under the term "cultural business" those businesses that operate squarely, albeit not necessarily exclusively, in certain industries. For example, in our view, one could argue that Parliament intended to only capture under paragraph 14.1(6)(a), book, magazine, periodical and newspaper publishers and distributors, as well as stores whose primary (or at least significant) business is the retail sale of those articles; under paragraph 14.1(6)(b), Parliament intended to only capture businesses in the "film" industry; under paragraph 14.1(6)(c), Parliament intended to only capture businesses in the music industry; under paragraph 14.1(6)(d), Parliament intended to only capture businesses in the music composition industry; and finally, under paragraph 14.1(6)(e), Parliament intended to only capture businesses in certain aspects of the radio and television industries.

When interpreting the activities enumerated under subsection 14.1(6), IRD and CSIR must be careful not to do so in a vacuum. Instead, what they consider to be cultural businesses should be consistent with Canada's cultural policies (e.g. those businesses subject to government sponsored cultural programs or requirement, such as in respect of subsidies or Canadian content requirements) and Canada's international trade and investment obligations – if not the express terms, then at least the spirit. An excessively broad interpretation of the businesses intended to be covered under subsection 14.1(6) could have the perverse result of treating a substantial majority of Canadian businesses as cultural businesses, notwithstanding that it was likely only intended to cover a narrow band of businesses that were considered to contribute in an important manner to Canada's cultural heritage or national identity. To ensure consistency of approach, this is an area that is in desperate need of an interpretation guideline.

(b) The Undue Hardship Exception

Except in a few limited circumstances, the acquisition of a Canadian business by a non-Canadian that is subject to an application for review requirement cannot be implemented until the appropriate Minister has issued, or is deemed to have issued, a net benefit to Canada ruling. One exception to this requirement is where the (responsible) Minister is "satisfied that a delay in implementing the investment would result in undue hardship" to the investor or "would jeopardize the operations of the Canadian business" that is being acquired.[42] While this decision is clearly a discretionary one, and while it may be impractical to enumerate a categorical list of considerations and relevant factors that the Minister would be required to consider, an interpretation guideline with respect to the general factors that the Minister considers under this provision would be helpful. For example, in the context of merger review under the *Competition Act*[43], the Commissioner of Competition has set out in his *Merger Enforcement Guidelines* (the "MEGs") the factors that he considers when assessing the applicability of the so-called "failing firm" defence. Although the factors set out in the MEGs are likely too rigorous for the purposes of paragraph 16(2)(a) of the ICA,[44] they nevertheless may be helpful in providing some guidance.

(c) The Determination of Control

As noted above, for an acquisition by a non-Canadian to be subject to the provisions of the ICA, there must be an acquisition of control of a Canadian business. Subsection 28(3) of the ICA sets out certain presumptions and

deeming provisions with respect to determining control. For example, with respect to the acquisition of a corporation, the acquisition of more than 50 percent of the voting interests[45] of a corporation is deemed to be an acquisition of control, while the acquisition of less than one-third of the voting interests of a corporation is deemed not to be an acquisition of control. In accordance with paragraph 28(3)(b), in instances where less than a majority but one-third or more of the voting interests of a corporation are acquired, an acquisition of control is presumed to have occurred unless it is established that "the corporation is not controlled in fact by the acquiror through the ownership of voting shares".

It would appear that, on the basis of the above stated rules and, in particular, their emphasis on the ownership of voting interests, control under the ICA is primarily (if not exclusively) a mathematical exercise. Accordingly, the acquisition of control presumably could not be rebutted where, for example, 40 percent of a corporation's voting interests are being acquired and where the remaining voting interests are dispersed among numerous shareholders. Likewise, in instances where another party owns 50 percent of the voting interests of a corporation, the acquisition of 35 percent of that corporation's voting interests by a non-Canadian would not amount to the acquisition of control. References to control "through the ownership of voting shares" in paragraph 28(3)(b) further suggests that attempts to rebut the presumption of control cannot be countered by reference to things such as shareholders' agreements or obligations associated with debt holdings or, at least, as noted by R. Deigan: "[I]t is open to question whether, and to what extent, the legislation recognizes the concept of negative control and shareholders' agreement, which are a type of legal control."[46]

At least one opinion issued by the Minister suggests that a mathematical approach may be appropriate even where a shareholders' agreement exists. In that opinion, the Minister held that the acquisition of 42 percent of the voting shares of a corporation, where a Canadian retained 43 percent of the voting shares, was not an acquisition of control even though a shareholders' agreement had been entered into whereby both the Canadian and non-Canadian agreed to act together to elect a Board of Directors equally divided by their nominees. The Minister indicated that although the acquisition of a 42 percent of voting shares did raise a presumption of the acquisition of control, the existence of a larger existing Canadian shareholder was sufficient to set this presumption aside.[47] Admittedly, this is not a conclusive endorsement of the mathematical approach as it is unclear whether the same decision would have been reached if the shareholders' agreement did not result in equal control but granted the non-Canadian control of the board.

Additional insight from IRD on how it interprets the term "through the ownership of voting shares" would be helpful.

(d) Transportation Services

A transportation service is a Sensitive Sector Activity under the ICA and, accordingly, the acquisition of a business involved in the provision of a transportation service is subject to review at threshold levels of $5 million for Direct Acquisitions and $50 million for Indirect Acquisitions.

The IRD's interpretation of the prescribed definition of a transportation service is of particular interest since the definition of this phrase provided by the IC Regulations is excessively vague. A transportation service is defined under the IC Regulations as a "Canadian business directly or indirectly engaged in the carriage of passengers or goods from one place to another by any means, including, without limiting the generality of the foregoing, carriage by air, by rail, by water, by land and by pipeline". As is the case with the definition of a cultural business, one could argue that, on the basis of a purely literal interpretation of that provision, it covers the mere activity of carrying persons or goods. For example, does it cover a business that transports goods between its facilities or delivers the goods that it manufactures to its customers? The definition is problematically opened-ended in that it refers to businesses "engaged in the carriage of passengers or goods" rather than, for example, entities engaged in the business of carrying passengers or goods. If interpreted too broadly, it could arguably cover almost all Canadian businesses.

To ensure consistency of approach and understanding, an interpretation guideline should be established to clarify what constitutes a transportation service.

(e) Financial Services

Financial services also constitute a Sensitive Sector Activity. Unfortunately, however, the definition of a financial service provided by the ICA is inadequate. Specifically, a financial service is defined as "a service of a financial nature offered by a financial institution excluding the underwriting and selling of insurance policies", while a financial institution is defined as "any entity authorized to do business under the laws applicable to a WTO Member or any of its political subdivisions relating to financial institutions...". The definition of a financial institution is hopelessly circular, and, as a result, what constitutes a financial service is also unclear. While it was our understanding that IRD had adopted the view that a financial institution has the same meaning accorded to that term under section 2 of the *Bank Act*,[48] a senior officer at IRD indicated to us that no such internal policy exists and that neither the former definition of a financial institution under the *Bank Act* nor the expanded definition under recent amendments to the *Bank Act* are necessarily exhaustive.

Again, to ensure consistency of approach, IRD should issue an interpretation guideline setting out its interpretation of the terms "financial services" and "financial institutions" for the purposes of the ICA.

(f) Canadian-Controlled and WTO Investor-Controlled Status

A further area that could benefit from an interpretation guideline is the status rules under subsection 26(1) of the ICA for determining whether an entity is Canadian-controlled or WTO Investor-controlled.[49] For ease of reference, we reproduce subsection 26(1), as follows:

> 26.(1) Subject to subsections (2.1) and (2.2), for the purposes of this Act,
>
> (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 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 through the ownership of its voting interests and two-thirds of the members of its board of directors or, in the case of a limited partnership, two-thirds of its general partners, are Canadians.

The status rules are relevant, for example, when determining whether an investor is Canadian-controlled or WTO Investor-controlled, as the case may be, or whether the Canadian business being acquired is Canadian-controlled or WTO Investor-controlled, as the case may be. This determination may have important consequences regarding the application of the ICA.

The above provision operates in descending order such that the first paragraph descriptive of the examined entity applies and it is not necessary to consider the other paragraphs. Thus, for example, if a private Canadian corporation has three shareholders none of whom are members of a voting group, and if more than fifty percent of the voting shares are beneficially owned by a Canadian (as defined by the ICA), by virtue of paragraph 26(1)(a), the entity is a Canadian corporation. It is not necessary, for example, to examine the composition of the company's board of directors. Similarly, if the majority shareholder is a non-Canadian in the above example, by virtue of paragraph 26(1)(b), the entity is not Canadian controlled. Once again, it would not be relevant to examine other factors, such as the composition of the board.

The above two examples are fairly straightforward. A more difficult issue arises, however, where the entity referenced above is a widely-held, publicly traded corporation. Under that scenario, because paragraphs (a) and (b) would not apply, it would be necessary to consult paragraph 26(1)(c). In so doing, however, it becomes evident that no clear answer can be arrived at under paragraph (c). To begin, at what date is the determination of share ownership to be made? The ICA prescribes two different periods for certain determinations. For example, for the purposes of determining whether the monetary thresholds for reviewability are exceeded, the IC Regulations provide that the relevant timeframe is the fiscal year immediately preceding the implementation of the investment. Accordingly, if this timeframe is used for the purposes of paragraph 26(1)(c), then the determination of Canadian status would be made at the year-end for the fiscal year immediately preceding the investment. Alternatively, for the purposes of determining whether an investment by a non-WTO Investor qualifies for the higher thresholds applicable to an investment by a WTO Investor, the ICA provides that reference must be made to whether the Canadian business is controlled by a WTO Investor immediately prior to the implementation of the investment. Accordingly, under this approach, the determination would be made as at the time that the investment is completed.

On first blush it would appear that the appropriate timeframe is the second one mentioned above since the circumstances under which it arises are more closely connected to the determination of status than is the first mentioned timeframe. However, if this interpretation is correct, it presents a practical problem; namely, in the case of a widely-held, public corporation, it may not be possible to determine with accuracy whether the ICA applies to an acquisition (i.e., whether the investor is Canadian-controlled) or, for that matter, possibly whether a notification or review requirement applies (i.e., which may depend on WTO Investor status[50]), since the corporation's shares may be traded right to (and possibly after) closing. Indeed, for the purposes of determining whether the investor is Canadian-controlled, it would not be satisfactory to file an application for review[51] on the chance that the investor will not be Canadian-controlled for the purposes of paragraph 26(1)(c) since, as a matter of law, IRD and/or CSIR do not have jurisdiction to review an acquisition by a Canadian, which may turn out to be the case.[52] At the same time, it may not be satisfactory to use the year-end of the preceding fiscal year since, during the intervening period, a majority of the shareholders may have become Canadians, thus having the perverse impact that the business is treated as not being Canadian-controlled.

In addition to timing issues, as a practical matter, in respect of widely-held, publicly traded corporations, it may not be possible to ever know with certainty whether paragraph 26(1)(c) is satisfied. In particular, by virtue of section 3 of the ICA, "own" is defined as beneficial ownership. Accordingly, examining the share register would not render absolute certainty as to the identity of the beneficial owners.[53]

As a practical matter, where the above situation applies and it is not possible to determine with certainty whether paragraph 26(1)(c) applies to a particular entity, by using a "common sense approach", in most cases it is appropriate to then have reference to paragraph 26(1)(d). This is possible because the non-satisfaction of paragraph 26(1)(c) does not render an entity to be non-Canadian-controlled or non-WTO Investor-controlled, as the case may be. Thus, by conceding the non-application of paragraph (c) an investor may proceed to determine whether the

requirements of paragraph (d) are satisfied. In that case, Canadian status could be established, for example, by demonstrating that the entity is not controlled in fact and that two-thirds of the members of its board of directors are Canadians.[54]

While paragraph 26(1)(c) can be given practical application (as described above), as a statutory construction matter, its vagueness is unsatisfactory. To begin, it is noted that paragraph 26(1)(d) only applies "where paragraphs (a) to (c) do not apply ...". For the reasons discussed above, it may never be possible to provide a definitive answer to the opening phrase of paragraph 26(1)(d). This provision could be made clearer by stating the following "where paragraphs (a) to (c) do not apply or cannot be established ...".

A more problematic issue arises, however, where the investor intends to rely on paragraph 26(1)(c) but, as a result of drafting imperfections, is unable to do so. To illustrate how this may arise, assume the following facts: an investor who is not a WTO Investor because it is controlled by a Guernsey investor seeks to acquire all of the assets of a widely-held, public corporation that is listed on both the New York Stock Exchange and the Toronto Stock Exchange. The corporation is a Canadian business under the ICA, and its head office is located in Winnipeg, Manitoba. The company is not engaged in a Sensitive Sector Activity. The book value of the Canadian corporation's assets shown in the audited financial statements for its fiscal year immediately preceding the implementation of the investment is $165 million. The business is not controlled in fact through the ownership of its voting interests, and a majority of the beneficial owners of its voting interests are likely not Canadians, but this fact is unclear because not all of the beneficial owners can be identified. Two-thirds of the Canadian corporation's board members are U.S. citizens. In this scenario, if it were determined that paragraph 26(1)(c) does not apply, the Canadian business is not a Canadian-controlled entity. Furthermore, as noted previously, by conceding the non-applicability of paragraph 26(1)(c), as two-thirds of the board of directors are non-Canadian, WTO Investors, the proposed acquisition would only be subject to a notification filing requirement as the investment would be controlled by a WTO Investor immediately prior to the implementation of the investment. The difficulty in this scenario, however, is that to conclude that the Canadian business is not a Canadian-controlled entity, it is necessary to know with certainty that paragraph 26(1)(c) does not apply. Unlike in the situation where one is determining WTO Investor status, making the assumption that paragraph (c) does not apply in this case is to the benefit of the investor (in the WTO Investor context, by conceding the non-application of that paragraph it is to the investor's detriment in that if it were answered in the affirmative then the investor would qualify as a WTO Investor). Thus, to be safe, the investor would likely have to conclude that the Canadian business is a Canadian-controlled entity and, rather than a notification, would have to file an application for review. This is an unsatisfactory result. Paragraph 26(1)(c) must be drafted in a manner that allows investors to determine with certainty whether the paragraph applies.

V. Conclusions

The ICA is a complex statute. It prescribes numerous rules that apply in different contexts and which are critical to determining whether the ICA applies to a proposed investment, and if it does, the nature of an investor's obligations. The complexity of the statute is not assisted by the fact that certain of its provisions are vague and,

in a limited number of cases, unworkable (e.g. as discussed above in respect of paragraph 26(1)(c)). The situation is made more difficult by the fact that, with respect to Section 15 Cultural Businesses, the Ministers of Industry Canada and Canadian Heritage may have concurrent jurisdictions with respect to the same proposed investment yet, despite the fact that the Transfer Order was issued in June 1999, as at the present time, not a single guideline (or less formal policy) has been issued by IRD and CSIR that gives guidance to investors as to how both departments intend to administer the ICA.[55] As stated above, this includes such basic things as determining the department in which filings are to be made.

Through this paper, we call upon IRD and CSIR to reinvigorate the process of issuing Ministerial interpretation guidelines. Of course, to the extent that interpretation guidelines are issued in respect of matters under Parts II to VI of the ICA, the guidelines should be issued jointly by the Ministers of Industry Canada and Canadian Heritage. This is necessary to ensure consistency of approach between both departments. As well, to encourage a comprehensive approach, we recommend that IRD and CSIR consult with practioners and industry representatives who have experience working through the ICA and who can assist IRD and CSIR identify the wide range of issues that need to be addressed through guidelines.

Finally, when drafting interpretation guidelines, the Ministers (through IRD and CSIR) must ensure that their guidelines are consistent with the purpose of the ICA, as set out at section 2. As noted, the purpose of the ICA is to promote investments by non-Canadians in Canada and to only review significant investments by non-Canadians. There are numerous provisions of the ICA that are vague and, if given too broad an interpretation, there is a risk they can be used to contradict the very purpose of the legislation. For example, if every business that offers products on credit is considered to be offering a financial service, and if every business that moves goods between its facilities or delivers the goods that it manufactures to its customers is considered to be a transportation service, and if every business that plays (exhibits) music recordings over its intercom or produces internal corporate videos for employee training purposes is considered to be a cultural business (and also a Section 15 Cultural Business), then a substantial number of Canadian businesses will be considered to engage in a Sensitive Sector Activity and thus their acquisition by a non-Canadian will be subject to the lower thresholds prescribed for non-WTO Investors. Similarly, if clarity is not brought to paragraph 26(1)(c) of the ICA, it may mean that, for certain investments, the investor will treat the ICA as applying (i.e., by assuming that it is not a Canadian-controlled entity) even though Parliament never intended it to apply in such circumstances, while for certain acquisitions, investors will file an application where Parliament only intended for a notification to be filed.

While on first blush the above results may appear to some regulators as an acceptable outcome, they are entirely inconsistent with the stated purpose of the ICA. Parliament only intended that the ICA apply to investments by non-Canadians and, perhaps more importantly in the context of the discussion herein, only intended that significant acquisitions by non-Canadians of Canadian businesses should be reviewed. This is confirmed by the very fact that the ICA's predecessor, the FIRA, imposed a review requirement on all investments by non-Canadians and that Parliament did not carry this requirement over to the ICA. Accordingly, when drafting interpretation guidelines, the Ministers must ensure that their interpretations do not accord so broad a meaning to the various definitions and provisions of the ICA so that most Canadian businesses will be considered to be engaged in a Sensitive

Sector Activity, or that investors will feel compelled to take the "safe path" and assume that they are not Canadian-controlled or that the Canadian businesses that they are acquiring are Canadian-controlled (which is critical for investors who are not WTO Investors) even though, through clearer drafting, that would not be the case. An obvious way to limit which Canadian businesses qualify as engaging in a Sensitive Sector Activity is, for example, to read in a *de minimis* requirement (e.g. by requiring that a certain minimum percentage of a Canadian business's revenues be in respect of a Sensitive Sector Activity) or a requirement that the business's primary activities be related to a Sensitive Sector Activity. While it is true that the ICA does not provide for this requirement explicitly, in our view it would be reasonable to interpret the existence of such a requirement through the purpose clause insofar as a *de minimis* test would filter out investments that are not significant. To that end, we make reference to the following statement by Justice Stone in the recent case of *The Commissioner of Competition* v. *Superior Propane Inc. and ICG Propane Inc.*[56] wherein he was considering certain ambiguities in the meaning of the term "effects" under section 96 of the *Competition Act*:

> Nonetheless, despite the typically indeterminate quality and inherent inconsistencies of purpose or objectives clauses, including s. 1.1, statutory provisions containing general statements of legislative purpose are integral to the statute and can carry as much weight as its other sections: Ruth Sullivan, Driedger on the Construction of Statutes, 3rd edition (Markham, Ont.: Butterworths, 1994), pages 263-68. Thus, a purpose clause serves as a guide to the court or tribunal in its interpretation of other statutory provisions: R v. T. (V.), [1992] 1 S.C.R. 749, at page 765, and may establish the parameters within which it must interpret the provisions of the statute: CAIMAW, Local 14 v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, at page 1028, 62 D.L.R. (4th) 437.

Other statutory interpretation tools, such as legislative intent, may also assist the Ministers in adopting reasonable interpretation guidelines that ensure the effectuation of the underlying purposes of the ICA.

Notes

[1] © Jason L. Gudofsky and Patrick Gay, Messrs. Gudofsky and Gay are associate lawyers in the Toronto office of Stikeman Elliott where they advise clients on federal regulatory matters, most particularly in the areas of competition law and international trade law. The views expressed herein are those of the authors alone, and do not necessarily represent the view of Stikeman Elliott. The authors express their gratitude to D. Jeffrey Brown for reviewing an earlier draft of the paper.

[2] R.S.C. 198 5, c. 28 (1st Supp.), as amended.

[3] S.C. 1973, c. 46, as amended.

[4] See R.A. Donaldson, "Canadianization" in J.M. Spence, Q.C., & W.P. Rosenfeld, Q.C., eds., *Foreign Investment Review Law in Canada* (Toronto: Butterworths & Co. (Canada) Ltd., 1984) 93-119. Also see R. Deigan, *Investing in Canada: The Pursuit and Regulation of Foreign Investment* (Scarborough: Thompson Professional Publishing Canada, 1991) at 2-3, who notes that FIRA did not serve as a major hurdle to foreign direct investment in Canada, but rather as a means by which to require foreign investors to take steps to benefit Canada through their investments. Deigan further notes (at 12) that "[T]he perception that FIRA was a barrier to foreign investment and that Canada did not want foreign investment was partly, if not substantially, incorrect".

[5] See Deigan, *ibid.* at 1, citing a speech by Prime Minister Mulroney before a meeting of the Economic Club of New York, on December 10, 1984.

[6] SOR/85-611, as amended.

[7] As explained *infra*, the list of prescribed activities is slightly narrower than the list of activities enumerated for determining whether a Canadian business is a "cultural business" per subsection 14.1(6) of the ICA.

[8] While, historically, IRD consulted with the Department of Canadian Heritage where an investment involved a cultural business, ultimate authority over determining net benefit to Canada resided with IRD and the Minister of Industry.

[9] The one possible exception is where the business is engaged in an activity prescribed by paragraph 15(a) of the ICA, Section 15 Cultural Businesses, in which case Cabinet may require the filing of an application for review.

[10] Subsection 26(1) prescribes a list of rules for determining whether an entity is Canadian-controlled. That subsection is structured in descending order such that the first paragraph that describes the entity applies. Certain of the paragraphs of subsection 26(1) set out conditions whereby an entity is deemed to be Canadian-controlled, while others deem (or presume) an entity not to be Canadian-controlled. As set out in subsection IV.2(f) of this paper, subsection 26(1) is an example of a provision that could benefit from a clarifying interpretation guideline.

[11] Paragraph 28(3)(a), ICA.

[12] Subsection 28(4) of the ICA allows the responsible Minister (explained below) to find that there has, in fact, been an acquisition of control, notwithstanding that less than 50 percent, and even less than one-third, of the voting interests have been acquired where the subject investment is a Section 15 Cultural Business.

[13] Paragraph 28(3)(d), ICA.

[14] Paragraph 28(3)(c), ICA.

[15] In fact, in Ministerial Opinion No. 94, the Minister held that the acquisition of 50 percent of the voting shares of a Canadian business by a non-Canadian controlled company was not an acquisition of control since a Canadian-controlled company held the remaining 50 percent of the voting shares. Ministerial Opinion reproduced in P. Hayden & J. Burns, *Foreign Investment in Canada* (Scarborough: Carswell, 1998) vol. 2 at 20.

[16] Paragraph 28(1)(a), ICA.

[17] Paragraph 28(1)(b) or subparagraph 28(1)(d)(i), ICA.

[18] Paragraph 28(1)(c), ICA.

[19] Subparagraph 28(1)(d)(ii), ICA.

[20] As well, it is necessary to refer to section 3.1 of the IC Regulations, which outlines the assets that must be included in the asset threshold determination and how they should be valued.

[21] Subsection 14.1(1), ICA. A list of the WTO members can be found on the WTO's website at: http://www.wto.org.

[22] By virtue of subsection 14(2) of the ICA.

[23] Subsection 14(5), ICA.

[24] A cultural business is defined by the ICA as follows:

> ... a Canadian business that carries on any of the following activities, namely,
>
> (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers,
>
> (b) the production, distribution, sale or exhibition of film or video recordings,
>
> (c) the production, distribution, sale or exhibition of audio or video music recordings,
>
> (d) the production, distribution, sale or exhibition of music in print or machine readable form, or
>
> (e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

[25] Section 4, ICA. As well, the authority to appoint the Director of Investments to advise and assist the Minister in exercising the Minister's powers and performing the Minister's duties under the ICA derives from section 6 of the ICA.

[26] *Order transferring from the Minister of Industry to the Minister of Canadian Heritage the powers, duties and functions under Parts II to VI of the Investment Canada Act*, SI/99-61 (23 June 1999).

[27] As noted, a Section 15 Cultural Business is not synonymous with the definition of a "cultural business". In particular, Section 15 Cultural Businesses are all of the businesses enumerated by subsection 14.1(6) to be "cultural businesses", except for those cultural businesses that engage in any of the following cultural business activities: "radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services" (a "Non-Section 15 Cultural Business"). In the case of a Non-Section 15 Cultural Business, a notification or application for review, as the case may be, is only made to IRD.

[28] This is based on our experience, as well as on discussions with senior officers at IRD and CSIR.

[29] In fact, IRD and CSIR are of the view that this is the case no matter how minimal a portion of the Canadian business's activities involves the prescribed or other activities. For example, a senior officer stated that joint filings would be required

even if 5 percent of the business was engaged in a prescribed activity.

[30] As noted, even where a cultural business is only subject to a notification requirement, on the recommendation of the Minister and where considered to be in the public interest, Cabinet has 21 days to require the filing of an application for review.

[31] As a practical matter, if the investor disagrees with IRD's (and CSIR's, where applicable) decision and intends to challenge it in court, the time for doing so is likely then. If the investor waits until the completion of the review, in accordance with the *Federal Court Act*, R.S.C. 1985, Chap. F-7, ss.18.1(2), as amended, the investor may be time barred from challenging the decision to categorize the Canadian business as engaging in a Sensitive Sector Activity. Furthermore, the likelihood of initiating judicial review, let alone a successful one, regarding a net benefit to Canada determination is remote. In particular, Deigan, *supra* note 4 at 267, notes that, in *Baril* v. *Min. of Regional Industrial Expansion* (1986), 26 A.C.W.S. (2d) 322 (F.C.A.), the Federal Court of Appeal held that a decision of the responsible Minister as to whether an investment is of net benefit to Canada was administrative in nature and could not be reviewed under the *Federal Court Act*.

[32] As noted, there may be circumstances where a notification must be submitted to both IRD and CSIR.

[33] Subsection 16(2) of the ICA provides for the following three instances where an application for review can be filed post-closing: (a) where the Minister has sent a notice allowing the investment to be completed prior to the issuance of a net benefit ruling on the basis that waiting for such a ruling would result in an "undue hardship" for the investor or Canadian business being acquired; (b) an Indirect Acquisition; or (c) a cultural business that is below the threshold for filing an application for review but in respect of which the Cabinet has exercised its jurisdiction to convert the acquisition from being notifiable to reviewable.

[34] Section 20, ICA.

[35] It is our understanding that CSIR has adopted an approach similar to IRD's in applying the above noted assessment factors.

[36] As previously noted, the Minister of Industry is responsible for reviewing all acquisitions that are subject to review, other than those that pertain to Canadian businesses that engage exclusively in those activities that qualify them as a Section 15 Cultural Business. In respect of this latter class of businesses, the Minister of Canadian Heritage is responsible for reviewing the acquisition of Section 15 Cultural Businesses, and the Minister of Industry only shares this responsibility where the Canadian business also engages in activities that are not prescribed under paragraph 15(a) of the ICA and the value of the Canadian business' assets exceeds the monetary threshold applicable to the review of a non-Sensitive Sector Activity business.

[37] Section 23, ICA.

[38] This is consistent with the purpose clause which states that the ICA is to promote investments by non-Canadians in Canada.

[39] Part I of the ICA gives IRD the authority to consult with other federal departments and agencies.

[40] Also assume that there is no exemption that applies pursuant to section 10 of the ICA.

[41] As posted on CSIR's internet site.

[42] Paragraph 16(2)(a), ICA.

[43] R.S.C. 1985, c. C-34, as amended.

[44] The difference being that the failing firm defence is used to effectively excuse the Commissioner from reviewing a merger, while paragraph 16(2)(a) merely delays the Minister's review.

[45] In the case of a corporation, a "voting interest" is defined as a "voting share". In turn, a voting share is defined, under section 3 of the ICA as "a share in the capital of a corporation to which is attached a voting right ordinarily exercisable at meetings of shareholders of the corporation and to which is ordinarily attached a right to receive a share of profits, or to share in the assets of the corporation on dissolution, or both."

[46] *Supra* note 4 at 41.

[47] Ministerial Opinion reproduced in Hayden and Burns, *supra* note 15 at 36.

[48] In accordance with the *Bank Act*, 1991, Chap. 46, s.2, a financial institution is:

(a) a bank or an authorized foreign bank,
(b) a body corporate to which the Trust and Loan Companies Act applies,
(c) an association to which the Cooperative Credit Associations Act applies,
(d) an insurance company or a fraternal benefit society to which the Insurance Companies

Act applies,

(e) a trust, loan or insurance corporation incorporated by or under an Act of the legislature of a province,

(g) an entity that is incorporated or formed by or under an Act of Parliament or of the legislature of a province and that is primarily engaged in dealing in securities, including portfolio management and investment counselling, and

(h) a foreign institution.

This definition has changed due to recently enacted amendments to the *Bank Act*: *Financial Consumer Agency of Canada Act*, S.C. 2001, c.9.

[49] The status rules are the same for both Canadians and WTO Investors, except that, in order to determine whether an entity is a "WTO [I]nvestor-controlled entity", paragraph 14.1(7)(a) provides, in part, that subsections 26(1) and (2) and section 27 apply, expect as follows:

(i) every reference in those provisions to "Canadian" or "Canadians" shall be read and construed as a reference to "WTO investor" or "WTO investors", respectively,

(ii) every reference in those provisions to "non-Canadian" or "non-Canadians" shall be read and construed as a reference to "non-Canadian, other than a WTO investor," or "non-Canadians, other than WTO investors," respectively, except for the reference to "non-Canadians" in subparagraph 27(d)(ii), which shall be read and construed as a reference to "not WTO investors".

(iii) every reference in those provisions to "Canadian-controlled" shall be read and construed as a reference to a "WTO Member", and...

[50] For example, suppose that the investor is from Guernsey (i.e., not presently a WTO Member), the investment would only be subject to the higher thresholds applicable to WTO Investors if it could be demonstrated that the entity is controlled by a non-Canadian, WTO Investor immediately prior to the implementation of the investment.

[51] This would not be as significant a problem in the case of a notification since it can be filed after closing.

[52] In this scenario, if the investor agreed to undertakings, would they still be binding if it later turned out that the investor was Canadian-controlled?

[53] That said, it is acknowledged that one may be able to infer the nationality of the beneficial owners through the identity of the registered holders (e.g. by inferring that where the registered holders are Canadian financial institutions, there is a reasonable likelihood that a substantial majority of the beneficial owners are Canadians, and vice versa).

[54] Alternatively, in the case of WTO Investor status, that the corporation is not controlled in fact through the ownership of its voting shares and that two-thirds of the members of its board of directors are non-Canadian, WTO Investors (e.g. U.S. citizens).

[55] We acknowledge that CSIR and IRD have both published their own notification and application forms. However, the usefulness of these documents assumes that investors are aware of the appropriate department or departments in which they must make their filings.

[56] (2001), 199 D.L.R. (4th) 130 at 156 (F.C.A.). Leave to the Supreme Court of Canada was denied: [2001] S.C.C.A. No. 252 (QL).