OSLER

Frequently asked questions concerning the *Investment Canada Act* (ICA)

February 2024

The following are some frequently asked questions (FAQs) concerning the application, administration and enforcement of the ICA. These FAQs and responses are of a general nature, and cannot be regarded as legal advice.

When do the net benefit provisions of the ICA apply?

The net benefit provisions apply when a "non-Canadian" (e.g., an "entity" that is not Canadian-controlled)

- establishes a new business in Canada
- proposes to acquire control — directly or indirectly — of an existing Canadian business

"Canadian business" is defined in the ICA as a business carried on in Canada that has

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

Note that the ICA applies even if the Canadian business being acquired is not Canadian-controlled.

Direct acquisitions of control where the enterprise value or the book value of the Canadian business exceeds prescribed monetary thresholds are subject to pre-closing government approval on a net benefit basis. Except for certain cultural transactions, all other acquisitions of control and establishments of new Canadian businesses are subject to a mandatory notification process only.

What are the thresholds for net benefit review?

Financial Threshold

Outside of the cultural sector, a direct acquisition of control of a Canadian business by a non-Canadian that is controlled by nationals of a specified trade agreement state (the European Union, the United States, Mexico, Australia, Brunei, Chile, Colombia, Honduras, Japan, Malaysia, New Zealand, Panama, Peru, Singapore, South Korea, the United Kingdom or Vietnam), or a sale of a Canadian business when it is controlled by nationals of these nations, is subject to mandatory pre-closing review by the Minister of Innovation, Science and Economic Development Canada if the enterprise value of the Canadian business is $1.989 billion or more (in 2024; indexed annually).

For investments or divestitures by investors controlled by nationals of a World Trade Organization (WTO) member state that is not a trade agreement state, the direct acquisition of control of a Canadian business, or the sale of a Canadian business controlled by a WTO investor, is subject to mandatory pre-closing review by the minister if the enterprise value of the Canadian business is $1.326 billion or more (in 2024; indexed annually).

The case of a direct acquisition must be distinguished from that of an indirect acquisition. In an indirect acquisition, the investor acquires shares of a non-Canadian corporation, which in turn owns shares in a Canadian corporation. An indirect investment is not subject to net benefit review either on a pre-closing or a post-closing basis, except if the Canadian business is a "cultural business". In this circumstance, the acquisition is subject to review where the book value of assets is $50 million or more unless the value of the worldwide assets of the Canadian business exceeds 50% of the value of all assets acquired, in which case the review threshold is $5 million.

Enterprise value is calculated differently, depending on whether the Canadian business is a publicly traded or privately held entity, or consists of assets.

Direct acquisition of a publicly traded entity — the publicly traded entity must have an enterprise value equal to or greater than the appropriate threshold, based on its market capitalization, plus its total liabilities excluding its operating liabilities and minus its cash and cash equivalents.

- Market capitalization is calculated by using the average daily closing price of the target's quoted equity securities on the entity's principal market (i.e., where the greatest volume of trading occurred during the trading period) over the most recent 20 days of trading ending before the first day of the month that immediately precedes the month in which the application for review or notification is filed.
- If there are unlisted equity securities, the fair market value of such securities, as determined by the board of directors of the investor or other person authorized to make that determination, is included.
- Total liabilities, excluding operating liabilities, cash and cash equivalents are determined based on the most recent quarterly financial statements.

Direct acquisition of a privately held entity — the privately held entity must have an enterprise value equal to or greater than the appropriate threshold, based on the total acquisition value, plus its total liabilities excluding its operating liabilities and minus its cash and cash equivalents.

- Where the investor is acquiring 100% of the voting interests, total acquisition value is the total consideration payable. Where the investor is acquiring less than 100% of the voting interests, total acquisition value is the aggregate of the consideration payable by the investor, the consideration payable by any other investors, and the fair market value determined by the investor of any portion of the voting interests that is not being acquired.
- In circumstances where the parties are non-arm's length, or consideration is nominal or zero, total consideration payable is fair market value.
- Total liabilities, excluding operating liabilities, cash and cash equivalents are determined based on the most recent quarterly financial statements.

Acquisition of assets — the assets must have an enterprise value equal to or greater than the appropriate threshold, based on the total consideration payable, plus the liabilities that are assumed by the investor (other than operating liabilities), and minus the cash and cash equivalents that are transferred to the investor.

- In circumstances where the parties are non-arm's length, or consideration is nominal or zero, total consideration payable is fair market value.

Direct acquisition by a state-owned enterprise (SOE) investor — the applicable threshold is the book value of assets of the Canadian business of $528 million or more (in 2024; indexed annually).

Acquisition of Control Threshold

An investment by a non-Canadian must involve an acquisition of control in order for the net benefit review provisions of the ICA to apply. An acquisition of control is presumed to occur if a non-Canadian acquires one- third or more of the voting shares of a corporation, and is

deemed to occur if a non-Canadian acquires a majority of the voting shares of a corporation or a majority of the voting interests of a partnership, trust or joint venture.

An acquisition of less than one-third of the voting shares of a corporation or less than a majority of the voting interests of a partnership, trust or joint venture, is deemed not to be an acquisition of control (except in cases involving a cultural business or an SOE investor, where a control in fact test applies).

An acquisition by a non-Canadian of all or substantially all of the assets used in carrying on a Canadian business is an acquisition of control.

What are the implications of the enterprise value threshold for investment reviews?

The enterprise value threshold has several implications:

- For public bids, there is an element of strategy in deciding when to make an ICA filing. The time period for calculating the share price for market capitalization is determined when an ICA filing is made. It is possible that the first bidder may file a notification based on an enterprise value which is below the threshold (i.e., no ICA review would be required for that bidder). If the announcement of this first bid has the effect of increasing the target's share price, this has the potential to result in an uneven playing field amongst foreign bidders. While the first bidder would not be subject to ICA review, if there is a significant time gap in between bids such that enterprise value must be re-calculated to take into account the impact on share price as a result of the first offer, subsequent bidders may be subject to ICA review if the enterprise value has increased above the threshold.
- SOE and private sector investors are subject to different thresholds. As a result, it is possible that a private sector investor may trigger a review as a result of the target's enterprise value exceeding the appropriate threshold, while that same investment by an SOE would not trigger a review if the book value of the target's assets is below the $528 million asset value threshold. The converse may also occur, i.e. a private sector investor may not be subject to review if the enterprise value of the target is below the enterprise value threshold, while an SOE may be subject to review because the book value of the target exceeds $528 million.
- Consideration payable and fair market value determinations in acquisitions of privately held entities and assets have ICA filing implications.

Are there any exemptions from filing under the *Investment Canada Act*?

The ICA exempts several types of transactions from the net benefit provisions, for example

- an acquisition of control in connection with the realization of security granted for a loan orother financial assistance and not for any purpose related to the ICA
- a corporate reorganization following which the ultimate control of the Canadian business remains unchanged
- certain acquisitions of control or establishments of new Canadian businesses where the investor is a foreign bank or is associated with a foreign bank

If an acquisition of control does not meet thresholds for review, is the investor required to obtain any kind of clearance, or take any action?

If a direct or indirect acquisition of control of a Canadian business by a non-Canadian does not meet the review thresholds set out above, the investor must file a notification with the Foreign Investment Review and Economic Security Branch (FIRES). A notification may be filed at any time prior to the implementation of the investment and no later than 30 days after its implementation. Non-Canadians who establish a new Canadian business also must file a notification.

Do specific considerations apply to investments involving a cultural business?

Review thresholds for acquisitions of control of a cultural business are $5 million in book value of assets of the business for direct investments and $50 million in book value of assets of the business for indirect investments. For an indirect acquisition of control of a cultural business, where the value of the worldwide assets of the Canadian business exceeds 50% of the value of all assets acquired, the review threshold is $5 million in book value of assets.

Unlike non-cultural businesses, indirect investments in the cultural sector are reviewable on a post-closing basis. If the assets of the cultural business fall below the thresholds for review, the Governor in Council (i.e., the federal cabinet) may still order a review on a discretionary basis. Cultural investments are reviewed by Cultural Sector Investment Review (CSIR) and approval is granted by the Minister of Canadian Heritage.

What is considered a cultural business?

A "cultural business" is defined in the ICA as a business that carries on any of the following

- the publication, distribution or sale of books, magazines, periodicals or newspapers in print or in machine readable form (but excludes businesses involved only in the printing or typesetting of these items)
- the production, distribution, sale or exhibition of film or video recordings
- the production, distribution, sale or exhibition of audio or video music recordings
- the publication, distribution or sale of music in print or machine readable form
- radio communication intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services

Notably, there are special policies which prevent or restrict investments in the film distribution and book publishing and distribution sectors. However, the government has been adopting a more flexible and pragmatic approach to enforcement of these policies. For example, in 2010, Amazon.com was permitted to establish a Canadian fulfilment centre and Apple Canada was granted approval to establish iBookstore Canada, in return for certain commitments to strengthen the Canadian book sector. In 2012, Target received approval to sell cultural products, including books, when it launched its stores in Canada. In 2014, Torstar Corporation's sale of the

Harlequin book business to HarperCollins Publishers, a subsidiary of News Corp., was approved (a transaction which on its face was prohibited by the book policy). In 2017, Netflix entered an agreement with the government which allowed it to avoid the traditional taxation framework applied to broadcasters in exchange for a $500 million investment for content creation in Canada. In 2019, Hasbro's acquisition of Toronto- based film, music and television content producer and distributor Entertainment One (eOne) was approved.

Are there any other sensitive sectors besides culture?

Until 2009, the lower review thresholds which still apply to acquisitions of control of cultural businesses also applied to acquisitions of control of Canadian businesses involved in financial services, transportation services, and uranium production. These industries are no longer subject to these lower thresholds. In addition to specific sectoral review legislation, however, acquisitions in these sectors may be subject to national security review in the same way as all other sectors of the economy.

Investors may also encounter provincial government concerns during an ICA review, such as during the attempted 2010 acquisition of Potash Corp. by BHP Billiton (Saskatchewan) and the 2012 offer by Lowe's to acquire Rona (Quebec).

Can investors implement a proposed investment pending net benefit approval?

Generally, where an acquisition of control is subject to net benefit review the acquisition cannot be implemented until the reviewing minister "is satisfied that the investment is likely to be of net benefit to Canada". In a global transaction where the Canadian business is being acquired directly and there is no obstacle to closing outside of Canada, it may be necessary on closing to "carve out" the Canadian portion of the acquired business until the transaction is approved by the minister.

Indirect transactions involving WTO investors or sellers are not subject to net benefit review. Indirect cultural transactions may be implemented without obtaining pre-closing approval.

When will the investor receive approval of a reviewable investment?

Where an investment is subject to pre-closing net benefit review, investors must file an application for review with the Foreign Investment Review and Economic Security Branch (FIRES) (or CSIR in the case of cultural businesses) prior to implementation of the investment, and allow sufficient time for review and ministerial approval before closing. The minister has up to 45 calendar days (which may be unilaterally extended by an additional period of 30 calendar days) to determine whether the investment should be approved. The review period may be extended past 75 days for an additional period which is determined by agreement between FIRES (or CSIR) and the investor. It is prudent to allow at least 75 days for approval.

What does 'net benefit' mean?

The reviewing minister will consider the following factors set out in the ICA to determine whether an investment is likely to be of "net benefit"

- effect of the investment on the level of economic activity in Canada, on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada
- degree and significance of participation by Canadians in the Canadian business
- effect of the investment on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada
- effect of the investment on competition within any industry in Canada
- compatibility of the investment with national industrial, economic and cultural policies (taking into consideration provincial policy objectives)
- contribution of the investment to Canada's ability to compete in world markets

In practice, this means that the investor will have to set out in its application for review projections for Canadian employment, capital expenditures in Canada, Canadian management participation and responsibilities for the Canadian business, research and development activity in Canada, production in Canada and exports, and other relevant information. Foreign investments in cultural businesses must take into account the goal of the Department of Canadian Heritage to promote Canadian content across various forms of media. In addition, the investor in nearly all cases must submit binding undertakings to the minister confirming its commitment to perform the key elements of these plans. Undertakings typically apply over a three-to-five year period after closing.

What happens once the minister approves an investment?

After receiving approval and implementing the investment, the investor must comply with its undertakings. The investor is also required to submit a "progress report" to FIRES (or CSIR) approximately 12–18 months after closing and every 12–18 months thereafter for the duration of the undertakings, so that FIRES (or CSIR) may assess whether the investor is complying with its undertakings.

The minister is empowered to demand that an investor comply with its undertakings. If an investor fails to comply with a demand issued by the minister, the minister may apply to a superior court for an order directing the investor to comply with the undertakings, requiring it to divest itself of the acquired business and imposing a penalty not exceeding $10,000 for each day of contravention.

In 2009, the minister brought court proceedings against U.S. Steel in relation to alleged shortcomings in performing its undertakings. In 2011, the minister reached an out-of-court settlement with U.S. Steel, in return for U.S. Steel's commitment to significantly enhanced undertakings. Typically, however, an investor will reach an agreed solution with the Minister concerning a failure to fulfill undertakings.

After receiving approval and implementing the investment, the investor must comply with its undertakings.

What information will be publicly disclosed about an investment?

Certain limited information regarding net benefit approvals and notifications for acquisitions of control and new business establishments is available on the FIRES and CSIR websites: the investor name and origin, the name and location of the Canadian business, a brief description of the Canadian business' business activities and the investment type (i.e., acquisition of control or new business establishment).

Normally, where an investor enters into binding undertakings to obtain net benefit approval the minister does not publicly disclose the undertakings. However, in connection with enforcement proceedings in the U.S. Steel case, certain undertakings were disclosed. An investor may voluntarily disclose the general tenor of its proposed undertakings for strategic reasons.

In addition, the minister may disclose the fact that an application for net benefit approval has been filed under the ICA, and at what point the investment is in the review process. Prior to making such a disclosure the investor will be informed and such information will not be disclosed if the investor can demonstrate that it would prejudice the investor.

As of November 2022, the minister will disclose the names of the parties and the outcome (i.e., non-approval or approval subject to conditions) of national security reviews that result in a final Cabinet order.

What considerations apply to an acquisition of control by a state-owned enterprise (SOE)?

Investments by SOEs, including sovereign wealth funds, are analysed under the usual "net benefit" factors in the ICA, as well as special guidelines which refer to

- the nature and extent of control by the foreign government
- the SOE's corporate governance, operating and reporting practices
- the SOE's adherence to free market principles
- the effect of the investment on the level and nature of economic activity in Canada
- whether the Canadian business will retain the ability to operate on a commercial basis

In an SOE transaction, the minister may require undertakings such as appointing independent Canadian directors, employing Canadians in senior management, incorporating the business in Canada and listing shares of the SOE or the Canadian business on a Canadian stock exchange.

Acquisitions by SOEs which do not confer control are not subject to net benefit review but may be subject to national security review.

In December 2012, following the minister's approval of Malaysian-controlled PETRONAS' $6-billion acquisition of Progress Energy Resources Corp. and CNOOC's $15.1-billion acquisition of Nexen Inc., the government announced it was taking a more restrictive approach to reviewing investments in Canada by SOEs. Although the government stated that it continues to welcome and encourage foreign investment in Canada, it indicated a clear preference for private foreign investment over investment by SOEs, minority SOE investments over acquisitions of control by SOEs, and a lower tolerance for SOEs acquiring control of, or material

influence over, leading firms in any sectors of Canada's economy. Further, the government stated that acquisitions of control in the Canadian oil sands by SOEs will only be permitted in "exceptional" circumstances.

In 2013, the ICA was amended to introduce an expanded definition of SOE to include individuals acting under the direction of a foreign government and individuals and entities directly or indirectly influenced by a foreign government. The minister may determine whether an entity is controlled in fact by a SOE or whether there has been an acquisition of control by a SOE, or that an otherwise Canadian-controlled entity is controlled in fact by a SOE.

In March 2022, the federal government issued a policy advising that investments by Russian investors will be found to be of net benefit to Canada only on an exceptional basis.

In October 2022, the federal government issued a policy relating to the treatment of SOE investment in Canada's critical minerals sector. The policy states that where the minister is required to determine whether an investment of this nature is of net benefit to Canada, that will be the finding on an exceptional basis only. For more information, see Osler Update: New restrictions and divestiture orders send clear warning to foreign SOE investment in Canada's critical minerals sector (November 3, 2022).

Which investments are subject to a national security review?

An investment is subject to national security review if the minister considers that the investment could be injurious to national security and if the Governor in Council (i.e., the federal cabinet, on the minister's recommendation) makes an order for review. Notably, even establishments of new businesses and investments which do not involve an acquisition of control of a Canadian business may be subject to national security review.

What does 'national security' mean?

"National security" is not defined in the ICA. In 2021, the government updated the Guidelines on the National Security Review of Investments first released in 2016 for the national security review process. The Guidelines state that, in assessing the national security implications of an investment, the nature of the assets or business activities and the parties involved, including the ultimate controller and potential for third party influence, are considered. The Guidelines indicate that the government will subject all investment by SOEs or private investors assessed as being closely tied to or subject to direction from foreign governments to enhanced scrutiny, and set out a non-exhaustive set of factors that are used when assessing national security. These include

- the potential effects of the investment on Canada's defence capabilities and interests
- the potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada
- involvement in the research, manufacture or sale of goods/technology identified in section 35 of the *Defence Production Act*, which refers to controlled goods such as firearms and military equipment
- the potential impact of the investment on the security of Canada's critical infrastructure

- the potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada
- the potential impact of the investment on critical minerals and critical mineral supply chains
- the potential of the investment to enable foreign surveillance or espionage
- the potential of the investment to hinder current or future intelligence or law enforcement operations
- the potential impact of the investment on Canada's international interests, including foreign relationships
- the potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime
- the potential for the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation

In March 2022, the federal government issued a policy advising that if an investment, regardless of its value, has direct or indirect ties to an individual or entity associated with, controlled by or subject to influence by the Russian state, this finding supports reasonable grounds for the minister to believe that the investment could be injurious to Canada's national security.

In October 2022, the federal government issued a policy advising that all foreign SOE investment in a Canadian business engaged in the critical minerals sector value chain, regardless of size or value, will be subject to enhanced scrutiny under the national security review provisions. For more information, see Osler Update: New restrictions and divestiture orders send clear warning to foreign SOE investment in Canada's critical minerals sector (November 3, 2022).

How do investors receive national security clearance?

For an investment involving an establishment of a new Canadian business or an acquisition of control of an existing Canadian business, an investor may obtain comfort on national security issues by submitting the mandatory notification or application for review (as applicable).

For investments that do not trigger a mandatory notification or application for review, investors may elect to file a voluntary notification.

Upon receipt of a complete notification or application for review, the minister has 45 days to notify the investor that an order for national security review may be issued or has been issued. Where no such notice is received, the national security review process is complete. Where such a notice is received and an investment is not yet implemented, it is prohibited from closing until the review is complete. A full national security review occurs in stages. Including all of the interim review periods and the final period in which cabinet may take action with respect to the investment, a full national security review may take up to 200 days (or longer, if the investor and the minister agree to an extension).

Where an investor elects not to voluntarily notify an investment, the minister has until five years following completion of the investment to commence a national security review.

If a national security review has been ordered, what measures may the Governor in Council take?

The federal cabinet may, by order, take any measures it considers advisable to protect national security. Measures include

- directing the investor not to implement the investment
- authorizing the investment on the condition that the investor provide undertakings or implement the investment on specified conditions
- requiring divestiture of the investment (if previously completed)

What statistics are available on national security reviews?

For the fiscal year ended March 31, 2023, 32 investments were subject to extended national security review. Of these 32 investments, 20 were subject to no further action, eight were withdrawn by the investor during the review process, three resulted in a divestiture order, and one was subject to ongoing review as of September 2023.

How does the ICA review process relate to the *Competition Act* review process?

The ICA review is undertaken separately from the review of a proposed transaction on competition law grounds under the *Competition Act* (CA). The CA review is undertaken by the Competition Bureau. One of the net benefit factors listed in the ICA is the effect of the investment on competition within any industry in Canada. The Minister may delay the approval of a proposed transaction until the CA review is complete. The minister may also decide to approve a transaction that is still under review by the Competition Bureau.

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