



# Foreign Investment

## *Doing Business In Canada*

For foreign companies considering doing business in Canada, the *Investment Canada Act* (the “ICA”) provides complex, comprehensive rules designed to ensure that investments by non-Canadians result in a net benefit to Canada. In addition to the net benefit review, all transactions are potentially reviewable on national security grounds. Transactions by foreign investors involving companies operating in certain regulated industries (e.g., telecommunications, broadcasting, financial services, transportation and natural resources) may be subject to several multi-jurisdictional regulatory requirements and approvals. There are separate guidelines for investments by state-owned enterprises (“SOEs”).

### When Does The ICA Apply?

The ICA applies to acquisitions of control of a Canadian business or the establishment of a new Canadian business by a non-Canadian. A Canadian business has a place of business in Canada, assets in Canada used for the business and (an) individual(s) employed in connection with the business. The ICA applies where a new Canadian business that is established by a non-Canadian is either unrelated to any other business that the non-Canadian is operating when the new business is established or, if so related, considered connected to Canada’s cultural heritage or national identity.

The ICA defines who a Canadian person is (e.g., a citizen or certain permanent residents) and provides detailed rules and presumptions regarding Canadian status (e.g., circumstances in which an entity is considered Canadian-controlled). Despite the rules regarding acquisitions of control, the Minister of Innovation, Science and Economic Development Canada or the Minister of Canadian Heritage

(as applicable) can override both the general rules regarding an investor’s “Canadian” status and the rules and presumptions regarding “control” and acquisition of control. In so doing, the Minister may determine that an investor is not Canadian-controlled, or an entity does not control another entity, or control has (not) been acquired.

### Review vs. Notification

Where the ICA is applicable, investments are subject to either pre-closing review or post-closing notification. Generally, a reviewable acquisition of control of a Canadian business may not be completed until approved by the relevant Minister. Whether an investment is reviewable or requires notification depends on criteria such as whether: the business being acquired is cultural; the transaction is a direct (acquisition of a Canadian company) or indirect (acquisition of a non-Canadian parent) investment; and the purchaser or vendor is a resident of a World Trade Organization (“WTO”) member country. All investments are potentially subject to national security review (see “**National Security Review**” below).

### Which Investments Are Subject to Review Under the ICA?

Both direct and indirect acquisitions may be subject to review. The ICA considers a direct acquisition to be the acquisition of all or substantially all of a Canadian business’s assets or operational control (which can happen once one-third or more of the shares of the Canadian business are acquired). Direct acquisitions (other than one involving a cultural business) involving a WTO investor will be reviewable where (i) in the case of investments by



non-SOEs, where the Canadian business has an enterprise value of \$800 million and (ii) in the case of SOEs, where the book value of the acquired Canadian assets exceeds \$379 million for 2017. A direct acquisition by a non-WTO investor is reviewable where the value of the acquired Canadian assets is \$5 million or more.

Under the ICA, an indirect acquisition is the acquisition of control of a Canadian business by virtue of the acquisition of a non-Canadian parent entity. Indirect acquisitions by WTO investors (other than those involving a cultural business) are not reviewable. Indirect acquisitions by non-WTO investors are reviewable where the value of the Canadian assets is \$50 million or more. The lower \$5 million threshold will apply if the asset value of the Canadian business being acquired exceeds 50% of the asset value of the global transaction.

## What is a “Cultural Business”?

The higher WTO threshold for direct investments and the exemption for indirect investments (as discussed above) do not apply where the Canadian business being acquired is a “cultural business.” A cultural business is a Canadian business that carries on any of the following activities:

- ◆ 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;
- ◆ The production, distribution, sale or exhibition of: film or video recordings, audio or video music recordings, or music in print or machine-readable form;
- ◆ 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.

The Department of Canadian Heritage has also issued specific policies applicable to book and periodical publishing and distribution. Even if the “cultural business” aspect of a Canadian business overall operations are minimal or incidental to the overall business, the investment is subject to review by the Department

of Canadian Heritage. A Canadian business that has both cultural and non-cultural components must make the required notification or application for review with both Industry Canada and the Department of Canadian Heritage, as applicable.

## Which Activities May Be Related to Canada’s Cultural Heritage or National Identity?

The acquisition of control of an existing Canadian business or the establishment of a new such business may also be reviewable, *regardless of asset value*, if the business is engaged in: the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form; or the production, distribution, sale or exhibition of: film or video products, audio or video music recordings, or music in print or machine-readable form. These activities are deemed to be related to Canada’s cultural heritage or national identity and fall under the jurisdiction of the Department of Canadian Heritage. An investor must be informed within 21 days of filing its completed ICA notification with the Department if a review is to be conducted.

## What Procedures Govern an ICA Review?

- ◆ An application for review must include annual reports or financial statements for the three most recent fiscal years and set out particulars of the proposed transaction, including information about the investor, the Canadian business and the investor’s plans for the business.
- ◆ The relevant Minister has 45 days to determine whether to allow the investment. The Minister can unilaterally extend the 45-day period by an additional 30 days by sending a notice to the investor prior to the expiration of the initial 45-day period. Further extensions of time must be agreed to by the investor.
- ◆ If the investor does not receive approval or notice of extension within the applicable time then the investment is deemed approved. The investor may close a direct acquisition only after the Minister has approved, or is deemed to have approved, the



investment. Failure to comply with the ICA can result in enforcement proceedings that provide for fines of up to \$10,000 per day.

- ◆ Where the Minister determines that the investment will not be of “net benefit to Canada,” the investor is provided with an opportunity to make additional representations and to submit undertakings (discussed below) that demonstrate the “net benefit” of the investment.

## What Factors Are Considered in Connection With the “Net Benefit” Test?

The ICA requires the responsible Minister to consider certain factors (where relevant) in determining whether an investment is likely to be of net benefit to Canada. Submissions accompanying an application for review should address:

- ◆ The effect of the investment on the economic activity in Canada, including employment, use of Canadian products and services, and exports from Canada;
- ◆ How many Canadians will be employed, and in what positions, in the acquired or newly formed business or in the relevant industry;
- ◆ The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- ◆ The effect of the investment on competition within the relevant industry or industries 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 internationally.

Typically, during the review period, the investor and Investment Review Division or Canadian Heritage will negotiate a mutually acceptable set of time-limited (usually three to five years) binding undertakings to be provided in connection with the Minister’s approval of the transaction. These undertakings typically require the investor to make commitments regarding the operation of the Canadian business following the completion of the transaction. Common commitments can:

- ◆ Obligate the investor to keep the head office of the Canadian business in Canada;

- ◆ Ensure that a majority of senior management of the Canadian business is comprised of Canadians;
- ◆ Maintain certain employment levels at the Canadian business;
- ◆ Make specified capital expenditures and conduct research and development activities based on specified budgets; and
- ◆ In some cases, make a certain level of charitable contributions.

These undertakings normally are reviewed on a 12- to 18-month basis to confirm the investor’s performance. The ICA’s enforcement provisions include potential fines of up to \$10,000 per day for a breach of undertakings given in connection with ICA approval.

## National Security Review

Any investment may be reviewed on national security grounds, even if is not otherwise reviewable under the ICA. The applicable test is whether an investment is “injurious to national security.” Even minority or passive investments may be reviewable on national security grounds. A national security review may be triggered pre- or post-closing. If the review is triggered pre-closing, the transaction may not be completed until the Minister completes the review. An investor may be notified that an investment will be subject to a national security review or simply advised that the review is taking place. Timelines for clearance of reviewable transactions under the ICA will be extended to accommodate such reviews. A full national security review may last up to 200 days (and possibly longer, if the investor and the Minister agree to extend the review period).

## Investments by State-Owned Enterprises

In December 2012 the federal government announced that further acquisitions of control of Canadian oil sands businesses would only be of net benefit to Canada in “exceptional” circumstances. There are specific guidelines that subject investments by SOEs to heightened scrutiny. Reviews of investments by SOEs include an assessment of the entities corporate governance and reporting structure and may require additional undertakings to address potential concerns in these areas. Under the ICA, the definition of SOE includes individuals acting under



the direction of a foreign government and individuals and entities directly or indirectly influenced by a foreign government. Additionally, 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.

## When is an ICA Notification Required?

Where a non-Canadian acquires control of an existing Canadian business or establishes a new Canadian business and, on its facts, the acquisition is not reviewable, the non-Canadian must submit notification to Investment Canada before (or within 30 days of) closing, identifying the parties to the transaction, the number of employees employed by the business and the value of the business's assets.



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