

Strengthening the Investment Canada Act... in the name of Canadian jobs and the economy

The Investment Canada Act (ICA) is deeply flawed, and must be thoroughly overhauled. Workers at Electro-Motive in London, Ontario are now paying the price of government inaction and ineffective legislation.

The government plans to soon undertake a review process, so let's ensure the government strengthens the Act, *instead of making it weaker*. In addition releasing the terms of the Caterpillar acquisition, the CAW is calling for:

Improved Transparency: Currently the review process is entirely secretive, with Investment Canada refusing to even indicate whether an application has been received, let alone the terms and effects of that acquisition.

This leaves other stakeholders (including workers, communities, and lower levels of government) entirely in the dark regarding an acquisition and its significance. For example, by the time the CAW learned of the purchase of Electro-Motive by Caterpillar, the transaction was already completed.

There must be a more reasonable balance struck between the needs for confidentiality of acquiring businesses, and the needs for all affected economic stakeholders to know what could happen to them.

Stakeholder Input: Other stakeholders must have a legislative ability to provide their input to the foreign investment review process, through public hearings or other consultative mechanisms. This is a fundamental prerequisite for economic democracy.

Tighten up Loopholes: The idea that a \$330 million acquisition (the current threshold for WTO investors) is “too small” to matter, and should not be reviewed, is not credible – especially given a complete lack of transparency or independent verification regarding how that value is measured.

Similarly, the exemption of “indirect acquisitions” is an especially dangerous loophole, one that proved disastrous in the Electro-Motive Canada case. Current discussions regarding a potential business combination between Glencore and Xstrata provide another current example of the potential dangers of exempting indirect acquisitions.

Indirect acquisitions should be fully reviewable by the Investment Canada process if they meet the other criteria for review. Canadian jobs are on the line.

Defining and Measuring Canadian Costs and Benefits: The concept that a foreign investment must provide a “net benefit” to Canadians in order to be allowed to proceed, is in principle a valid one. The problem with the current ICA is that it provides no detail, transparency, or verification regarding how the costs and benefits of incoming foreign investments are to be contemplated, measured, and compared. In practice, this “net benefit” test has been mostly meaningless, except that it allowed the government (when pressed by political forces) to overrule exceptional acquisitions (namely, MDA in 2008 and Potash in 2011).

The new legislation should recognize the many dimensions of cost benefit analysis affecting foreign investments. It should downplay the one-time benefit received by Canadian financial investors as a result of a potential acquisition, and focus instead on the long-run net impact of the acquisition on Canadian production, employment, investment, and exports.

The fact that a foreign investor might be willing at a certain point in history to pay a premium price for the shares of a Canadian company (as occurred with several Canadian resource companies at the peak of the last resource cycle) should not lead government to approve acquisitions which subsequently cause long-run damage to Canadian facilities and production (as we have experienced painfully in the aftermath of the takeovers of Inco, Falconbridge, Alcan, and Stelco).

Imposing and Enforcing Commitments and Conditions: In the course of reviewing and approving foreign investments, an appropriately pro-active government would have many opportunities to negotiate commitments from the incoming investor that would enhance the net benefits to Canada. These could and should include commitments regarding its future Canadian production footprint, technology transfer, minimum employment and training commitments, and targets for investment and innovation activity. These commitments, once attached to an approved acquisition, must be publicly released and be subject to a more genuine enforcement process (including the imposition of financial penalties up to and including annulment of the acquisition) than has occurred to date.

The embarrassing experience of U.S. Steel, which thumbed its nose at its Investment Canada undertakings (and then bought itself out of those undertakings through an insulting, minimalist out-of-court settlement) demonstrates dramatically that government must be prepared to use meaningful powers of enforcement to ensure that the Investment Canada process is more than a token hoop for foreign investors to jump through.

February 10, 2012
amvcope343