CANADA

Oliver Borgers, Dominic Thérien , Erin Keogh

(McCarthy Tétrault LLP)

LAW AND POLICY

Policies and practices

1. What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Canada has a single foreign investment statute of general application, the Investment Canada Act, providing both for 'net benefit reviews' and reviews on national security grounds.

Net benefit review

The direct acquisition of control of a Canadian business by an entity that is ultimately controlled outside of Canada is subject to a suspensive mandatory pre-merger filing and approval when the applicable review threshold is exceeded. Although Canada welcomes foreign investment, in such circumstances, a non-Canadian investor will be required to satisfy the relevant minister that the transaction will likely be of 'net benefit' to Canada to obtain approval. It is typical for a non-Canadian investor to agree to give written undertakings to the government of Canada to secure approval.

The review threshold first varies as a function of the foreign investor: higher thresholds apply where the purchaser is a private-sector trade agreement investor, or a private-sector World Trade Organization (WTO) investor.

A lower threshold applies to trade agreement or WTO investors that are state-owned enterprises (or SOEs), and additional criteria are considered by the Canadian government in determining whether a reviewable investment by an SOE is of 'net benefit' to Canada.

A lower review threshold also applies where the Canadian business qualifies as a ‘cultural business’.

In limited circumstances where the acquired Canadian business is a cultural business or where the purchaser and target are ultimately controlled in a non-WTO member state, an indirect acquisition of control of a Canadian business (ie, the acquisition of control of a corporation outside Canada that controls the Canadian entity carrying on a Canadian business) may also be subject to a ‘net benefit review’.

If the relevant financial threshold for a ‘net benefit review’ under the Investment Canada Act is not met, an administrative notification form must be filed by the foreign investor any time before the acquisition of control of a Canadian business or within 30 days of the implementation. An administrative notification form must also be filed where a non-Canadian investor establishes a new Canadian business.

National security review

Since 2009, the Investment Canada Act also grants the Canadian government the power to review all proposed investments (including minority investments and the establishment of a new Canadian business) where the relevant minister has ‘reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security’. In late 2016, the Canadian government issued guidelines that shed some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review. The guidelines provided a list of factors that the Canadian government considers when assessing whether an investment poses a national security risk. These factors focused on defence, technology and critical infrastructure and supply.

In March 2021, the Canadian government released revised national security review guidelines, which both confirmed that SOEs will receive enhanced

scrutiny, provided a non-exhaustive list of sensitive technologies, and expanded the list of national security factors to include critical minerals and sensitive personal data.

In October 2022, the government announced a new policy setting out a stricter framework for evaluating foreign investments in both Canadian entities and Canadian assets in the critical minerals sector by both SOEs and private investors considered to be 'closely tied to, subject to influence from, or who could be compelled to comply with extrajudicial direction from foreign governments, particularly non-like-minded governments.' The policy states that investments in the critical minerals sector by SOEs and state-linked private investors pose 'inherent economic risk' and will be approved on only an 'exceptional basis' under the net benefit provisions. Further, the participation of an SOE or foreign-influenced private investor in an investment in a critical minerals business in Canada will 'support a finding' that there are reasonable grounds to believe that the investment could be injurious to Canada’s national security.

In December 2022, the Canadian government tabled Bill C-34: An Act to amend the Investment Canada Act. The proposed amendments expand the categories of investments subject to pre-implementation notification. The new regime would require pre-implementation notification, within a to-be prescribed period, of any investment in an entity carrying on all or any of its operations in Canada, whose operations: involved a to-be prescribed business activity; could result in the investor obtaining access to, or direct the use of, material, non-public technical information or material assets; and the investor would, as a result of the investment, have the power to appoint at least one board member, senior management, trustee or a general partner, or prescribed special rights with respect to the entity. The terms 'prescribed business activity' and 'material, non-public technical information or material assets' remain to be defined.

If each of these conditions is met, the investor would be barred from closing for at least 45 days after filing, thereby aligning the period for potential national security intervention with the current mandatory notification system. The stated rationale for this change is to increase government visibility over transactions where there is a risk of the investor acquiring – immediately on closing - access to sensitive assets, information, intellectual property or trade secrets, making post-closing national security enforcement ineffective in the eyes of the government.

Main laws

2. What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The Investment Canada Act is the main legislation that regulates investments by non-Canadians.

The Canadian Competition Act also provides for the review of investments, both for foreign and domestic investors. Further, investments in transportation businesses that exceed the pre-merger notification thresholds under the Competition Act may be subject to pre-closing review under the Canada Transportation Act.

Although the Investment Canada Act review process is a separate process from the Competition Bureau's review under the Competition Act, the Competition Bureau and the Foreign Investment Review and Economic Security Branch (FIRES) of the Department of Innovation, Science and Economic Development communicate and cooperate when both are reviewing the same transaction. For example, the effect of the investment on competition is one of the net benefit factors under the Investment Canada Act and the FIRES would generally not finalize its review and, accordingly, the relevant minister would generally not make a decision regarding the likely net benefit of an investment, until after the

Competition Bureau's analysis is complete. If there is any concern registered under the Competition Act, the relevant reviewing authority under the Investment Canada Act will generally encourage an applicant to deal directly with the Competition Bureau under the Competition Act. In April 2018, the Competition Bureau and the FIRES issued an administrative note formalizing the nature and scope of communication between the two organizations.

Further discussion regarding the application of the Competition Act and Canada Transportation Act is beyond the scope of this chapter.

Scope of application

3. Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Acquisition of control

A pre-merger 'net benefit review' or notification is only required where a non-Canadian acquires control of an existing Canadian business (notifications are also required for the establishment of a new business in Canada by a foreign investor).

The acquisition of control of a Canadian business is effected by acquiring:

- substantially all of the assets of a Canadian business; or
- the majority of the voting interests in an entity such as a corporation, partnership, joint venture or trust that carries on, or controls, a Canadian business (ie, de jure control test). For partnerships, joint ventures and trusts, 'voting interest' means an entitlement to profits and assets on dissolution.

The acquisition of a third or more of the voting shares of a corporation that controls, or carries on, a Canadian business will give rise to a rebuttable presumption that control has been acquired. The acquisition of less than a third of the voting shares of such a corporation is deemed not to be an acquisition of control.

Notwithstanding these deeming and presumption provisions, in the cases of cultural industries or SOEs, the Minister can look at control-in-fact evidence and make a determination that an acquisition of control has taken place.

Procedure

The Investment Canada Act, in essence, contains two procedures:

- non-Canadian investors that acquire control of Canadian businesses must, where the applicable review threshold is exceeded, submit their proposed investments for pre-closing review and 'net benefit' approval by the Canadian government; and
- non-Canadian investors must submit a notification (which can be filed post-closing) to the Canadian government when they acquire control of an existing Canadian business and the applicable review threshold is not met or when they start up new Canadian businesses.

A 'Canadian business' is defined as a business carried on in Canada that has a place of business in Canada, individuals in Canada that are employed in connection with the business, and assets in Canada used to carry on the business.

Once the non-Canadian investor submits a completed review application or notice, as applicable, the government screens the investment for the following purposes:

- in the case of an investment subject to the pre-closing review and approval procedure, it is assessed to determine whether it is 'likely to

be of net benefit to Canada';

- in the case of an investment that is subject to the notification procedure, with the exception of cultural businesses, the investment is not assessed for its net benefit to Canada;

- in the case of a 'cultural business', the notice may trigger a government decision to require a 'net benefit' review and approval procedure;

- the Minister may declare that the investor is controlled by a state-owned enterprise and/or that there has been an acquisition of control of the entity by a state-owned enterprise, as the case may be; and

- all applications and notifications filed under the Investment Canada Act are screened for and subject to review for potential national security concerns.

Special scrutiny

All investments (including minority investments) may be assessed to determine whether they could be injurious to Canada's national security under the national security regime (created in 2009). Until relatively recently, publicly available information regarding the Canadian government's approach to national security reviews has been scant. This lack of information, coupled with the fact that a number of important terms regarding the national security scheme are not defined in the legislation, created uncertainty for foreign investors. With the highly anticipated release of its Guidelines on the National Security Review of Investments in late 2016, the Canadian government shed some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review. In March of 2021, the Canadian government released revised national security review guidelines, which provided more detail on the process and factors for consideration.

Investments by SOEs are given special attention under the Investment Canada Act.

Reviews involving cultural businesses will also take into account government policies that limit investment by non-Canadians in such businesses.

New voluntary notification regime

As of 2 August 2022, non-controlling investments in Canadian businesses or establishments of new Canadian entities (that do not qualify as Canadian businesses under the Investment Canada Act) may be notified voluntarily, either before or after closing, pursuant to amendments to the National Security Review of Investments Regulations. This mechanism is intended to encourage investors to identify transactions with a higher national security risk profile proactively: investments voluntarily notified benefit from a short 45-day limitation period from filing, after which time the government is statutorily barred from initiating a national security review, whereas a five-year limitation period applies from closing for investments that are not notified.

Amendments before Parliament

In December 2022, the Canadian government tabled Bill C-34: An Act to amend the Investment Canada Act, which would expand the categories of investments subject to mandatory pre-implementation notification. The new regime would require pre-implementation notification, within a to-be prescribed period, of any investment in an entity carrying on all or any of its operations in Canada, whose operations: involved a to-be prescribed business activity; could result in the investor obtaining access to, or direct the use of, material, non-public technical information or material assets; and the investor would, as a result of the investment, have the power to appoint at least one board member, senior management, trustee or a general partner, or prescribed special rights with respect to the entity. The terms 'prescribed business activity' and 'material, non-public technical information or material assets' remain to be

defined.

If each of these conditions is met, the investor would be barred from closing for at least 45 days after filing, thereby aligning the period for potential national security intervention with the current mandatory notification system.

Definitions

4. How is a foreign investor or foreign investment defined in the applicable law?

Review under the Investment Canada Act is triggered by investments by 'non-Canadians'. Under the Act, 'non-Canadian' means 'an individual, a government or an agency thereof or an entity that is not a Canadian'. A 'Canadian' means:

- an entity that is Canadian-controlled; the Investment Canada Act sets out a number of tests and presumptions for determining whether an entity is Canadian-controlled (and therefore not a 'non-Canadian') (eg, an entity will be Canadian-controlled where Canadians own a majority of the voting interests in the entity);
- a Canadian citizen; or
- a permanent resident within the meaning of the Immigration Act (Canada) who has been ordinarily resident in Canada for not more than one year after the time at which he or she first became eligible to apply for Canadian citizenship.

The term 'non-Canadian' includes Canadian-incorporated entities that are ultimately controlled outside Canada.

For investments involving an SOE, there are special rules regarding the determination of 'non-Canadian', which broadens the reach of the Investment Canada Act.

Special rules for SOEs and SWFs

5. Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are specific SOE-related provisions under the Investment Canada Act in respect of the following: the definition of SOE, the threshold for review, control and acquisition of control rules, and 'net benefit' review.

Investments by SOE investors may also receive greater scrutiny under the Investment Canada Act. In 2012, following the approvals of two high-profile acquisitions by foreign SOE investors of Canadian businesses in the oil and gas sector, the Canadian government announced that investments by foreign SOEs to acquire control of a Canadian oil sands business will, going forward, be found 'to be of net benefit, only in an exceptional circumstance'. However, in 2017 the Liberal government stated that Canada welcomes Chinese investment, including in the oil sands.

On 28 October 2022, the government announced a new policy setting out a stricter framework for evaluating foreign investments in the critical minerals sector by SOEs and foreign-influenced private investor. The policy states that investments in the critical minerals sector by SOEs and state-linked private investors will be approved on only an 'exceptional basis' under the net benefit provisions. Further, the participation of an SOE or foreign-influenced private investor in an investment in a critical minerals business in Canada will 'support a finding' that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.

Definition of SOE

SOE is broadly defined under the Investment Canada Act. An SOE means:

- a foreign government or its agency;

- an entity that is controlled or influenced, directly or indirectly by a foreign government or its agency; and
- an individual acting under the direction or influence of a foreign government or its agency, directly or indirectly.

SOE review threshold

The higher review thresholds for private sector WTO or trade agreement investors based on the enterprise value of the acquired Canadian business do not apply to SOE investors.

The review threshold for investments by SOE WTO investors is C$512 million (2023) in asset value. This threshold is adjusted annually to reflect the change in nominal gross domestic product in the previous year.

Control and acquisition of control rules for SOEs

Subject to certain exemptions, where a transaction involves the 'acquisition of control' of a Canadian business by a non-Canadian and the acquired business exceeds certain financial thresholds, the transaction may be reviewable by the Canadian government under the Investment Canada Act. The Investment Canada Act contains specific provisions regarding both the determination of whether an entity is Canadian-controlled and the 'acquisition of control' where an SOE is involved.

Control

Under the Investment Canada Act, even if an entity qualifies as a Canadian (and, thus, not caught by the Investment Canada Act), the Minister may, nevertheless, determine that the entity is not Canadian if he or she determines that the entity is controlled in fact by an SOE. The effect of this rule is that it broadens the reach of the Investment Canada Act where a foreign state is involved. For example, the Minister's determination that an investor, which would otherwise be Canadian, is an SOE may give the Canadian government

the power to challenge the investment under the national security review regime. Similarly, the Minister can make a determination that a foreign investor is con trolled in fact by an SOE. The effect of this provision is that where the Minister determines that a foreign investor is controlled by an SOE and the investor is making an acquisition of control of a Canadian business, then the applicable review threshold is the lower SOE-specific threshold and not the significantly higher threshold for non-SOE investments.

Acquisition of control

The Investment Canada Act contains detailed deeming and presumption provisions to determine acquisition of control. Generally speaking, a minority investment is not an acquisition of control under these provisions and, as such, the investment would not be reviewable under the Act. However, notwithstanding these provisions, the SOE rules allow the Minister to make a determination that there has been an 'acquisition of control in fact' by an SOE. The effect of this is that an otherwise non-reviewable acquisition may be subject to review where it is made by an SOE and the lower SOE-specific review threshold is met.

The Minister may make the above determinations based on 'any information and evidence made available to the Minister'. Further, if an entity does not provide information that the Minister has requested and considers necessary to make the determination, the Minister 'may declare' that an entity is not a Canadian-controlled entity, the entity is controlled in fact by an SOE or that there has been an acquisition of control by an SOE.

The Minister's above determinations may be made retroactively. Consequently, any indirect or tangential involvement by a foreign state potentially gives rise to uncertainty. Because of the retroactive powers that the Minister of Innovation, Science and Industry has to review transactions, it is prudent for parties to consider the feasibility of pre-emptive consultation with the Minister and his or her staff.

Net benefit review of SOE investments

The Canadian government's SOE administrative guidelines provide that in determining whether a reviewable investment by an SOE is of 'net benefit to Canada', the Minister will examine the corporate governance and reporting structure of the non-Canadian investor as part of the assessment of the factors enumerated in the Investment Canada Act. This examination will include whether the non-Canadian adheres to Canadian standards of corporate governance (including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders), and to Canadian laws and practices, including adherence to free market principles. The Minister will assess the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, production and capital levels in Canada. The examination will also cover how and the extent to which the non-Canadian is owned, controlled by a state or its conduct and operations are influenced by a state. The Minister will also assess whether the Canadian business to be acquired will likely operate on a commercial basis, including with regard to:

- where to export;
- where to process;
- the participation of Canadians in its operations in Canada and elsewhere;
- the impact of the investment on productivity and industrial efficiency in Canada;
- support of ongoing innovation, research and development; and
- the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

An SOE should therefore anticipate that it will be required to provide undertakings beyond those normally expected of a privately owned company. Indeed, the SOE administrative guide lines state that non-Canadian investors will be expected to address the inherent characteristics of SOEs (specifically that they are susceptible to state influence) in their plans and undertakings. SOEs will also need to demonstrate their strong commitment to transparent and commercial operations. The SOE administrative guidelines also suggest undertakings that SOEs may offer to demonstrate 'net benefit', including the appointment of Canadians as independent directors on the board of directors, the employment of Canadians in senior management positions, the incorporation of the business in Canada, and the listing of shares of the acquiring company or the Canadian business being acquired on a Canadian stock exchange.

National security review of SOE investments

The Canadian government's revised national security guidelines, released in 2021, stated that all foreign investments by SOEs, regardless of value, will be subject to enhanced scrutiny under the national security provisions. What constitutes enhanced scrutiny is undefined. However, an SOE investor should expect that it may be subject to requests for additional information, longer reviews, and a higher risk of a formal national security review and order, which may block the deal, impose conditions, or mandate divestitures. In addition, the participation of an SOE or foreign-influenced private investor in an investment in a critical minerals business in Canada will 'support a finding' that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.

Relevant authorities

6. Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

For acquisitions reviewed under the Investment Canada Act, the FIRES of the Department of Innovation, Science and Economic Development is the government authority responsible for the administration of the Investment Canada Act for all investments, except those involving a cultural business.

The Department of Canadian Heritage (Cultural Sector Investment Review) is responsible for the administration of the Investment Canada Act for investments involving a cultural business.

The review of an investment is carried out by the FIRES or the Cultural Sector Investment Review (with respect to cultural matters), or both, who then make a recommendation to the relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage). The relevant minister decides whether the investment is likely to be of net benefit to Canada.

Where a national security review is commenced, additional government departments are consulted, including Public Safety Canada, the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, the Canada Border Services Agency and the Department of National Defence.

7. Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The Minister of Innovation, Science and Industry (or, for cultural transactions, the Minister of Canadian Heritage) will only approve the acquisition of control of a Canadian business if he or she is satisfied that the transaction is likely to be of net benefit to Canada. The Investment Canada Act specifies the information that the Minister shall take into account in satisfying himself or herself that the investment is likely to be of net benefit to Canada:

- information submitted by the investor;

- information submitted by the entity from which control of the Canadian business is being acquired;
- written undertakings given by the investor;
- representations by provinces of Canada that are likely to be significantly affected by the investment; and
- net benefit factors.

As long as the Minister has not taken into account factors that are not listed above, he or she may decide whether an investment is likely to be of net benefit to Canada and as such, whether a transaction is approved or rejected.

Transactions that could be 'injurious to national security'

A number of important terms in the national security review scheme are not statutorily defined, which creates wide discretion for the Minister of Innovation, Science and Industry (or the Minister of Canadian Heritage for cultural trans actions) and some uncertainty for foreign investors. However, the government's 2021 Guidelines on the National Security Review of Investments is instructive as to the type of investments that the government is likely to assess under the national security review regime.

PROCEDURE

Jurisdictional thresholds

8. What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

After concluding that the Investment Canada Act applies to an investment, the next step is to determine the appropriate screening procedure. Where a new Canadian business is established or an investment below the applicable review threshold is made, an administrative notification form must be filed. Whereas higher financial value acquisitions (and acquisitions of cultural businesses)

require a more onerous review procedure. To determine whether a review is required (versus an administrative notification form), one must examine the size of investment, whether the investor or the vendor is controlled in one or more countries that are members of the WTO, whether the investment is a private sector trade agreement investment, whether the investor is an SOE, whether the acquisition is direct or indirect, and whether the target's business is cultural or gives rise to national security concerns.

Higher review thresholds for private sector trade agreement and WTO investors

One of following two thresholds will apply to most direct acquisitions of control of Canadian businesses by non-Canadian, non-SOE investors from WTO member states:

- C$1.931 billion (2023) in enterprise value of the Canadian target for private sector trade agreement investors, or
- C$1.287 billion (2023) in enterprise value of the target for other non-SOE investors from WTO member states.

The higher trade agreement investor review threshold came into place in 2017 as a result of the Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act (CETA), and currently applies to non-SOE investors ultimately controlled in EU member states, the United States, the United Kingdom, Mexico, South Korea, Chile, Peru, Colombia, Honduras, Panama, as well as Australia, Japan, New Zealand, Singapore and Vietnam (under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership - CPTPP).

These two thresholds are adjusted annually to reflect the change in nominal gross domestic product in the previous year.

The Investment Canada Act provides for complex formulas for calculating the

enterprise value of Canadian businesses acquired by way of share (public or non-public entities) or asset acquisition.

Lower review thresholds

SOE WTO investors

The review threshold for investments by SOE WTO investors is C$512 million (2023) in asset book value.

Non-WTO investors

For direct acquisitions (see 'Indirect acquisitions', below), if both the purchaser and target are each ultimately controlled in a non-WTO member state (or Canada in the case of the target), the review threshold is C$5 million in asset book value.

Cultural businesses

Where the Canadian business being acquired is a cultural business and is directly acquired, the reviewable threshold is C$5 million in asset book value, regardless of whether the purchaser or vendor is ultimately controlled in a WTO member state. A 'cultural business' is a business that carries on any of the following activities:

- publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form;
- production, distribution, sale or exhibition of film or video products;
- production, distribution, sale or exhibition of audio or video music recordings; or
- publication, distribution or sale of music in print or machine-readable form.

Even if an acquisition by a non-Canadian of a 'cultural business' does not

trigger the statutory review threshold, a review may, nonetheless, be ordered where the 'Governor in Council considers it in the public interest'.

Indirect acquisitions

The above thresholds relate to direct acquisitions. If the investment is an indirect acquisition (acquisition of control of a corporation outside Canada that controls an entity carrying on a Canadian business) the following thresholds apply:

If the target is a cultural business or if purchaser and target are each ultimately controlled in a non-WTO member state (or Canada in the case of the target), the threshold for review is C$50 million in asset book value. However, if the Canadian assets being acquired comprise more than 50 per cent of all of the assets being acquired, the threshold for review is C$5 million in asset book value.

As a result, if the purchaser or target is from a WTO member state and the target is not a cultural business, an indirect acquisition of control of a Canadian business (ie, acquisition of control of a corporation outside Canada that controls an entity carrying on a Canadian business) is not reviewable. Instead, only notice of the investment must be given to the Canadian government (see 'Notification under the Investment Canada Act', below).

Transactions that could be 'injurious to national security'

The Canadian government has the power to review all proposed investments where the relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) has 'reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.' There is no statutory definition of 'national security'. No financial threshold applies to a national security review. A national security review can also apply to minority investments. This means that any equity transaction that involves a non-Canadian is potentially subject to a national

security review. After a national security review, the Minister may deny the investment, ask for undertakings, provide terms or conditions for the investment or, where the investment has already been made, require divestment. A national security review can occur before or after closing.

The major concern for foreign investors under a review for ‘national security reasons’ is that a number of important terms regarding the ‘national security’ review scheme have not been defined in the legislation. This lack of definition creates a wide discretion for the Minister and some uncertainty for foreign investors. At the end of 2016, the Canadian government released its highly anticipated Guidelines on the National Security Review of Investments, which sheds some light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review. The guidelines provide a list of factors that the Canadian government considers when assessing whether an investment poses a national security risk. These factors focus on defence, technology and critical infrastructure and supply. The Canadian government may take into account:

- the potential effects of the investment on Canada’s defence capabilities and interests;
- involvement in the research, manufacture or sale of goods and technology identified in section 35 of the Defence Production Act (Canada);
- the potential of the investment to enable foreign surveillance or espionage;
- the potential of the investment to hinder current or future intelligence or law enforcement operations;
- the potential impact of the investment on Canada’s international interests, including foreign relationships;

- the potential of the investment to involve or facilitate the activities of terrorists, terrorist organizations or organized crime and other illicit actors;

- the potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;

- the potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;

- the potential impact of the investment on the supply of critical goods and services to Canadians; and

- the potential impact of the investment on the supply of goods and services to the government of Canada.

In March of 2021, revised guidelines were released, which both confirmed that SOEs will receive enhanced scrutiny, elaborated on existing national security factors (such as what may constitute sensitive technology) and expanded the list of national security factors to include:

- the potential impact of the investment on critical minerals and critical mineral supply chains (Canada's critical minerals include: aluminum, antimony, bismuth, cesium, chromium, cobalt, copper, fluorspar, gallium, germanium, graphite, helium, indium, lithium, magnesium, manganese, molybdenum, nickel, niobium, platinum group metals, potash, rare earth elements, scandium, tantalum, tellurium, tin, titanium, tungsten, uranium, vanadium and zinc); and

- the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security

through its exploitation.

Within the last five years, formal national security reviews have been ordered at least 59 times, with increasing frequency in recent years. The outcomes of these reviews include: investor was directed to not implement the proposed investment (one case), investor was ordered to divest control of the Canadian business (ten cases), and, in 21 cases, the investor withdrew its application prior to a final order being made. Many more investments have been the subject of informal national security scrutiny that, for the most part, resulted in clearance.

Notification under the Investment Canada Act

If the relevant financial thresholds for review under the Investment Canada Act are not met, an administrative notification form must be filed by the investor any time before the implementation of the investment or within 30 days of the implementation.

Some of the more onerous reporting requirements include providing information in respect of the investor's board of directors, five highest paid officers and individuals or entities that own 10 per cent or more of the investor; whether the investor is influenced by a foreign state; and sources of funding for the investments.

Following receipt of the notice, the FIRES, the Cultural Sector Investment Review of Canadian Heritage, or both, as applicable, assess it for completeness and issue a receipt. Eventually, basic details identifying the investor, the target and the nature of the target's business will be disclosed on the department's website.

It is important to note that there are circumstances in which an investment that would not otherwise be reviewable (in other words, subject to notification) is subject to review under the Investment Canada Act.

Non-controlling investments in a Canadian businesses or establishments of new Canadian entities (that do not qualify as Canadian businesses under the Investment Canada Act) may be notified voluntarily, either before or after closing, pursuant to amendments to the National Security Review of Investments Regulations. However, as previously indicated, amendments are before parliament to require pre-implementation notification with respect to investments (controlling and non-controlling) involving certain to-be prescribed business activities.

National interest clearance

9. What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Application for review

A filing is mandatory for those transactions that are reviewable under the Investment Canada Act. A review is commenced by the completion and filing of an application for review. The purpose of a review is to satisfy the relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) that the investment 'is likely to be of net benefit to Canada'.

An application for review is a much more detailed document than the administrative notification form that must be filed where the applicable threshold is not met (or for the establishment of a new Canadian business), and requires much care in its preparation. A key element in the application for review is the requirement to set out the investor's plans for the Canadian business, including plans typically related to employment, participation of Canadians in the business, and capital investment.

Form and content of the application for review

The preparation of the application for review (which includes the application form stipulated by government) typically focuses on four main components:

- collection of data that is specifically required for the application form. For example, the investor will be required to provide information relating to:
    - its board of directors, five highest paid officers and individuals that own 10 per cent or more of the investor;
    - whether it is influenced by a foreign state; and
    - sources of funding for the investments;
- collection of supplementary information (the FIRES sets out supplementary information that the officials strongly suggest be submitted with the application for review);
- preparation of the plans for the Canadian business; and
- in most cases, preparation of a submission that outlines why the proposed investment is likely to be of 'net benefit' to Canada.

Plans for the Canadian business

The most important element of any application for review is the articulation of the investor's plans for the target following the acquisition. These plans are the key source of information upon which the relevant minister assesses whether the proposed investment is likely to be of 'net benefit to Canada'. Further, the plans are the primary input for the development of the undertakings that the investor is usually required to provide in order to secure approval. The application for review form requests a detailed description of the investor's plans for the Canadian business with specific reference to 'net benefit' factors and the current operations of the Canadian business. The FIRES suggests the following list of subjects for the plans:

- employment (number and type of jobs created or lost);
- additional investment (increased working capital provisions, expansion);
- resource processing (value added, extent of processing);
- utilization of parts, components and services (requirements of the Canadian business and opportunity for Canadian suppliers to compete in supplying them);
- exports (percentage of exports compared with total sales, markets served, types of products or services exported);
- Canadian participation (number of Canadians as employees, managers, directors and owners);
- productivity and efficiency (new or expanded plant, new equipment, rationalization of activities, training);
- technological development (nature of research and development (R&D), R&D expenditures and timing, R&D facilities, R&D contracts in Canada, use and terms and conditions to use licences, patents, etc);
- product innovation or variety (different or complementary product lines, state-of-the-art products); and
- international competitiveness (world product mandate, access to international distribution networks).

Filing fee

There are no filing fees under the Investment Canada Act.

Statutory timelines for review

Once the application for review is filed and certified as complete, the relevant

minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) initially has 45 days within which to decide whether or not the proposed acquisition is likely to be of 'net benefit to Canada'. Depending on the nature of the Canadian business, the review is carried out by the FIRES of the Department of Innovation, Science, and Economic Development, the Cultural Sector Investment Review of Canadian Heritage (with respect to 'cultural' matters), or both, which make a recommendation to the relevant minister. Other government bodies, such as provinces where the Canadian business operates and government agencies, such as the Competition Bureau, may be consulted in this process. The review process often includes negotiating undertakings that are requested by the reviewing authority, for instance, as to employment levels and location of important offices and facilities. This can lead to intensive negotiations between the investor and the government. When finalized, these under takings are legally enforceable by the government.

If the relevant minister is unable to reach a decision during the initial 45-day period then he or she can unilaterally extend the period for a further 30 days or such longer period as may be agreed on consent. These time frames can be further extended if national security issues surface. Upon the expiry of this period, the Minister must render a decision or he or she is deemed to be satisfied that the proposed acquisition is likely to be of net benefit to Canada.

If, at the end of the review period, the Minister sends a notice that he or she is not satisfied that the investment is likely to be of net benefit to Canada, the investor has the right, for 30 additional days (or such further period as may be mutually agreed), to make further representations and submit undertakings to the Minister. Upon the expiry of such additional period, the Minister will, in light of further undertakings or representations, either confirm the original conclusion or advise the applicant that the proposed transaction is approved.

Cultural businesses

Reviews involving cultural businesses will take into account government policies that limit investment by non-Canadians in such businesses. These policies apply to the publication, distribution or sale of books, magazines and periodicals, and the production, distribution, sale or exhibition of film or video products, or audio or video music recordings. As a practical matter, a non-Canadian investor will find it difficult to obtain Investment Canada Act clearance to acquire or establish a Canadian business in a number of these sectors. In other cultural businesses as well, and notwithstanding the lack of a particular sector policy, a non-Canadian investor will often find it a challenge to gain Investment Canada Act clearance. The Ministry has issued guidelines with respect to the types of issues and undertakings that applicants should be prepared to address during the review process.

Transactions that could be 'injurious to national security'

The Canadian government has the power to review all investments by non-Canadians on national security grounds. The entry point for national security screening will, in most cases, be the notification and review processes under the Investment Canada Act. Under the applicable regulations, the relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) has 45 days after an application or notification has been certified. For non-notifiable investments for which no voluntary notification is filed, the government has five years following implementation to initiate action. A transaction that is subject to a national security review after it has already been implemented can be unwound if the Governor in Council (ie, federal cabinet) makes an order directing the non-Canadian to divest itself of its investment or conditions could be imposed by order of the Governor in Council.

Where a transaction gives rise to national security risks, parties are advised to file notice of the transaction with the Minister more than 45 days (preferably 50 or more days) prior to the closing date in order to obtain a pre-clearance

(assuming the Minister does not order a further national security review).

The Minister initiates a national security review by sending notice to the non-Canadian investor. The Minister can, and likely will, also send a request for information. Following this preliminary procedure, the Minister can either terminate screening or issue another notice, this time ordering a full national security review of the investment. A full national security review could take up to 200 days (or longer with the consent of the investor) from the date of the initial notice of the transaction sent to the Minister.

The Minister can request information from the non-Canadian or any other person involved. The investor will also be given the opportunity to make representations to the Minister. The Minister considers the information, consults the Minister of Public Safety and Emergency Preparedness and other agencies and then sends a report to the Governor in Council with recommendations. The Governor in Council then makes a decision and can issue an order that blocks the investment, authorizes the investment on conditions or requires divestiture (in the case of a completed investment).

Once the national security screening process begins, the deadlines for ministerial decision-making in an Investment Canada Act 'net benefit' review are postponed. Thus, the two procedures become, in effect, merged and would presumably lead to a synchronized outcome.

10. Which party is responsible for securing approval?

The investor is responsible for filing an application for review or notification. However, where the acquisition is friendly, it is common for the Canadian business (ie, the target) or seller, or both, to assist the investor by providing supporting information regarding the Canadian business for the investor's application for review.

Review process

11. How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) initially has 45 days within which to decide whether or not the proposed acquisition is likely to be of 'net benefit to Canada'. If the relevant minister is unable to reach a decision during the initial 45-day period then he or she can unilaterally extend the period for a further 30 days or such longer period as may be agreed on consent. A very limited exception applies and would allow for an earlier closing where the Minister has sent a notice to the investor stating that a delay in closing the transaction would result in 'undue hardship' to the investor or 'would jeopardize the operations of the Canadian business'.

With respect to review time in the past year, of the five applications reviewed and approved under the net benefit provisions, it took an average of 97 days from certification to approval. The average period in 2021-22 was 88 days.

There are actions that the investor can take that may expedite the review process, including ensuring that the appropriate level of information is included in the application for review. The FIRES has stated on its website that the most frequent cause of delays in the review of applications is the lack of adequate information on the investor's plans for the Canadian business and suggests that plans be described in sufficient detail to enable the reviewing officer to obtain a clear understanding of their intentions. It is also typically helpful for applicants to provide three-year projections for the Canadian business for employment, sales, exports, capital expenditures and R&D expenditures, where relevant.

Once the application for review has been submitted, it is helpful to consider the three key stages of the review period and possible actions that an investor may take at or prior to each stage to expedite the review:

- intergovernmental consultation: depending on the nature of the proposed investment, the officials will interact with the provincial or territorial jurisdiction that is affected by the transaction, other federal government departments, as well as federal and provincial agencies;

- provision of additional information to the government representatives: often the timing of review is affected by the time it takes the investor to prepare and submit information to the government. To the extent that the investor is able to anticipate information likely to be requested by the government, preparation of that material should begin as soon as possible; and

- negotiating the content and scope of written undertakings to be given to the government, if any. To the extent that it is expected that undertakings will be required in support of a proposed transaction, this eventuality should be managed early on in the process. For example, draft undertakings should be prepared in anticipation of the Minister's request for undertakings so that once the request has been made, the negotiation of the undertakings can begin forthwith.

12. Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Subject to a limited exception (ie, the Minister has sent a notice to the investor stating that a delay in closing the transaction would result in 'undue hardship' to the investor or 'would jeopardize the operations of the Canadian business'), if a direct acquisition is reviewable, it cannot be completed without the approval of the relevant minister (the Minister of Innovation, Science and Industry or, for cultural trans actions, Minister of Canadian Heritage).

If a direct transaction is implemented before clearance is obtained, the Minister can seek a court order, which may require the investor to divest control of the

Canadian business, dispose of any voting interests or assets acquired by the investor or pay a penalty of up to C$10,000 for each day that the investor is in contravention of the Investment Canada Act, or all of these. An indirect acquisition of control (acquisition of control of a corporation outside Canada that controls an entity carrying on a Canadian business) can be completed before the Minister makes his or her decision.

Involvement of authorities

13. Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Early in the evolution of a reviewable transaction, and certainly if a public announcement has been made, it is commonplace to make a courtesy call to the FIRES or the Cultural Sector Investment Review (with respect to cultural matters), or both, to advise them of the proposed transaction. Generally, how ever, it is unusual for there to be any pre-filing dialogue or meetings between the investor and the reviewing agency.

With respect to investments that raise national security concerns, the Canadian government (in its Guidelines on the National Security Review of Investments), encourages investors to contact the FIRES at the earliest stages of the development of their investment projects to discuss their investment. These meetings may facilitate national security assessments and clarify information requirements that might be useful in the course of an assessment.

14. When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

In most cases, the investor will have legal and financial advisers engaged in respect of a proposed transaction. However, in some complex or sensitive

cases, the contribution of public relations and government relations experts can be valuable. Given the Canadian government's power to undertake a review for 'national security' and its special treatment of investments by SOEs, it is important for investors that expect to be affected by these types of reviews to develop an appropriate government relations strategy early on when making an investment in Canada that may be reviewable (including considering pre-filing consultations with key government officials). The Canadian government's recent rejections of investments based on national security grounds highlight the importance of early identification and careful management of sensitive issues. Careful consideration should be given, as soon as possible, to engaging experts whose experience can make the processing of a file smoother for both investor and government alike.

15. What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

National security review

Any transaction that involves a non-Canadian is potentially subject to a national security review, which can occur before or after closing. After the national security review, the Minister may block the investment, ask for undertakings, provide terms or conditions for the investment or, where the investment has already been made, require divestment. The Minister has 45 days after an application for review or notification has been certified to initiate a national security review. For non-notifiable investments and establishments of new Canadian entities, the government has 45 days after a voluntary notification has been certified to initiate action and five years following implementation if no voluntary notification is filed.

SOEs

There are provisions under the Investment Canada Act that significantly affect

foreign investors whom the Canadian government considers SOEs. The Minister has broad powers to declare an investor to be an SOE and to declare an otherwise non-reviewable acquisition by an SOE to be subject to review. Furthermore, the Minister may make these determinations retroactively.

Cultural businesses

Even if an acquisition by a non-Canadian of a 'cultural business' does not trigger the statutory reviewable thresh old, a review may, nonetheless, be ordered where the 'Governor in Council considers it in the public interest'.

SUBSTANTIVE ASSESSMENT

Substantive test

16. What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

If a transaction is subject to review, the relevant minister (the Minister of Innovation, Science and Industry or, for cultural transactions, the Minister of Canadian Heritage) must be satisfied that the transaction is likely to be of net benefit to Canada in order to approve the acquisition of control of a Canadian business. The factors that the Minister must consider in his or her net benefit determination are listed in section 20 of the Investment Canada Act:

- the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians;
- productivity, efficiency, technological development, product innovation and variety;
- competition in Canada;
- compatibility with national industrial, economic and cultural policies; and

- Canada's ability to compete in world markets.

The investor's plans for the target, articulated in the investor's application for review, are the key source of information upon which the Minister assesses whether the investment is likely to be of net benefit to Canada. On its website, the Investment Review Division has listed suggested subjects that investors are encouraged to elaborate on, where relevant, to assist staff in the assessment of the application for review.

SOE investors

For investments by state-owned enterprise (SOE) investors, the Canadian government has articulated specific factors that the relevant minister will examine as part of his or her assessment of net benefit factors listed above, with a focus on defence, technology and critical infrastructure and supply.

Transactions that could be 'injurious to national security'

The Investment Canada Act does not define the term 'national security'. This has created uncertainty for foreign investors. Until relatively recently, publicly available information regarding the Canadian government's approach to national security reviews has been scant. With the release of its Guidelines on the National Security Review of Investments in late 2016, the Canadian government shed some initial light on circumstances that may draw investors and parties involved in the investment into the realm of a national security review. In addition to these guidelines, the Canadian government's recent rejections, based on national security grounds, provide some indication of the type of business that the government considers within the purview of national security.

For example, consider Beida Jade Bird's proposal to build a new fire alarm systems factory and Accelero Capital Holdings's attempted acquisition of MTS Allstream. According to media reports, Beida Jade Bird's proposal to build a new fire alarm systems factory in Quebec was blocked because of the site's

proximity to Canadian Space Agency facilities located under two kilometers away.

In announcing that Accelero Capital Holding's acquisition would not proceed, the Minister referenced MTS Allstream's national fibre optic network, which provided critical telecommunications services to businesses and governments. On the other hand, in 2017, the Canadian government's decision to allow the sale of sensitive technology businesses may also provide some insight into what the government considers as raising significant national security concerns. In an unusual move, the Liberal government consented to setting aside an order (made by the previous Conservative government), which required O-Net Communications to divest its investment in ITF Technologies. In 2017, under a fresh national security review, the investment was allowed to proceed subject to conditions that have not been made public. Additionally, in 2017, the Canadian government was criticized when it decided not to subject Hytera Communications Co, Ltd's (a private Chinese communications company) acquisition of Norsat International Inc (a Canadian satellite company) to a formal national security review following the preliminary 45-day period. Critics from Canada (including two former directors of the Canadian Security Intelligence Service) and the United States said that the transaction should have received greater national security scrutiny, although in fairness to the officials and the Canadian government, the degree of depth of review in the preliminary phase is not known.

In 2018, after conducting a full-scale national security review, the Canadian government blocked CCCC International Holding Limited's (a Chinese SOE) proposed acquisition of Aecon Group Ltd (a Canadian construction company) because of concerns that the investor could control critical infrastructure projects.

In November of 2022, the government announced that it had required the divestiture of three separate and unrelated investments completed in 2022 by

Chinese investors; the Canadian companies are active with respect to lithium and, in certain cases, other critical minerals. Though the government's announcement did not provide any information on the nature of the government's concerns, the announcement did come days after the government's release of its critical minerals policy, which highlighted the strategic importance of critical minerals to Canada's and its allies' economic and military well-being.

17. To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The Canadian government will generally not consult with any foreign government in the context of a net benefit review. However, with respect to a national security review, it is possible, if not probable, that the Canadian government would interact with the international intelligence and security community.

Other relevant parties

18. What other parties may become involved in the review process? What rights and standing do complainants have?

The type of information that the relevant minister (the Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) shall take into account in satisfying himself or herself that the investment is likely to be of net benefit to Canada is limited to information submitted by the investor, information submitted by the entity from which control of the Canadian business is being acquired and representations by a province of Canada that is likely to be significantly affected by the investment.

Prohibition and objections to transaction

19. What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Although very few transactions have been rejected since the Investment Canada Act was created in 1985, there has been increased enforcement of the Act in recent years with some notable rejections of major transactions.

The relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) can seek a court order, which may require the investor to divest control of the Canadian business, dispose of any voting interests or assets acquired by the investor or pay a penalty of up to C$10,000 for each day that the investor is in contravention of the Investment Canada Act, or all of these:

- if an investor has failed to give notice of an investment or file an application for review;
- if a reviewable transaction is implemented before clearance is obtained;
- if a transaction is implemented on terms and conditions that materially vary from those contained in the application for review or any information provided in relation to the investment;
- if an investor has failed to comply with a written undertaking; or
- if an investor has entered into any transaction or arrangement primarily to avoid the application of the Investment Canada Act.

Bill C-34 proposes to raise the penalty to up to C$25,000 for each day of contravention.

20. Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

During the review period of an application for review, the investor will commonly be asked to submit written undertakings in support of its application (eg, commitments relating to employment levels and location of important

offices and facilities).

A written undertaking is a promise made by the investor to the relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage). The Minister will only approve the acquisition of control of a Canadian business if he or she is satisfied that the transaction is likely to be of 'net benefit to Canada'. Generally, the Minister will insist on written undertakings to support a positive 'net benefit' finding. The larger, or more sensitive, a transaction is, the more likely it is that undertakings will be required. Once finalized, these undertakings are legally enforceable by the government.

The content and scope of the undertakings are typically based on the business plans contained in the application for review. Although each transaction is different, undertakings often focus on Canadian employment levels, Canadian participation in management, Canadian capital expenditure levels, Canadian R&D commitments and the use of Canadian suppliers and businesses.

Undertakings typically last for three years, although they can run longer. During that period, the government can ask for status reports; this is usually done at the 18-month mark. Where market conditions change such that the investor cannot reasonably be expected to abide by the undertakings, the government will sometimes negotiate amendments, although there is no legal requirement for the government to do so.

To the extent that the foreign investor expects undertakings will be required in support of a proposed transaction, this eventuality should be managed early on in the process.

In the context of a national security review, measures to mitigate potential harm to national security may also be imposed through conditions in a section 25.4 Order on the investment. Examples of potential mitigating measures include:

- requiring government approval of proposed business locations to avoid

proximity to strategic assets;

- requiring that all servicing and support for some or all business lines is conducted in Canada;
- creating approved corporate security protocols to safeguard information and access to a site;
- requiring engagement of a security-cleared compliance officer to ensure and report on compliance;
- requiring access to facilities for compliance inspection;
- requiring employees with access to sensitive information to attest to compliance with approved security protocols;
- notifying existing customers of pending new ownership;
- providing notice to the Minister of new prospective employees who would have access to sensitive information or technology as a part of their job description; and
- excluding sensitive business segments or assets from a transaction.

Bill C-34 would revise the mitigation process in national security reviews. As is, only the Cabinet has the jurisdiction to accept undertakings or impose terms and conditions. As there is no opportunity for an investor to interact with Cabinet, this is a one-sided and inflexible process. Once in force, the amendments would empower the Minister to negotiate binding undertakings with the investor, and to clear an investment on the basis of those undertakings. This approach has the potential to act as a flexible middle-ground, allowing the Minister formulate appropriate conditions through discussions with the investor, rather than relying on Cabinet to approve their conclusion and impose mitigation, resulting in more tailored remedies overall. Further, Bill C-34 would empower the Minister to impose interim measures as well.

Challenge and appeal

21. Can a negative decision be challenged or appealed?

There is no right of appeal where the relevant minister (Minister of Innovation, Science and Industry or, for cultural transactions, Minister of Canadian Heritage) decides that an investment is not likely to be of 'net benefit to Canada' and does not approve the investment.

In 2015, for the first time, the national security review process was challenged when the investor applied for judicial review of the Canadian government's order for the investor to divest it investment on the basis that the investment would be injurious to national security.

The action was settled out of court. A similar second judicial review was initiated in 2021 and is currently ongoing.

Confidential information

22. What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Section 36 of the Investment Canada Act provides that information obtained by the relevant minister is privileged and no one shall knowingly communicate or allow to be communicated any such information. Anyone (including government officials) who contravenes section 36 of the Act is guilty of a criminal offence punishable on summary conviction. These confidentiality protections are subject to certain exceptions, including information contained in any written undertaking given to the government (even though the undertaking may contain sensitive information). Despite the government's right to disclose certain information, it has been the government's policy not to exercise the right of disclosure without investor consent. It is therefore common for the investor and the government to negotiate and agree on what information can be

made public. The Minister has a desire to communicate to the public the outcome of a review and the basis for his or her conclusions, whereas the investor typically has an interest in keeping most of the information confidential. Usually the officials and the Minister are amenable to striking a compromise that balances the interests of both sides. It is not unusual for the scope and content of press releases and speaking notes to be discussed and reviewed in advance.

RECENT CASES

Relevant recent case law

23. Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Rejections of investments and enforcement activity are relatively rare, but appear to be escalating. The government has shown that it will avail itself of the powers it has under the Investment Canada Act to reject foreign investments based on national security concerns. Since the national security review process was introduced in March 2009, which provides the government with formal powers to prohibit or unwind foreign investments on the basis of national security concerns. Formal national security reviews have been ordered at least 59 times in the past five years, with increasing frequency in the past three years. These cases highlight the importance of early identification and careful management of sensitive issues. Now more than ever, before bringing a deal that raises such sensitivity to the Minister for approval, it is critical for investors and their advisers to carefully evaluate whether there is a sufficient basis for the Minister to reach a positive conclusion.

Rejections

In recent years, the Minister has disapproved only a handful of transactions, although there have been other transactions were abandoned when it became

clear that Investment Canada Act approval would not be obtained.

In May 2008, the Minister decided that the over C$1 billion sale of Macdonald, Dettwiler and Associates Ltd to US-based Alliant Techsystems Inc was not likely to be of 'net benefit to Canada'. This transaction was likely blocked because of reasons relating to national sovereignty and security. Although no formal reasons were given, many believe that the government was concerned about the loss of Canadian control over satellite technology (developed with govern mental financial support) that could be used for surveillance of Canada's northern territories.

In November 2010, BHP Billiton withdrew its unsolicited take-over bid for the Potash Corporation of Saskatchewan after the Minister delivered a rejection of the bid at the end of the review period, despite BHP Billiton's undertakings that were, in the words of BHP Billiton, 'unparalleled in substance, scope and duration'.

In October 2013, the Minister blocked the proposed C$520 million acquisition of the Allstream division of Manitoba Telecom Services Inc. by Accelero Capital Holdings on national security grounds. This is the first known rejection of a transaction under the Act's national security review regime, which was introduced in 2009. The Minister provided the following singular statement as the reason for the rejection: 'MTS Allstream operates a national fibre optic network that provided critical telecommunications services to businesses and governments, including the Government of Canada'.

In 2015, according to Canadian media reports, a Chinese SOE's investment to establish a new Canadian business was blocked on national security grounds. Beida Jade Bird's proposal to build a new fire alarm systems factory in Quebec was blocked based on national security grounds because of the site's proximity to Canadian Space Agency facilities located under two kilometers away. Beida Jade Bird planned on building fire-alarm systems for the Chinese market. Interestingly, the Quebec government had given Beida Jade Bird C$3 million in

loans and a C$1 million grant in respect of its project. At the time, the Quebec government indicated that it was continuing to assist Beida Jade Bird, saying that the company plans to locate its factory elsewhere, likely still in Quebec.

In 2015, O-Net Communications was ordered to divest its investment in ITF Technologies. O-Net challenged the order and, in an unusual move, the government consented to setting aside the order. Under a fresh national security review, the investment was allowed to proceed subject to conditions that have not been made public.

In 2018, after conducting a full-scale national security review, the Canadian government blocked CCCC International Holding Limited's (a Chinese SOE) proposed acquisition of Aecon Group Ltd. (a Canadian construction company) because of concerns that the investor could control critical infrastructure projects.

In 2020, the Canadian government blocked the proposed acquisition of TMAC Resources Inc (owner of the Hope Bay gold mine in Nunavut) by a Chinese SOE, Shandong Gold Mining Co Ltd. The government provided no public explanation for the decision.

In August 2021, after operating in Canada for several years, China Mobile Communications Group was ordered by the Canadian government to shut down or divest its Canadian operations because of national security concerns. The company applied for judicial review of the government's decision and brought a motion to stay implementation of the order pending determination of its application. The Federal Court of Canada denied the motion to stay in December 2021. China Mobile also pursued an order compelling production of the material relevant to the application and the Governor in Council's order before both the Governor in Council and the Minister. This was ultimately denied, and the Federal Court of Canada upheld this decision in October 2023. The judicial review is ongoing as of the time of the preparation of this article.

In 2022, the government required the divestiture of three separate and unrelated investments completed by Chinese investors; the Canadian companies are active with respect to lithium and, in certain cases, other 'critical minerals'. The government provided no public explanation for the decisions.

Challenges

For the first time, the Investment Canada Act's national security review process was challenged in 2015. According to materials filed before the Federal Court of Canada in 2015, O-Net Communications applied for judicial review of the Canadian government's (Governor in Council's) order to divest its investment in ITF Technologies (a specialty fibre components and modules provider in Quebec) on the basis that the investment would be injurious to national security. O-Net is a high technology company (optical networking, automation and touch panels) listed on the Hong Kong Stock Exchange. In its application, O-Net argued that it was not provided with the basis of the decision nor was it provided with an opportunity to respond. O-Net also argued that its investment is not a threat to national security. However, references to military applications on ITF Technologies' website at that time may provide some insight into the possible cause for the government's national security concern: 'ITF specializes in high-level solutions for specialized photonic applications such as underwater transmission, military manufacturing and manufacturing systems.' In an unusual move, the new Liberal government consented to setting aside the order, which was made under the previous Conservative government. The judicial review was settled. Under a fresh national security review of the transaction in 2017, the Liberal government allowed the transaction to proceed subject to conditions that were not made public.

In 2021, China Mobile Communications Group applied for judicial review of the Governor in Council's decision to require the winding-up or divestiture of its business, which had been operating in Canada for five years, and brought a motion to stay implementation of the order pending determination of its

application. The Federal Court of Canada denied the motion to stay in December 2021. The company also pursued an order compelling production of material relevant to the application and to the Governor in Council's order. This was ultimately denied, and the Federal Court of Canada upheld this decision in October 2023. The judicial review is ongoing.

Enforcement activity

In July 2009, in its first and only enforcement action, the Canadian government sued US Steel for breaching its undertakings to maintain minimum levels of employment in connection with its 2007 acquisition of Stelco Inc. acquisition. The acquisition was subject to review and approval under the Investment Canada Act. As part of the approval process, US Steel made undertakings (including production and employment commitments) to the Canadian government to demonstrate that the acquisition was likely to be of net benefit to Canada. In March 2009, US Steel shut down two Canadian plants, cit ing market conditions as forcing the closures and layoffs. In July 2009, the Canadian government, not satisfied that US Steel was honoring its commitments, sought a court order requiring US Steel to comply with its undertakings on production and employment. This represented the first time that the Canadian government had sought a court order to enforce undertakings under the Investment Canada Act. Up until December 2011, US Steel and the Canadian government were involved in legal proceedings in connection with the government's 2009 application. In December 2011, the then Minister of Industry, Christian Paradis, announced that 'US Steel has given significant new and enhanced undertakings under the Investment Canada Act that provide the basis for the government to settle its lawsuit against US Steel.' Former Minister Paradis accepted US Steel's new commitments (many of which ran to 2015) and requested that the Attorney General of Canada discontinue the court action against US Steel.

There has been a slow escalation of the rigour of enforcement of the

Investment Canada Act by the Minister of Innovation, Science and Industry over the past years, as evidenced by the increase in the length of reviews and the scale and scope of written undertakings that foreign investors are required to give the Minister to secure approval.

UPDATE AND TRENDS

Key developments of the past year

24. Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

Increased transparency with respect to national security reviews

Since being established in 2009, Canada's national security review process has been somewhat of a 'black box' in terms of transparency, with investors left in the dark as to the government's concerns with their particular investment through much of the process, and with prospective investors left in the dark as to the nature of the reviews that had historically taken place. As a practical matter, it is our experience that foreign investors receive limited transparency during the national security review process.

The degree of transparency improved somewhat in 2017-2018, when for the first time the government's Annual Report included details of investments that have been subject to review since 2012. Investments are segmented by industry, nationality of the investor, and outcome. The report shows that very few investments are subject to a national security review – in 2022-2023, only 22 (2.18 per cent) of the 1,010 investments for which notifications or applications were submitted received notices for review. The report also indicates that since 2018, 59 investments have been reviewed, one of which was blocked, 10 had divestitures, an unknown number had conditions imposed, and 21 were withdrawn. Of these 59, the investments derived from a combination of

countries, including China, Russia, Jordan, Cyprus, France, Switzerland, Egypt, Finland and the United Kingdom, and from the industries ranging from pharmaceuticals and computing to manufacturing and mining.

Moreover, the revised national security review guidelines released in March of 2021, provided further clarity on which transactions may attract scrutiny. The revised guidelines stipulated that SOE investors would be subject to enhanced scrutiny due to concerns regarding their non-commercial orientations and provided a more detailed overview of which Canadian industries may be sensitive from a national security perspective.

Finally, in November 2022, the government announced that limited details on national security reviews that result in a decision by the Federal Cabinet will be published moving forward, signaling that the government is committed to increasing the transparency with which it administers the ICA.

More national security reviews

The 45 national security reviews ordered since 2020 make up over 75 per cent of the 59 national security reviews ordered since the national security provisions were added to the Investment Canada Act in 2018. Accordingly, the potential risk of national security review should be evaluated on every transaction. This is especially so for SOEs, which have been targeted for enhanced scrutiny under the revised guidelines.

Amendments on the table

In December 2022, the Canadian government tabled Bill C-34: An Act to amend the Investment Canada Act, which – among other changes – would expand the categories of investments subject to pre-implementation notification. The new regime would require pre-implementation notification, within a to-be prescribed period, of any investment in an entity carrying on all or any of its operations in Canada, whose operations: involved a to-be prescribed business activity; could result in the investor obtaining access to, or

direct the use of, material, non-public technical information or material assets; and the investor would, as a result of the investment, have the power to appoint at least one board member, senior management, trustee or a general partner, or prescribed special rights with respect to the entity. The terms 'prescribed business activity' and 'material, non-public technical information or material assets' remain to be defined.

If each of these conditions is met, the investor would be barred from closing for at least 45 days after filing, thereby aligning the period for potential national security intervention with the current mandatory notification system. The stated rationale for this change is to increase government visibility over transactions where there is a risk of the investor acquiring – immediately on closing - access to sensitive assets, information, intellectual property or trade secrets, making post-closing national security enforcement ineffective in the eyes of the government.

Bill C-34 also seeks to increase the penalties for non-compliance, empower the Minister to impose interim measures and clear investments subject to mitigation, and allow for international cooperation between intelligence agencies over the course of a review.

**** The information in this chapter was accurate as at November 2022.***