Raising The Curtain On Canadian National Security Reviews: 2015-16 Investment Canada Act Report

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Innovation, Science and Economic Development Canada ("ISEDC") has published its Annual Report on the *Investment Canada Act* (the "ICA") for the fiscal year 2015-2016 (the "Report"). The ICA is Canada's foreign investment review statute. The Report discloses statistics concerning ISEDC's review of transactions subject to the ICA. Notably, the Report includes for the first time information about ISEDC's administration of the national security provisions of the ICA since those provisions were introduced in 2009.

This alert highlights the Report's disclosures concerning the administration of the national security review provisions of the ICA.

Results of National Security Reviews

The national security provisions of the ICA came into effect in March 2009. Between that date and March 31, 2016, ISEDC has received 4,359 notifications of proposed investments subject to notification requirements, and 112 applications for review of proposed investments. It appears that pursuant to the ICA, ISEDC has recommended that the Governor-in-Council (the "GIC") order eight national security reviews of investments, as broken down below:

April 2012 – March 2013	April 2013 – March 2014	April 2014 – March 2015	April 2015 – March 2016
2	1	4	1

Among the eight national security reviews ordered by the GIC: three resulted in directives not to implement the proposed investment; two resulted in orders that the non-Canadian investor divest control of the Canadian business; and two resulted in authorization of the proposed investment subject to conditions to mitigate the associated national security risk. One review resulted in the proposed investment being withdrawn prior to the issuance of a final order.

Guidance Concerning the Administration of the National Security Provisions

The Report also provides some additional guidance about how ISEDC administers the foreign investment provisions of the ICA. This is a welcome development, given the generally opaque nature of the national security review process.

Screening of transactions for national security review under the ICA is conducted by ISEDC in conjunction with Canada's national security agencies. After initial screening, further examination may be initiated through a recommendation to the GIC from the Minister of Innovation, Science and Economic Development (the "Minister") after consultation with the Minister of Public Safety and Emergency Preparedness.

If an investment is subject to the ICA's notification requirements, the Minister has 45 days after receiving notification (which can be unilaterally extended up to an additional 45 days) to seek an order from the GIC initiating a national security review. For investments that do not require notification, the Minister has up to 45 days from the implementation of the investment to seek such an order. If an investment is reviewed after implementation, the review may result in an order unwinding the investment if it is found to be injurious to national security.

In cases where an application for review or notification has not been properly filed, ISEDC may advise the non-Canadian investor of its obligations under the ICA and may also require the non-Canadian investor to provide information necessary to determine whether an investment could be injurious to national security. In conducting a national security review ISEDC may also require non-Canadians, or businesses involved in a proposed or implemented investment by a non-Canadian, to provide information required to conduct the national security analysis. The issuance of such a request for information does not necessarily imply that the GIC either has or will order a national security review.

By

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