Foreign investment in Canada: Understand the review process

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This article is part of a practical series written for international companies looking to establish, launch, operate or invest in a business Canada. Each article covers a major area of law in Canada – everything from employment laws to taxes. Access all the articles on the "Doing business in Canada: A practical guide from 'Eh' to 'Zed'" page.

Generally, there are few restrictions on foreign investment in Canada. However, foreign investment in Canada has been subject to some type of screening or review for nearly 40 years, and some sectors are subject to restriction at the federal and/or provincial levels. Such review generally occurs pursuant to the *Investment Canada Act*, a federal law that generally applies to investments to acquire Canadian businesses or to establish new Canadian businesses by "non-Canadians"–a term that includes any person who is not a Canadian citizen or permanent resident of Canada, as well as any entity that is not ultimately controlled by Canadians.

The *Investment Canada Act* contains two separate foreign investment review processes: (i) the review of significant investments in Canada involving acquisitions of control of a "Canadian business" by non-Canadians to ensure they are of "net benefit" to Canada ("**Net Benefit Review** "); and (ii) a national security review process that is applicable to any investments by a non-Canadian, including non-controlling investments, to determine if it would be "injurious to national security" ("**National Security Review** ").

In recent years, the National Security Review process has emerged as the key foreign investment screen, and even more recent changes have enhanced Canada's ability to screen and potentially block investments that could be injurious not only to national security, which encompasses a broad range of potential harms, including but not limited to defence and economic security.

Net Benefit Review

Under the Net Benefit Review process, a non-Canadian seeking to establish a new business or acquire control of an existing Canadian business must file either:

- a straightforward "**Notification** " of the investment; or

- a much more detailed "**Application for Review** ".

A "Canadian business" is defined as a business carried on in Canada that has:

- a place of business in Canada;
- an individual or individuals employed or self-employed in connection with the business; and
- assets in Canada used in carrying on the business.

Current ownership or control of the business is not relevant in this determination. Therefore, foreign-owned entities operating in Canada will still be considered "Canadian businesses".

Subject to rarely applicable special provisions that can apply to cultural businesses, Net Benefit Review only applies to "acquisitions of control" of a Canadian business or substantially all of its assets. For share/interest acquisitions, the acquisition of more than one-third of the voting interests in an entity is presumed to be an acquisition of control, but this presumption can be rebutted if it can be shown that control was not acquired in fact. The acquisition of more than half of the voting interests in an entity is irrebuttably deemed to be an acquisition of control.

A Notification can be filed at any time up to 30 days after closing of an investment (or establishment of a new business). However, where an Application for Review is required, it must be filed prior to closing and a waiting period applies to prevent closing until the Minister of Innovation, Science and Economic Development (or, in the case of cultural businesses, the Minister of Canadian Heritage) (collectively, the "**Minister**") determines that the proposed investment will be of "net benefit" to Canada.8 The initial waiting period is 45 days from the filing of a complete Application for Review, but the Minister may unilaterally extend this by a further 30 days, and can also seek further extensions on the consent of investors, and investors practically have little choice but to consent. The review period is also extended automatically if the investment is subjected to the National Security Review Process. Generally, once an Application for Review has been filed, the investor cannot make the proposed investment until after the Minister has made a positive determination that the investment will be of "net benefit" to Canada.

The obligation to file a Notification or an Application for Review under the *Investment Canada Act* falls solely on the non-Canadian making the investment. The Canadian business or vendor involved has no filing obligations, although commonly it will assist the investor by providing information necessary to complete the required filing. There is no filing fee associated with either a Notification or an Application for Review.

Applicable Thresholds an Application for Review

Acquiring control of an existing Canadian business by a non-Canadian requires an Application for Review if the value of the Canadian business being acquired exceeds one of the following applicable thresholds:

- C$2.079 billion[1] in "enterprise value"[2] if the investor is a "**trade agreement investor**"[3] and not a state-owned enterprise ("SOE"), or the investor is a not a

trade agreement investor and not an SOE but the Canadian business being acquired is controlled by a trade agreement investor;

- C$1.386 billion[4] in "enterprise value" if the investor is not a trade agreement investor or SOE but is a "**WTO investor**"[5], or if the investor is a non-WTO investor and not an SOE and the Canadian business being acquired is controlled by a WTO investor. (Note: this applies only to direct acquisitions. Indirect acquisitions by any WTO investor, including SOE's, are not reviewable under the Net Benefit Review provisions, but are subject to Notification. This exception does not apply to non-WTO investors or to acquisitions of cultural businesses);
- C$551 million[6] in assets if the investor is a WTO investor *and* an SOE or if the investor is a non-WTO investor and an SOE, but the Canadian business being acquired is controlled by a WTO investor;
- C$5 million in asset value for direct acquisitions and C$50 million in asset value for indirect acquisitions[7] in those rare cases where the investor is not a WTO investor and the Canadian business is not controlled by a WTO investor;
- C$5 million in asset value for direct acquisitions and C$50 million in asset value for indirect acquisitions for any acquisition of a **cultural business** (including the publishing, distribution or sale of books, magazines, newspapers, films or music); and

In addition to and notwithstanding any of the above, any investment that is usually only notifiable (including the establishment of a new Canadian business) and that relates to Canadian cultural heritage or national identity may be reviewable at the discretion of the Minister of Canadian Heritage.[8]

Additionally, amendments to the *Investment Canada Act* which have been passed but will not take effect until a date to be determined by the government (currently not expected to be implemented until 2026) will impose new preclosing filing requirements for foreign investments of any size in "prescribed" sensitive sectors–e.g., critical minerals (such as lithium for batteries), advanced technology (such as AI or semiconductors), or cultural assets (such as media)–if the investment grants access to material non-public information (e.g., proprietary data) or assets, or the right to appoint directors or senior management. These will apply even if the thresholds requiring an Application for Review set out above are not exceeded.

Substantive Net Benefit Review Factors

The factors that must be considered by the Minister in a determination as to whether an investment will be of "net benefit" to Canada are the:

- Effect of the investment on the level and nature of economic activity in Canada including the effect on:
  - employment;
  - resource processing;
  - utilization of parts, components and services produced in Canada;
  - exports from Canada.
- Significance of participation by Canadians in the existing or proposed business and in any industry in Canada of which the business forms or would form a part.
- Effect of the investment in Canada on:
  - productivity;
  - industrial efficiency;

    - technological development;
    - product innovation;
    - product variety.
- Effect of the investment on competition within any industry in Canada.
- Compatibility of the investment with national or applicable provincial industrial, economic and cultural policies.
- Contribution of the investment to Canada's ability to compete in world markets.

The Minister has issued additional guidelines which apply to investments by foreign SOEs. In particular, the ICA and policy pronouncements by the Government of Canada prohibit foreign SOEs from acquiring control of Canadian oil sands businesses, and significant additional scrutiny is typically applied to SOEs under the Net Benefit Review process across industries. For example, on October 28, 2022, the GoC released the Critical Minerals Policy, which provides that given the strategic importance of critical minerals and inherent economic risks posed by foreign SOEs, Net Benefit Review "applications for acquisitions of control of a Canadian business involving Critical Minerals by a foreign SOE will only be approved on an exceptional basis."[9]

Other than major investments by SOEs, significant investment in Canada is rarely blocked following a Net Benefit Review under the ICA. In almost all instances, however, negotiated undertakings relating to the investor's operation of the Canadian business going forward are given by the investor as a condition of the Minister's approval of an investment following an Application for Review. Such undertakings are negotiated between the Minister and the investor, and their terms are normally kept confidential. The precise scope and term of these undertakings vary, depending on the specific transaction involved and the investor's future plans for the business, as set out in its Application for Review. Once agreed to as part of an approved Application for Review, such undertakings then become enforceable against the investor and, post implementation, the investor is normally required to report to the Minister regularly concerning the investor's progress in meeting its undertakings.

National Security Review

The National Security Review process is a separate part of the *Investment Canada Act* from the Net Benefit Review process. Any direct or indirect investment in Canada by a non-Canadian, **regardless of value or whether it confers control** , can be subject to a National Security Review, if the investment raises national security concerns. If the investment is determined to be potentially injurious, it can be blocked completely or permitted to proceed only on terms and conditions acceptable to the Minister or Governor in Council (effectively, the federal Cabinet). If the investment has already been undertaken, the federal Cabinet can order divesture.

The National Security Review Timelines

If the Minister has reasonable grounds to believe that a proposed or implemented investment by a non-Canadian could pose a national security risk, they may send the investor a notice that an order for a National Security Review of the investment may be made. The deadlines for such a notice to be issued depend on what, if anything, the investor is required to file under the Net Benefit Review process:

- If an investment requires a Notification or Application for Review, the National Security Review process can be initiated at any time up to 45 days after the complete Notification or Application for Review is filed.
- If an investment does not require a Notification or Application for Review (such as non-controlling investments), the deadline depends on whether a "**Voluntary Notification**", which is very similar in content to a Notification, is filed:
    - If a Voluntary Notification is filed, the National Security Review process can be initiated at any time up to 45 days after filing.
    - If a Voluntary Notification is not filed, the National Security Review process can be initiated at any time up to five years after closing.

Once the National Security Review process is invoked, the Minister has up to 135 days to conduct the review, and can also seek further extensions on the consent of investors, and investors practically have little choice but to consent. The entire National Security Review process can range from 45 days to over a year, depending on the complexity of the case. During fiscal 2023-24, the average duration of completed National Security Reviews was 163 days. Generally, once the National Security Review process is commenced, if it has not already been closed, the investor cannot complete the investment until after the process is concluded.

Substance of the National Security Review Process

In recent years, the National Security Review process has emerged as the key foreign investment screen – and the recent changes to the ICA have further enhanced Canada's ability to screen and potentially block investments that could be injurious not only to national security but now, economic security, as announced by the government with clear but unstated reference to the Trump administration's ongoing trade actions.

In conducting a National Security Review, the Minister must consult with the federal Minister of Public Safety and Emergency Preparedness. The Minister also is expected to consult with numerous other federal departments and agencies as part of the review, including the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, the Canada Border Services Agency and the Departments of Justice, National Defence, Transport, Health, Finance and Immigration, Refugees and Citizenship Canada.

The ICA does not define national security, but the recently updated Guidelines on the National Security Review of Investments, sets out the approach the government will take in reviewing foreign-controlled inbound investments. In practice, the NSR provisions have been interpreted to scrutinize investments by non-Canadians which could:

- Negatively impact public health or the supply of critical goods and services to Canadians (including energy, utilities, food, health, and water);
- Negatively impact access to any of the minerals on Canada's Critical Minerals List;
- Impact Canada or its allies' defence capabilities and interests (including R&D or the supply of military weapons and technologies);
- Facilitate the transfer of sensitive technology or know-how outside of Canada;
- Enable foreign surveillance or espionage or hinderance of intelligence operations and law enforcement;

- Facilitate the activities of illicit actors (e.g., terrorists/terrorist organizations, organized crime); and/or
- Undermine Canada's economic security by increasing integration of the Canadian Business with the economy of another country.

Investments meeting these criteria may face significant delays and the potential imposition of conditions by the government before they can be made, if they are allowed at all. The types of binding undertakings from an investor to mitigate national security concerns that may be required include, but are not limited to, commitments related to corporate governance, data protection, technology use, supply chain arrangements, or other risk factors.

Corporate Ownership Restrictions

In addition to the provisions of the *Investment Canada Act*, both the federal and provincial governments impose corporate ownership restrictions in certain strategic or sensitive industries, including:

- Financial Institutions: Generally, without ministerial approval, a foreign bank cannot own more than 10 per cent of any class of shares in any Canadian bank, including a Canadian bank subsidiary. There are various exceptions to this general rule.
- Broadcasting: In an effort to promote the ownership or control of broadcasting entities by Canadians, Parliament has enacted a general rule that broadcasting licences may not be issued to non-Canadians or to companies that are effectively controlled, directly or indirectly, by non-Canadians.
- Telecommunications: In an effort to promote the ownership and control of telecommunications common carriers by Canadians, Parliament has enacted a general rule limiting eligibility to operate a telecommunications common carrier in Canada to carriers that are Canadian-owned and controlled corporation, incorporated or continued under the laws of Canada or a province.
- Air Transportation: Generally, a licence to operate a domestic airline service will only be issued to a corporation if the corporation is controlled in fact by Canadians and if at least 51 per cent of the voting interests in the corporation are owned and controlled by Canadians. Licences for international airline service may be issued to a non-Canadian if the non-Canadian applicant satisfies certain eligibility requirements.

Directors' Residency Requirements

The federal *Canada Business Corporations Act* (the CBCA) requires that at least one quarter of the directors of most federal corporations be resident Canadians. See Section 105(3) (Residency) for further details.

Footnotes

[1] This threshold has been adjusted annually since January 1, 2019, based on growth in the nominal gross domestic product.

[2] The calculation of a Canadian business' "enterprise value" will depend on whether that business is private or publicly traded and whether the transaction involves the acquisition of shares or assets. Generally, if publicly traded, the entity's enterprise value is calculated based on market capitalization, plus liabilities, minus cash and cash equivalents. If private, the enterprise value is calculated based on the total acquisition value, plus liabilities, minus cash and cash equivalents.

[3] "Trade agreement investors" are entities or persons whose country of ultimate control is party to one of Canada's trade agreements, namely: (1)The Canada-United Kingdom Trade Continuity Agreement; (2) Comprehensive and Progressive Agreement for Trans-Pacific Partnership; (3) Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act; (4) Canada-United States-Mexico Agreement; (5)Canada-Chile Free Trade Agreement Implementation Act; (6) Canada-Peru Free Trade Agreement Implementation Act; (7) Canada-Colombia Free Trade Agreement Implementation Act (8) Canada-Panama Economic Growth and Prosperity Act; (9) Canada-Honduras Economic Growth and Prosperity Act; (10) Canada-Korea Economic Growth and Prosperity Act

[4] This threshold has been adjusted annually since January 1, 2021, based on growth in the nominal gross domestic product.

[5] In basic terms, a "WTO investor" is a government of a WTO (World Trade Organization) member country, a permanent resident of a WTO member country, or an entity that is controlled by one or more WTO investors.

[6] Based on the book value of the business's assets, as shown on its last audited annual financial statements. This is the threshold for 2018. This value is adjusted annually based on inflation.

[7] Based on the book value of the business's assets, as shown on its last audited annual financial statements.

[8] In situations involving cultural businesses, the Minister of Heritage makes the "net benefit" to Canada decision on the recommendation of the Investment Review Division of Heritage Canada.

[9] Note, under a policy relating to foreign investment in Canada's oil sands, any future proposed investment by an SOE to acquire control of a Canadian oil sands business exceeding the review threshold will be found to be of "net benefit" to Canada only in exceptional circumstances. Non-controlling minority interests in Canadian oil sands businesses and joint ventures are not subject to this policy.

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