

Canadian Foreign Investment Review Regime 加拿大外国投资法审核制度

Investment Services Day in Toronto
多伦多投资服务节

April 24, 2012
2012年4月24日

Ontario Investment and Trade Centre
安大略省投资和贸易中心

Toronto, Ontario
安大略省多伦多市

Investment Canada Act 加拿大投资法

Investment Canada Act (“ICA”) 加拿大投资法（简称“ICA”）

- General Overview
概述
- Recent Notable Changes
最近的显著变化
 - New thresholds
新的投资门槛
 - National security review
国家安全审核

ICA: General Overview

ICA : 概述

- *Acquisition of control* of a Canadian business by a non-Canadian
非加拿大个人或公司收购加拿大企业的控制权
 - a non-Canadian if ultimate ownership/control is outside of Canada
如果最终所有权/控制权是在加拿大境外，则为非加拿大个人或公司
 - acquisition of control is more than 50%, although there is a presumption of control at one-third of the voting shares of a corporation
当收购股份超过50%，则确定为收购了控制权（收购一家企业的三分之一有投票权的股份之后，一般当推定收购了控制权）

ICA: General Overview

ICA : 概述

- “Review” if over a financial threshold; or
对超过资产价值门槛的“审核”；或
- Post-closing notification, which is benign
成交后的通报，并是良好通报

note: notice of a “cultural” business can be bumped to a review
注：“文化”产业的通报可能要作进一步的审核。

ICA: General Overview

ICA : 概述

- Industry specific regulation under the Investment Canada Act:
依据《加拿大投资法》，针对特定行业的规定如下：
 - **“Cultural” businesses**
“文化”产业
 - **National Security Review (discussed below in further detail)** likely focus on subject matter of investment -- e.g. military, government contracts, nuclear/uranium, aerospace, radar, classified work, technologies, etc.
国家安全审核（下面再详细讨论）的重点专注于讨论投资方向 – 诸如军事、政府合同、核/铀、航空、雷达、保密工作、技术等

ICA: General Overview

ICA : 概述

- Certain industries have specific foreign ownership restrictions (including uranium production, banking, air transportation and telecom)

某些行业有特定的外国所有权（包括铀业、银行、航空运输和电信）的限制

ICA: General Overview

ICA : 概述

- Financial thresholds are “book value” of assets
金融财务门槛指“账面价值”的资产
- greater than C\$330 million for “WTO investors”
如果投资方是来自于“世贸组织成员国”，审核门槛为3亿3千万加元的投资
- greater than C\$5 million for “cultural businesses” and non-WTO investors
如果投资方是来自于非“世贸组织成员国”，或投资于“文化产业”领域，审核门槛为5百万加元
- no review for “indirect” acquisitions of Canadian businesses (if “WTO”)
一般来说（如果投资方是来自于“世贸组织成员国”），“间接”收购加拿大企业则无需进行审核

ICA: General Overview

ICA : 概述

- If subject to review, Minister must be satisfied that transaction is “likely of net benefit to Canada”
一旦必须接受联邦工业部部长的审查，部长必须确定并满足该项交易可能给加拿大带来净惠利益

ICA: General Overview

ICA : 概述

- the factors which the Minister must consider in his net benefit determination are listed in section 20 of the Act:
部长在确定是否给加拿大带来净惠利益标准时，他必须依照本法案第20条例作出必要的考量：
 - the level and nature of economic activity in Canada;
在加拿大的经济活动的水准和性质
 - the degree and significance of participation by Canadians;
加拿大人的参与程度和重要性
 - productivity, efficiency, technological development, product innovation and variety;
生产力、效率、技术开发、产品创新和品种多样化
 - competition in Canada;
在加拿大行业内的竞争
 - compatibility with national industrial, economic and cultural policies; and,
与国家产业、经济和文化政策的兼容性；和
 - Canada's ability to compete in world markets.
加拿大在国际市场上的竞争能力

ICA: General Overview

ICA : 概述

- SOE investors may receive greater scrutiny under the ICA. Potential concerns: “governance and commercial orientation” of some state-owned enterprises.
根据ICA，国有企业的投资方的投资可能会受到更严格的审查。潜在的忧虑是：某些国有企业的“治理结构和商业取向”
- SOE may be required to provide undertakings beyond those normally expected of a privately owned company. Examples: appointment of Canadians to boards of directors, employing Canadians in senior management positions, incorporation of a company in Canada, or a listing of shares on a Canadian stock exchange.
国有企业可能需要提交比一般私营企业所制定的更广泛的承诺。诸如：任命加拿大人参与董事会、雇佣加拿大人作为高级管理职位、在加拿大设立公司，或在加拿大的证券交易所进行股票交易

ICA: General Overview

ICA: 概述

- Minister has up to 75 days to review (subject to mutually agreed extensions)
部长有多达75天的时间进行审核（经双方同意，也可再延期）
- Usually “undertakings” are required to obtain approval
通常来说，需要“承诺”才能获得认证批准

ICA: Rejection and enforcement activity is rare but escalating

ICA：不断提升的投资项目拒绝和执法行动

- BHP proposed acquisition of Potash Corp (\$38 billion) rejected in November, 2010 despite BHP's undertakings that were, in the words of BHP, “unparalleled in substance, scope and duration.”

2010年11月，必和必拓提出收购加拿大钾肥公司（380亿美元）尽管必和必拓提交了承诺，但仍然遭到拒绝，用必和必拓的话说，“承诺的实质内容、范围和持续时间是无与伦比的”。

ICA: Rejection and enforcement activity is rare but escalating

ICA：不断提升的投资项目拒绝和执法行动

- blocking in 2008 of the proposed \$1.3-billion acquisition of the Information Systems Business of MacDonald, Dettwiler and Associates Ltd. (MDA) by Alliant Techsystems Inc. (ATK) . The MDA transaction was likely blocked because of reasons relating to national sovereignty and security.

因为国家主权和安全的考量因素，2008年加拿大拒绝了 MacDonald, Dettwiler and Associates (MDA) 公司将旗下的信息系统业务以13亿加元出售给美国Alliant Techsystems Inc. (ATK)公司的计划。

ICA: Rejection and enforcement activity is rare but escalating

ICA：不断提升的投资项目拒绝和执法行动

- In its first enforcement action, the Canadian Government is suing US Steel for breaching its undertakings to maintain minimum levels of employment in connection with the Stelco acquisition.

在首次执法行动中，加拿大政府向未能履行承诺的美国钢铁公司就收购加拿大钢铁制造商Stelco公司交易提出起诉，声称美国公司违反了维持最低就业水准的承诺。

ICA: General Overview

ICA : 概述

- No right of appeal
无权上诉
- undertakings carefully monitored
承诺的严密监测

ICA: New Thresholds – Bill C-10

ICA : 新的门槛 – 法案C-10条

- WTO threshold will rise to \$600 million of “enterprise value” once regs are adopted*
对于来自世贸组织成员国的施工方来说，一旦法案通过，其“企业价值”的审查门槛将增长到6亿加元
- Draft regs were issued but have stalled, therefore the threshold remains at \$330 million “book value of assets”
由于这些法案尚未颁发，因此，目前该项门槛仍然保持在3.3亿加元的“资产的账面价值”

*will eventually rise to \$1 billion
将会增长到10亿加元

ICA: New Thresholds

ICA : 新的门槛

- Draft regs (not law yet) has two definitions of *enterprise value*:
法案草案 (此法尚未生效) 给“企业价值”界定了两项定义：
 - for public companies: Market Capitalization plus liabilities minus cash
对公众公司而言 : 市值加上负债减去现金
 - for private companies: “book value of assets” (essential same old threshold with a new name)
对私营公司而言 : “资产的账面价值” (新的名称 与旧的门槛基本相同)
- No public statement as to why new regs have stalled.
到目前为止仍然没有公开声明为什么该项新的法案尚未得以采纳。

ICA: National Security

ICA : 国家安全

- Any transaction that involves a non-Canadian is potentially subject to a National Security Review

任何交易涉及非加拿大人或公司的投资均可能会受到国家安全审核的要求限制

ICA: National Security

ICA : 国家安全

- Any transaction:
任何交易 :
 - acquisition of control (reviewable)
收购控制权 (需要审查)
 - acquisition of control (notifiable)
收购控制权 (需要呈报)
 - minority acquisitions
少数股权收购

ICA: National Security

ICA : 国家安全

- Government has powers to
政府有权力去：
 - delay, then block, a deal
延迟及阻止成交
 - order divestiture (if already implemented)
命令业务剥离 (如果已经实施)
 - demand conditions (undertakings)
要求条件 (承诺)

ICA: National Security

ICA : 国家安全

- No definition of National Security
国家安全的法律定义悬而未定
- National Security will likely focus on:
国家安全可能将集中如下因素：
 - subject matter of investment -- e.g. military, government contracts, nuclear/uranium, aerospace, radar, classified work, technologies, etc.
投资主题事项 - 例如军事，政府合同，核/铀，航空航天，雷达，秘密工作，技术等
 - identity of purchaser -- e.g. individuals, organizations or states that give rise to national security concerns – notably State Owned Enterprises (“SOE’s”)
购买者的身份 - 例如，有可能带来国家安全的忧虑问题的个人、组织或国家 - 尤其是国有企业 (“国有企业”)

ICA: National Security

ICA : 国家安全

- Breadth of jurisdiction? Canada only or will Canada consider enforcement with impact outside of its borders?

广泛管辖权？加拿大是否光考虑加拿大境内的影响或加拿大需要考虑执法时对加拿大境外的影响？

ICA: National Security

ICA : 国家安全

- National Security Review can take 130 days or longer
国家安全审查可能需要130天或更长的时间
- The initial time frame for screening of “acquisitions of control” is 50 days
“收购控制权”的初步筛选的时限为50天

ICA: National Security

ICA : 国家安全

- Therefore, if pre-clearance is important, notice of transaction must be filed with Minister more than 50 days prior to closing
因此，如果预检是重要的，交易方应在交易截止日期前50天之前向部长递交交易通告
- No pre-clearance provided for by the law for minority investments
对少数股权投资交易来说，没有预检的法律要求

ICA: Summary

ICA: 摘要

- Threshold for “net benefit” review will rise to \$600 million (from current \$330 million).
“净惠利益”的审查门槛将上升到6亿加元（从目前的3亿3千万加元）
 - rising to \$1 billion in four years
四年后将上升到10亿加元
- “enterprise value” will be the new threshold metric
“企业价值”将成为新的门槛标准

ICA: Summary

ICA: 摘要

- Any deal is now subject to National Security scrutiny
目前，任何交易均受到国家安全审查的限制
 - to pre-clear an acquisition under the National Security review regime, give notice to Minister more than 50 days prior to closing.
根据国家安全审核制度规定，交易方应在交易截止日期前50天之前，向部长提交预查交易通告。

Canadian Foreign Investment Review Regime

加拿大外国投资法审核制度

Discussion & Questions

提问和讨论

Oliver J. Borgers, Partner
McCarthy Tétrault LLP

奥利弗·伯格斯，合伙人
麦启泰律师事务所

温哥华 - VANCOUVER

Suite 1300, 777 Dunsmuir Street
P.O. Box 10424, Pacific Centre
Vancouver BC V7Y 1K2
Tel: 604-643-7100
Fax: 604-643-7900
Toll-Free: 1-877-244-7711

卡尔加里 - CALGARY

Suite 3300, 421 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500
Fax: 403-260-3501
Toll-Free: 1-877-244-7711

多伦多 - TORONTO

Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673
Toll-Free: 1-877-244-7711

蒙特利尔 - MONTRÉAL

Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2
Tel: 514-397-4100
Fax: 514-875-6246
Toll-Free: 1-877-244-7711

魁北克 - QUÉBEC

Le Complexe St-Amable
1150, rue de Claire-Fontaine, 7e étage
Québec QC G1R 5G4
Tel: 418-521-3000
Fax: 418-521-3099
Toll-Free: 1-877-244-7711

**英国和欧洲 - UNITED KINGDOM
& EUROPE**

125 Old Broad Street, 26th Floor
London EC2N 1AR
UNITED KINGDOM
Tel: +44 (0)20 7489 5700
Fax: +44 (0)20 7489 5777