



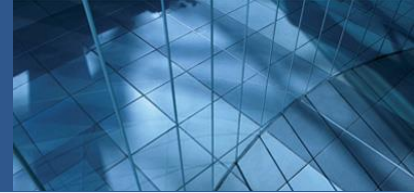
Investment Canada Today - Certainty or a Random Walk

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A. The Investment Canada Model

- Unconstrained Discretion
 - Broad Public Interest Test
 - net benefit
 - Political decision
 - No legal or specific accountability
 - Very opaque process
 - New add-ons
 - national security



A. The Investment Canada Model (cont'd)

- But not unique in the world
 - Australia
 - France
 - Others and growing



B. Comparison to Competition Act Merger Process

- *Competition Act* is very different
 - *Independent review*
 - *law enforcement*
 - *apolitical*
 - *Justiciable issues*
 - *doctrinal*
 - *standards*
 - *More transparent*



C. Evolution of Foreign Takeover Review in Canada

1. FIRA - Economic Nationalism Phase

- (1975-1985)

2. Market Dominance Phase

- Investment Canada
- (1985-2005)

3. Undertaking Creep Phase

- Minority governments
- Hollowing out transactions
- Tendency for one size fits all
- (2000-2012)



C. Evolution of Foreign Takeover Review in Canada

(cont'd)

4. Missionary Phase

- SOE Guidelines



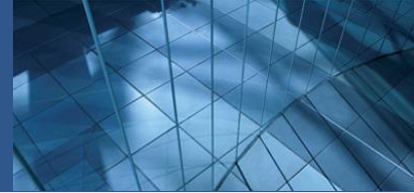
D. Illustrative Issues Today

1. New threshold standard - Enterprise Value
 - Wilson Panel
 - reaction to Nortel
 - Enterprise Value means
 - transaction value plus liabilities minus cash
 - Previous test was audited book value of assets



D. Illustrative Issues Today (cont'd)

- Current EV threshold of \$600 Million
 - May mean fewer reviews but
 - Less certainty.
- Less certainty because:
 - EV harder to determine in non-publicly traded companies
 - More complicated in hostile/multiple bidder situations
 - Is EV a great leap forward
 - Not sure
 - Thresholds arbitrary in any scenario



D. Illustrative Issues Today (cont'd)

2. Net Benefit gives very broad discretion

- Essentially public interest test
- Has been tendency to treat all transactions the same
 - “regulators regulate”
 - “regulation begets regulation”
- No real proof of overall benefit to Canada over time
- Should recognize process is very political and transactional
 - i.e., one size does not fit all
- Recent signs that is happening
 - Fast track for normal cases
 - Longer time / more undertakings for special situations



D. Illustrative Issues Today (cont'd)

3. SOE guidelines - talk about discretion

- Very open ended
- Not much experience yet
- One case on exceptional circumstances in oil sands
- Did Guidelines chill investment?
 - Directionally - yes
 - But general economic factors important

D. Illustrative Issues Today (cont'd)

4. Opaqueness - Confidentiality

- Tracing history demonstrates broad discretion
- Period in the 2005-2010 when much more transparency
- Government issued its own press statement
 - Or make applicants do so
 - Minority government a factor
- Now much lower profiles
 - Talisman / Repsol - one extreme
 - Burger King / Tim Horton's - the other
- Generally ICA seems to want less media

D. Illustrative Issues Today (cont'd)

5. National Security Reviews

- Added to ICA - but Industry Canada is not subject matter expert
- Extremely broad discretion
- Extreme opaqueness
- Extreme uncertainty
 - No guidelines
 - No clear institutional responsibility
 - No ability to really know case applicant must meet
- Timelines can be much longer
- Recent case more interventional than US - CFIUS rules



E. Conclusion

- ICA is here to stay - political safety value
- Some signs on “net benefit” that non-controversial deals easier
- But EV/SOE/National Security have significantly raised uncertainty
- Bottom line - who benefits? Advisors



For further information

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