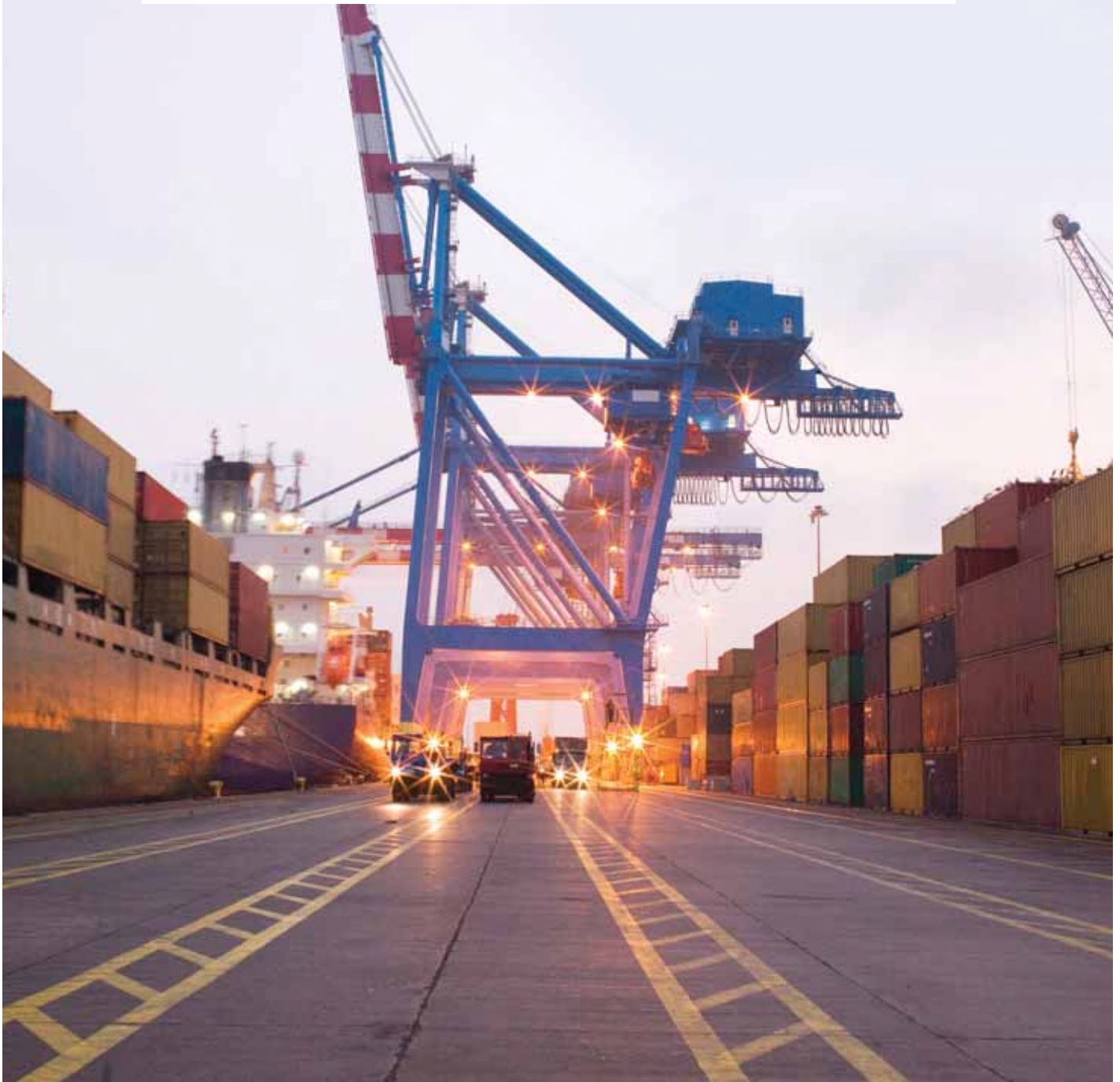


FOREIGN INVESTMENT LAWS & NATIONAL SECURITY

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FOREIGN INVESTMENT LAWS & NATIONAL SECURITY

General Overview

Whether a non-Canadian investor acquires a business with a presence in Canada or establishes a new Canadian business, the investment may be subject to foreign investment review or notification requirements of the *Investment Canada Act (ICA)*.

Generally, the direct acquisition of control¹ of a significant Canadian business (either by virtue of its “enterprise value²” in excess of C\$600 million or, if it is engaged in a “cultural business,” C\$5 million in asset book value) by a non-Canadian requires review and prior approval by the Minister of Innovation, Science and Economic Development (formerly the Minister of Industry) or the Minister of Canadian Heritage in the case of cultural transactions³. In the fall of 2016, the government announced that the C\$600 million threshold will be raised to C\$1 billion in 2017, two years sooner than the originally planned date of 2019.

Although one of the ICA’s stated purposes is to encourage investment in Canada by non-Canadians, which contributes to economic growth and employment opportunities, investments that are subject to review require the filing of detailed information concerning the target business and the investor’s plans for it. The review process generally takes at least 45 to 75 days. A non-Canadian investor will be required to satisfy the relevant Minister that the transaction will likely be of “net benefit” to Canada before the Minister will approve the transaction. It is typical for a non-Canadian investor to agree to give written undertakings to the government of Canada to secure approval. Such undertakings often include promises

WHETHER A NON-CANADIAN INVESTOR ACQUIRES A BUSINESS WITH A PRESENCE IN CANADA OR ESTABLISHES A NEW CANADIAN BUSINESS, THE INVESTMENT MAY BE SUBJECT TO FOREIGN INVESTMENT REVIEW OR NOTIFICATION REQUIREMENTS OF THE INVESTMENT CANADA ACT (ICA).

1. An acquisition of control occurs when a majority of the Canadian business is acquired, and is presumed where a third or more of a corporation is acquired.
2. The enterprise value calculation varies depending on whether the proposed acquisition involves the acquisition of (i) public entities, (ii) non-public entities or (iii) Canadian businesses acquired by way of an acquisition of assets.
3. Such as where the Canadian business’s activities relate to music, broadcasting, video, publishing and film.



relating to employment and expenditures in Canada and Canadian participation in the business.

Although rejections are rare, it is strongly advised to plan early for the ICA review process to minimize the risk of a negative outcome.

Investments to establish a new Canadian business, and acquisitions of control of existing businesses that do not exceed applicable thresholds, are subject to “notification,” which requires the filing of a relatively short information form either before or shortly after completion of the transaction.

Certain statutory provisions restrict foreign investment and ownership in specific areas, including the financial services, air transportation, and broadcasting and telecommunications sectors. There are also foreign investment disincentives for media and publishing.

Transactions which the Canadian government believes may be injurious to Canada’s “national security,” including minority investments, can be reviewed and blocked or unwound by the government.

Investments by investors whom the Canadian government considers foreign state-owned enterprises (SOE) receive special attention under the ICA and related policy documents.

Relevant Laws

The ICA is the only federal foreign-investment law of general application in Canada. The ICA regulates investments in Canadian businesses by non-Canadians.

The *Competition Act* (Canada) is another statute that regulates investments by non-Canadians. See [Competition Law](#). Additionally, investments in transportation businesses, which raise public interest issues and exceed the *Competition Act*’s pre-merger notification thresholds, may also be subject to the *Canada Transportation Act*’s pre-closing review.

Compliance with provisions of the ICA does not bar review or action by Canada’s Competition Bureau under the merger provisions of the *Competition Act*. The review processes under these statutes are separate from each other. However, the effect of the investment on competition is one of the “net benefit to Canada” factors under an ICA review.

Responsible Authority

Two federal ministers are responsible for administering the ICA: the Minister of Innovation, Science and Economic Development (non-cultural matters) and the Minister of Canadian Heritage (cultural matters). Any required review process for cultural businesses as defined under the ICA will be done through the Department of Canadian Heritage instead of Industry Canada.

Exempt Investments

Not all investments in Canadian businesses by non-Canadians are subject to review or notification under the ICA. For example, the ICA contains a number of exempt transactions, such as the acquisition of shares by a person whose business is dealing in securities. An investment to acquire an interest in an existing Canadian business that does not result in an acquisition of control under the ICA will also generally not be subject to notification or review.

Confidentiality

Information submitted under the ICA is treated as confidential and, subject to certain exceptions, will not be disclosed to the public.

Information produced can be shared with other investigating agencies. However, generally, information provided to the Minister in the context of an investment review is protected from disclosure to other government agencies unless necessary for the purposes of the administration and enforcement of the ICA. The Minister is able to compel a party to provide information within the context of a review application that the Minister “considers necessary.”

For information produced with respect to a national security review, the Minister may communicate this information to prescribed investigative bodies, which may also disclose the information to others for the purposes of that agency’s investigation.

Review Thresholds

WTO Investor Thresholds

The threshold for review for an acquisition of a non-cultural business by or from a “WTO Investor” (a person or entity from countries, other than Canada, that are members of the World Trade Organization), is higher than for non-WTO Investor investments.

- Where there is a direct acquisition of control of a Canadian business (through the acquisition of voting shares of a corporation incorporated in Canada or through the acquisition of voting interests of a non-share capital corporation, partnership, trust or joint venture carrying on that business, or by the acquisition of substantially all of the assets used to carry on that business) and the “enterprise value” of the Canadian business is C\$600 million⁴ or more, the acquisition is subject to review and pre-approval by the Minister.
- The calculation to determine “enterprise value” will vary depending on whether the proposed acquisition involves the acquisition of (i) public entities; (ii) non-public entities; or (iii) Canadian businesses acquired by way of an acquisition of assets. The “enterprise value” for publicly listed companies is equal to the market capitalization of the entity (plus non-operating liabilities, minus cash and cash equivalents). For the acquisition of private companies and for asset acquisitions, the “enterprise value” is the purchase price (plus non-operating liabilities, minus cash and cash equivalents).
- An indirect acquisition of control of a non-cultural Canadian business through, for example, the acquisition of the foreign corporate parent of an entity in Canada carrying on the Canadian business by or from a WTO Investor, is not subject to review, regardless of the value of Canadian assets. It is important to note that review threshold considerations are different for investments where the target’s business is cultural or raises national security concerns, as well as whether the investor is a SOE. See below for further detail.

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REVIEW THRESHOLD CONSIDERATIONS ARE DIFFERENT FOR INVESTMENTS WHERE THE TARGET’S BUSINESS IS CULTURAL OR RAISES NATIONAL SECURITY CONCERNS, AS WELL AS WHETHER THE INVESTOR IS A FOREIGN STATE-OWNED ENTERPRISE.

4. The thresholds for review of WTO investments in a Canadian business will be increased to C\$1 billion in 2017, two years sooner than the originally planned date of 2019. After that, the applicable threshold will be determined on an annual basis using a prescribed formula.

Cultural Investment and Non-WTO Investor Thresholds

Generally, when a non-Canadian is acquiring control of a Canadian cultural business, or the purchaser of a Canadian business is not a WTO Investor and the vendor is Canadian or a non-WTO Investor, review and approval by the relevant Minister are required in the following cases:

- Where there is a direct acquisition of control of a Canadian business, the book value of the assets of the Canadian business is C\$5 million or more.
- Where there is an indirect acquisition of control of a Canadian business if either (i) the Canadian business has assets of C\$50 million or more in value; or (ii) the Canadian business represents more than 50% of the assets of the acquired group of entities and the Canadian business has assets of C\$5 million or more in value. Note, for an indirect acquisition that triggers the thresholds in either (i) or (ii), the acquisition is reviewable on a post-closing basis. The value of the assets for the financial threshold analysis is usually calculated by using book values based on the most recent audited financial statements for the relevant entity.

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Areas of “cultural heritage and national identity” include book publishing, magazine publishing, film production and distribution, television and radio, and music production and distribution.

Note, even if an acquisition or establishment of a cultural business does not trigger the reviewable threshold, the governor-in-council may, nonetheless, order a review if it considers it in the public interest.

Other Review Threshold Considerations — SOE Investments and National Security

As mentioned above, review threshold considerations are different for investments where the target’s business raises national security concerns or the investor is a SOE.

SOE Investments

The definition of a SOE under the ICA includes an entity controlled or influenced, directly or indirectly, by a government or agency of a foreign state. In addition to this broad definition, the Minister has broad powers

to retroactively determine that an entity is controlled in fact by a SOE, as well as to determine retroactively whether there has been an acquisition of control in fact by a SOE.

SOE investments are subject to review where the book value of the assets of the Canadian business is C\$375 million (2016) or more.

National Security

The Canadian government has the power to review all investments where there are “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.” There is no financial threshold for investments under the ICA’s national security review regime. (See National Security Review below.)

“Net Benefit to Canada” Review

General

With certain exceptions, a non-Canadian may not implement a reviewable direct investment until the investment has been reviewed and the relevant Minister is satisfied, or deemed to be satisfied, that the investment “is likely to be of net benefit to Canada.”

In determining “net benefit to Canada,” the Minister must consider:

- the effect of the investment on the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians in the Canadian business and the industry of which it forms a part;
- the effect of the investment on productivity, industrial efficiency, technological development and product innovation and variety in Canada;
- the effect of the investment on competition within an industry in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution of the investment to Canada’s ability to compete in world markets.

If the Minister initially decides that the investment will not be of such benefit, the non-Canadian will be given an opportunity to make

representations and submit undertakings with respect to the investment with a view to satisfying these requirements.

SOE Investments

In recent years, the Canadian government has made it clear that investments by SOEs will be assessed differently than other investments under the ICA.

For example, following the approval of an acquisition by a SOE (CNOOC Ltd.) of a Canadian oil sands business (Nexen Inc.) at the end of 2012, the Prime Minister announced that going forward, the Minister of Innovation, Science and Economic Development will find the acquisition of control of a Canadian oil sands business by a SOE to be of net benefit (and therefore allowed) only in exceptional circumstances. It remains to be seen what the rules will be in other economic sectors besides oil sands.

Review Guidelines for SOE investments

The Canadian government has also issued guidelines for the review of SOE investments. The guidelines articulate specific factors that the relevant Minister will examine as part of his or her assessment of the “net benefit” factors listed above. The guidelines reflect the potential concerns the Minister may have regarding the “governance and commercial orientation of the SOE.” The Minister will examine:

- The corporate governance and reporting structure of the SOE, including whether it adheres to Canadian standards of corporate governance. This includes commitments to transparency and disclosure, independent members of the board of directors, an independent audit committee, equitable treatment of shareholders and adherence to Canadian laws and practices.
- Whether the Canadian business to be acquired by the SOE will continue to have the ability to operate on a commercial basis and specify a number of important indications. These include where exports go, where processing takes place, the participation of Canadians in the operations and the level of capital expenditures to maintain the Canadian business.

A SOE can therefore anticipate that it may be required to provide undertakings beyond those normally expected of a non-SOE in order

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to secure approval by the Minister. Indeed, the Minister expects a SOE investor to address its inherent characteristics (specifically that it is susceptible to state influence) in its plans for the Canadian business to be acquired and related undertakings. A SOE will also need to demonstrate its strong commitment to transparent and commercial operations.

National Security Review

The Canadian government has the authority to review all proposed investments (including minority investments) where the responsible Minister has “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.”

There is no definition of “national security.” As mentioned above, no financial threshold will apply to a national security review. The Canadian government may deny the investment, ask for undertakings, provide terms or conditions for the investment, or, where the investment has already been made, require divestment. Review can occur before or after closing and may apply to corporate reorganizations where there is no change in ultimate control.

In 2015, extended national security review timelines came into force which means that a national security review may now take up to 200 days.

To date, where details of the Minister’s approach to national security reviews are made public, they have not been significantly enlightening. Such was the case in the 2013 rejection of the proposed acquisition by Accelero Capital (a corporation controlled by Egyptian billionaire Naguib Sawiris) of Allstream (Manitoba Telecom Services’ network subsidiary). While the Minister of Industry referenced the national security provisions of the ICA in rejecting the deal, exactly what threat the transaction posed was left largely unsaid other than the following comment: “MTS Allstream operates a national fibre optic network that provides critical telecommunications services to businesses and governments, including the Government of Canada.” In 2015, according to 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 Québec was blocked based on national security grounds because of the site’s proximity to the Canadian Space Agency’s facilities located less than two kilometres away. Beida

Jade Bird planned on building fire-alarm systems for the Chinese market. Interestingly, the Québec government had given Beida Jade Bird C\$3 million in loans and a C\$1 million grant in respect of its project. The Québec government continued to assist Beida Jade Bird after the rejection and said the company plans to locate its factory elsewhere, likely still in Québec.

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