# Foreign Investment In Canada: Past, Present, & Future

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## Introduction

The Minister of Innovation, Science and Economic Development ("ISEDC") is responsible for the review and approval of non-cultural foreign investments in Canada. Though review of foreign investment had long been a feature of the *Investment Canada Act* (the "ICA") the former Conservative government under Prime Minister Stephen Harper (that governed from 2006 through to late 2015), chose to closely scrutinize its high-profile, politically controversial deals.

In October 2015, Canadians elected Justin Trudeau and his Liberal Party to a sweeping majority. In its first months in office, the Trudeau government emphasized its commitment to continued foreign investment, and to increasing the transparency of foreign investment reviews. However, it remains uncertain how the change in government will impact foreign investment reviews.

This article outlines Canada's foreign investment review regime, discusses the monetary thresholds related to reviews, and summarizes certain deals which have been approved, blocked, or abandoned in the past. It also considers what, if any, changes may be on the horizon in light of the new federal government.

## Overview of Canada's Foreign Investment Review Regime

Foreign investors are generally subject to the provisions of the ICA, which can require a foreign investor to either file a notification with the federal government up to 30 days following implementation of a proposed investment, or to file an application for review prior to implementation.[1]

According to the *Investment Canada Act — Annual Report 2015-16*, in the year ended March 31, 2016, the Minister of the ISEDC received 626 notifications and 15 applications for review under the ICA, totalling $30.51 billion in asset value, all of which were approved.[2]Investments from the United States accounted for 60 percent of the total number of investments and totalled $19.86 billion in asset value. Investors from the

European Union had the second highest share with 136 investments, totalling $7.41 billion in asset value.[3]

# The ICA Review Process

The ICA applies to all acquisitions of control by a non-Canadian of a Canadian business and to the establishment of new Canadian businesses by non-Canadians . "Canadian" is defined as those who are: Canadian citizens, permanent residents of Canada, governments of Canada and their agencies, and Canadian controlled corporations, partnerships, trusts and joint ventures.

"Non-Canadian" is defined in the ICA as individuals, governments, government agencies or entities that are not Canadian. The ICA requires all non-Canadians seeking to acquire "control" of a Canadian business to file either a post-closing notification ("Notification") or, if the applicable monetary thresholds relating to the value of the Canadian business are met, a pre-closing application for review ("Application") with the Investment Review Division. Establishments of new Canadian businesses by non-Canadians are also subject to the ICA, but only a Notification is required. Investments that involve Canadian cultural businesses are dealt with somewhat differently under the ICA.

If only a Notification is required for an investment, it must be filed within 30 days of the transaction's closing (or establishment of the new Canadian business). Following receipt of a Notification, the Director of Investments may request additional information or will issue a receipt certifying the date on which the completed notice was received; following which, no further action is required.

An Application is a much more extensive regulatory review process, and statutory waiting periods apply before the investment can be completed. The Minister has 45 days from the receipt of an Application to determine whether the proposed investment is "likely to be of net benefit" to Canada ("Net Benefit Test"). This period may be extended unilaterally by the Minister for 30 days and for additional periods upon agreement between the Minister and the investor. Foreign investments may also be subject to a separate national security review ("National Security Test") .

# Thresholds for Notification and Application — Net Benefit Test

The ICA is co-administered by the Minister of Canadian Heritage and the Minister of ISEDC (formerly the Minister of Industry) ("Minister"). The Minister of Canadian Heritage is responsible for assessing investments in Canada's cultural sector, while the Minister of ISEDC is responsible for assessing investments in all other sectors of the economy.

A non-cultural Canadian business being acquired by a private sector WTO investor is measured against an "enterprise value"[4] threshold.

Subsections 14.1(1) and (2) of the ICA state the review threshold is $600 million in enterprise value for investments to directly acquire control of a Canadian business. This

threshold will increase to $800 million in 2017; and to $1 billion in 2019. Starting January 1, 2021, and for subsequent years, the threshold level will adjust annually based on growth in nominal GDP.

Generally, an "asset-value" threshold is used for acquisitions involving WTO investors that are State Owned Enterprises ("SOEs"), and non-WTO investors that are SOEs where the Canadian business that is the subject of the investment is, immediately prior to the implementation of the investment, "controlled by a WTO investor". The asset value threshold is annually revised to reflect the change in Canada's nominal GDP, unlike private sector WTO investments, and is $375 million in 2016. This value is calculated with reference to the book value of assets as represented in a company's most recent financial statements. This threshold is further described in section 3.1 of the *Investment Canada Regulations*[5] ("Regulations").

A cultural business is defined in section 14.1(6) of the ICA[6] for the purposes of the acquisition of control rules. For a review of a Canadian cultural business, the thresholds are $5 million in book value of assets for direct investments, and $50 million in book value of assets for indirect investments. For an indirect acquisition of a cultural business, where the value of the worldwide assets of the Canadian business exceeds 50 percent of the value of all assets acquired, the review threshold is $5 million in book value of assets. Indirect investments in a cultural business are reviewable on a post-closing basis.

## Net Benefit Test — Will the Investment Produce a "Net Benefit to Canada"?

If an investment exceeds the Application threshold, the Net Benefit Test becomes relevant. Under section 21 of the ICA, this analysis requires the Minister to consider an Application and any other relevant information or evidence to determine whether or not the investment "is likely to be of net benefit to Canada".[7]

In making this determination, the Minister is required to consider the relevant factors listed in section 20 of the ICA.[8]

Under the Net Benefit Test, the positive impacts of the investment need only outweigh the negative impacts in order for the investment to be approved. The decision is essentially one of ministerial discretion.

Although the Minister is required to make his or her determination within the initial prescribed 45-day period after the receipt of the completed Application, the Minister can, and often does, exercise his or her ability to extend the time for deliberation. According to the 2015-16 Annual Report, the average length of time required by the Minister to make a net benefit determination in 2015-16 was 71.5 days.[9]

In 2007, Industry Canada released guidelines for state-owned enterprises wishing to invest in Canada (the "SOE Guidelines").[10] The SOE Guidelines clarified the existing principles under the ICA and underscored that sound principles of corporate governance and commercial orientation would be considerations when reviewing proposed SOE investments under the ICA.

It is important to note that even after an investment has been reviewed and has received "net benefit" approval, the investment will be subject to continued monitoring. An investor may also be required to give specific undertakings addressing concerns before receiving investment approval, and there can be penalties if these undertakings are not met; see *Canada (Attorney General.) v. United States Steel Corporation and U.S. Steel Canada Inc.*[11]

# Case Studies of Net Benefit Test Reviews Under the Harper Government

Prior to 2008, over 1,600 transactions were reviewed and no transaction had ever been blocked applying the Net Benefit Test. However, since 2008, there have been a number of instances where high profile deals have been blocked (not including proposed investments that were withdrawn before the Minister reached a decision, or that involved cultural businesses). Examples of three transactions scrutinized under the Net Benefit Test are outlined below.[12]

### Alliant Techsystems & MacDonald Dettwiler and Associates Ltd.

In early 2008 this deal became the first to be rejected under the Net Benefit Test (before the national security jurisdiction was enacted in early 2009). The $1.3 billion deal involved the proposed acquisition of MacDonald Dettwiler and Associates' geospatial division (including Canadarm, Dextre, and the Radarsat-2 satellite) to Minneapolis-based Alliant Techsystems, a major U.S. defence contractor. Media reports suggested that the decision was motivated by concern over losing control of Canadian space technology, including Radarsat 2's ability to monitor threats to Canadian sovereignty, especially in the Arctic.[13]

### BHP Billiton & Potash Saskatchewan

In 2010, the Australian company BHP Billiton's ("BHP") $40 billion hostile takeover bid for Potash Corporation of Saskatchewan Inc. ("Potash") was blocked . After an Application was submitted to the Minister, in November of 2010, the Minister announced that the bid failed to satisfy the Net Benefit Test pursuant to the ICA.[14] Many had been critical of the proposed transaction, including the government of the Province of Saskatchewan which voiced strong objections.

### CNOOC/Nexen Inc. & Petronas

In 2012, the Harper government approved the widely publicized proposed acquisitions of Nexen Inc. by the China National Offshore Oil Corp. ("CNOOC"), and of Progress Energy Resources Corp by Petroliam Nasional Bhd ("Petronas"). In both instances, the proposed investments were found to have met the Net Benefit Test.

However, after the approval of these deals, the Harper government adopted a new policy: to grant approval for future similar transactions "only in exceptional circumstances".[15] The government did not define what these "exceptional circumstances" would entail. The government also expressed its concern that "a series of large-scale controlling transactions by foreign state-owned companies could rapidly transform Canadian natural resource industries. Prime Minister Harper stated at the

time: "when we say that Canada is open for business, we do not mean that Canada is for sale to foreign governments"."[16]

# National Security Test

In addition to the Net Benefit Test, the ICA contains a standalone National Security Test, which subjects investments by non-Canadians to review by the Governor-in-Council (Federal Cabinet), if they are deemed to be injurious to national security. The National Security Test under the ICA is similar to the process of the Committee on Foreign Investment in the US ("CFIUS").

Part IV.1 of the ICA governs the National Security Test. The review is usually engaged once a Notification or Application for a net benefit review is submitted. However, any other investment that the Minister considers potentially injurious to national security may also be reviewed. The National Security Test has a broader scope and can capture and examine many more transactions than the net benefit review.

Section 25.1 of the ICA permits a review of non-Canadian investments that:

- establish a new Canadian business;
- acquire control of a Canadian business per the criteria laid out under the net benefit review; or
- establish or acquire a business only partially located in Canada, as long as there is a "place of operation" in Canada and either employees or assets in Canada connected with the business's operations.

No financial threshold is required to be met, and a transaction of any size may be reviewed.

If the Minister "has reasonable grounds to believe" that an investment could be injurious to national security, the Minister may notify the investor. This notification serves to pause the investment, if it has not yet been implemented, although the investment may still be reviewed post-implementation. If the Minister, independently or jointly with the Minister of Public Safety and Emergency Preparedness, determines that a National Security Test is required, an order will be made and notice of the review will be sent.

What constitutes an investment that is injurious to national security is deliberately not defined in the ICA or Regulations in order to preserve the legislation's flexibility. If the investment is not found to be injurious to national security, a notice will be sent indicating the conclusion of the review process. If the investment is found to pose a threat to national security, the Governor in Council may order any measure that is felt to be necessary to mitigate the risks, including those listed in section 25.4 of the ICA, such as; blocking the investment, requiring undertakings or imposing terms and conditions for the implementation, or requiring divestiture of the investment if it has already been made.

The Minister has 45 days after the certified date of a Notification or an Application to notify the investor that an order for a National Security Test may be issued. The Minister

may notify the investor up to 45 days after the transaction has closed that an order for a National Security Test may be issued.

A review under the National Security Test may last up to 200 days, inclusive of all of the interim review periods and the period during which the Governor-in-Council may take action with respect to the investment. This period might be extended even further if the investor and the Minister agree to an extension.

# Case Studies of National Security Test Reviews Under the Harper Government

Between 2009 and 2016, ISEDC recommended that the Governor-in-Council order eight National Security Tests of investments.[17] Among the eight National Security Tests that were conducted, three resulted in directives not to implement the proposed investment, two resulted in orders that the non-Canadian investor divest control of the Canadian businesses; and two resulted in the authorization of the proposed investments subject to conditions to mitigate the associated national security concerns. Finally, one review resulted in the proposed investment being withdrawn prior to the issuance of a final order. Examples of three transactions scrutinized under the National Security Test are outlined below.

### Accelero/Allstream

In this case, Egyptian investment group Accelero Capital Holdings ("Accelero") applied to acquire Allstream, a business unit of Manitoba Telecom Services Inc. ("MTS"). Allstream was valued at $520 million at the time. The Minister pointed to "unspecified national security concerns" as the basis for rejecting the deal. The Minister did not specify what the security concerns may have been, but said: "MTS Allstream operates a national fibre optic network that provides critical telecommunications services to businesses and governments, including the Government of Canada".[18] This was the first expressly disallowed deal under the National Security Test since the creation of the national security regime in 2009.

In 2015, MTS's assets were ultimately successfully sold to a non-Canadian investor, US-based Zayo Group Holdings Inc. ("Zayo"), for US$465 million in cash.

### GFI/Forsys

Another deal that raised issues of national security was George Forrest International's ("GFI") $585 million bid to buy Forsys Metals Corp. ("Forsys").[19] In 2011, Industry Canada (the predecessor to ISEDC) put the transaction on hold due to US suspicions that the Belgian buyers planned to sell Forsys' uranium to Iran. Allegedly, the Canadian government received information that linked GFI to ongoing discussions with Iranian officials and that those discussions may have been related to Iran's efforts to acquire additional uranium ore.[20] The deal ultimately fell apart because GFI reportedly missed several deadlines in transferring funds for the takeover, but it is unclear whether it was Industry Canada's intervention that ultimately affected its outcome.[21]

### Beida Jade Bird

According to media reports, a proposed investment by Chinese investor, Beida Jade Bird (which is affiliated with China's Peking University), to establish a $30 million alarm manufacturing facility in Saint-Bruno de Montarville, Québec was rejected under the National Security Test. The proposed facility would have placed it near the Canadian Space Agency. The deal was reportedly blocked due to these proximity concerns. This was the first deal in Canada that was rejected due to the proximity of an existing or planned Canadian business to an important government facility. The US has also in the past blocked or reviewed sensitive foreign investments owing to their proximity to military bases, also citing national security concerns.[22]

# The Liberal Government's Approach to Foreign Investment

In the lead-up to the October 2015 election, many statements by the Liberal party reflected sentiments favouring a more open and transparent foreign investment policy.

In April 2015, then-Liberal Finance Critic, Scott Brison, gave a speech to the Canadian Club of Toronto in which he emphasized that a Trudeau government would "rebuild Canada-China relations that have been diminished by Mr. Harper".[23] Mr. Brison went on to state:

Foreign investment including Chinese investment can help create jobs and growth in Canada. Mulroney, Chrétien, and Martin got that, and so does Justin Trudeau.
Mr. Trudeau was the first federal leader to endorse the CNOOC-Nexen deal, weeks before Mr. Harper announced federal approval, while muddying the waters, and creating uncertainty for future Chinese investments in Canada. He rejects Mr. Harper's position of making Canada's foreign investment rules deliberately opaque.

Mr. Trudeau understands that ambiguous rules might make the Prime Minister's political life a bit easier, but it comes at a cost. That cost is borne by Canadian businesses who are looking for investment, and Canadian workers who need jobs. Ambiguous rules post-CNOOC-Nexen have created a chill on Chinese investment. Chinese investors are as allergic to uncertainty as Canadian investors.

[…] With a small open economy dependent on trade and investment, Canada needs a Prime Minister who understands how important relationships are to the Canadian economy.

In June 2015, Mr. Trudeau himself stated that "in order to diversify and globalize our approach to trade and foreign investment, we need to do more to strengthen our ties with burgeoning global markets in Asia and Africa, in particular".[24]

It still remains unclear whether the Liberal government will propose changes to the ICA that would provide further clarity to the Net Benefit and National Security Tests which would result in more transparent rules and procedures.

The statements and comments from the Trudeau government suggest that it will continue its strong history of supporting free trade and openness to foreign investment. In September 2016, Trudeau embarked on a trade mission to China, with the stated hope of creating a renewed investment relationship. In discussing the trip, Finance

Minister Bill Morneau stated that Canada may consider relaxing its foreign investment rules, and that the government is open to reviewing the restrictions on the ability of SOEs to acquire Canadian oil assets.[25]

It is clear that governments around the world are paying attention to what is visibly a trend toward economic protectionism. Yet, given recent announcements by the Liberal government, there appears to be good reason to be hopeful that Canada remains committed to free trade and investment.

[1] Unless the investor qualifies for a specific exemption laid out in s. 10 of the ICA.

[2] "*Investment Canada Act* — Annual Report 2015-2016", Industry Canada at 1.

[3] *Ibid.*

[4] The enterprise value of a public company is calculated as follows: Enterprise Value = Market capitalization plus Liabilities (other than operating liabilities) minus Cash and cash equivalents.

The enterprise value of a private company is calculated as follows:

Enterprise Value = Total Acquisition Value ("TAV") plus Liabilities (other than operating liabilities) minus Cash and cash equivalents.

The enterprise value of a target business that is acquired by way of asset acquisition is calculated as follows:

Enterprise Value = Total Acquisition Value (“TAV”) plus Liabilities (other than operating liabilities) minus Cash and cash equivalents.

[5] SOR/85-611, s 3.1.

[6] A business that carries on: **a)** the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers; **b)** the production, distribution, sale or exhibition of film or video recordings; **c)** the production, distribution, sale or exhibition of audio or video music recordings; **d)** the publication, distribution or sale of music in print or machine readable form; or **e)** radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

[7] *Supra* note 2, s 21.

[8] These factors include: the investment's impact on economic activity in Canada, the investment's impact on participation by Canadians, the investment's impact on productivity, industrial efficiency, technological development, product innovation and product variety, the investment's impact on competition within the industry, the investment's impact on the "industrial, economic and cultural" policy objectives of Canada, and the investment's impact on Canada's global competitiveness.

[9] *Supra* note 3 at 10.

[10] There are also separate Guidelines that speak specifically to acquisitions of Oil and Gas Interests.

[11] [2011] SCCA No 364. In July 2009, the Minister imposed administrative monetary penalties of $10,000 per day, per breach of undertaking against US Steel.

[12] The Accelero/Allstream deal, where the federal government expressed "unspecified national security concerns", is discussed below under the National Security Test.

[13] David Ljunggren, "Canada blocks sale of MDA satellite unit to U.S." (10 April 2008), *Reuters Canada.*

[14] "Minister of Industry Confirms Notice Sent to BHP Billiton Regarding Proposed Acquisition of Potash Corporation" (3 November 2010), *Yahoo! Finance*.

[15] Aaron Wherry, "Harper government approves CNOOC and Petronas deals" (7 December 2012), *MacLeans*.

[16] Stephanie Levitz & Craig Wong, "Foreign Investment in Canada, CNOOC Nexen Deal The Subject of Industry Canada Announcement" (7 December 2012), *The Canadian Press*.

[17] *Supra,* note 3 at 1-2.

[18] Steven Chase & Rita Trichur, "Ottawa rejects MTS Allstream takeover deal, citing unspecified security concerns" (7 October 2013), *The Globe and Mail*.

[19] Campbell Clark, "Nuclear worries behind failed Forsys deal: WikiLeaks" (17 January 2011), *The Globe and Mail*.

[20] *Ibid*.

[21] *Ibid*.

[22] Jeff Gray, "Ottawa's 'national security' review a warning to foreign investors" (1 July 2015), *The Globe and Mail*.

[23] Scott Brison, "Providing a New Direction for Middle Class Jobs and Growth" (Speech delivered to the Canadian Club of Toronto, 30 April 2015), online: Liberal Party of Canada.

[24] Justin Trudeau, " Real change in Canada-US relations" (Speech delivered to Canada 2020, 23 June 2015), online: Liberal Party of Canada.

[25] Josh Wingrove, "Canada may alter rules for China; Ottawa looks to improve sales pitch for G20 summit" (21 August 2016), *Bloomberg.*

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