Investment Canada Act FAQ

Q | Is Canada open to foreign investment?

A | Absolutely. Although a few high-profile transactions have received a high level of public and political attention, there is no doubt that the Canadian government is generally supportive of foreign investment. Since the *Investment Canada Act* (the "ICA") came into force over a quarter of a century ago, over 99% of reviewable transactions have been approved. As discussed in more detail below, only two transactions have failed as a result of a rejection (other than in connection with national security matters) and they each had unique circumstances.

Q | How does the ICA work?

A | The ICA has three distinct processes applicable to foreign investment in CanadA notifications, economic reviews under the "net benefit" to Canada test, and national security reviews. A notification is a form-based filing that is often made after closing, when a non-Canadian investor acquires control of a Canadian business or commences a new business. No governmental approval is required for notifications.

An economic review under the "net benefit" to Canada test is required in certain cases when a non-Canadian investor acquires control of a Canadian business, and certain thresholds are exceeded. Reviewable direct investments in Canadian businesses require ministerial approval before closing (and indirect investments, where control is acquired via the acquisition of an offshore parent, is only subject to the notification requirement noted above within 30 days after closing).

A national security review may be required where the government believes that there are reasonable grounds to believe that an investment may be injurious to national security. If the process is initiated by the government, governmental approval must be obtained, and if initiated post-closing, may result in an order to divest. National security reviews are still relatively rare, although on the increase since 2012.

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Q | What is the trigger for an ICA notification?

A | A notification is required where there is an acquisition of control of a Canadian business by a non-Canadian, and where the thresholds for an economic "net benefit" review are not met. A Canadian business exists where the target business has: (i) a place of business in Canada, (ii) individual(s) in Canada who are employed or self-employed in connection with the business, and (iii) assets in Canada used in carrying on the business. Generally, the Canadian business test is easily met. Notifications are also required when new Canadian businesses are established by a non-Canadian.

Q | What is the trigger for an ICA economic review?

A | There must be an acquisition of control of a Canadian business by a non-Canadian in one of the ways specified in the statute and a financial threshold must be exceeded. Pursuant to rules effective April 24, 2015, in the case of buyers who qualify as "WTO Investors" under the ICA (i.e., buyers ultimately controlled by citizens of WTO-member states), and who are not controlled or influenced by a foreign state (and, as such, are not considered to be "state-owned enterprises" or SOEs), the threshold for 2016 is exceeded where the Canadian business has an enterprise value greater than C$600 million (unless the Canadian business carries on any "cultural" activities). The enterprise value threshold will rise in 2017 to C$800 million and in 2019 to C$1 billion.

In the Fall of 2016, the Canadian government announced that it will raise the enterprise value threshold for review directly to C$1 billion in 2017. In addition, as the part of the implementation of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, the Canadian government has introduced legislation to raise the enterprise value threshold for review to C$1.5 billion (to be indexed annually to GDP growth) for investments from the EU, its members member states and from the following countries with which Canada has pre-existing free trade agreements: the U.S., Mexico, Chile, Peru, Columbia, Panama, Honduras and Korea. This is expected to come into force in 2017.

The calculation of "enterprise value" depends on the structure of the acquisition (all terms within brackets are defined in the applicable regulations):

Acquisitions of shares of Publicly-Traded Entities

Enterprise Value =
- \+ Market Capitalization
- \+ Total Liabilities (excluding operating liabilities)
- − Cash & Cash Equivalents

Acquisitions of shares of Non-Publicly Traded Businesses

Enterprise Value =
- \+ Acquisition Value
- \+ Total Liabilities (excluding operating liabilities)
- − Cash & Cash Equivalents

Acquisitions of Assets

Enterprise Value =
- \+ Acquisition Value
- \+ Assumed Liabilities
- − Cash & Cash Equivalents

For SOEs who are WTO investors, the enterprise value threshold does not apply, and the threshold for 2017 for economic review (unless the Canadian business carries on any "cultural" activities) is $379M (indexed each January for inflation) and is based on the book value of assets. The threshold for the direct acquisition of control of a cultural business or for transactions where neither the buyer nor the seller is a WTO investor is C$5M. The threshold for review of an indirect acquisition of control of a cultural business, or of any Canadian business where neither the buyer nor the seller is a WTO investor, is C$50M.

Q | Are there exemptions from review requirements?

A | There are a number of exemptions. The most important exemption is for an indirect acquisition of a non-cultural Canadian business by a WTO investor (i.e., acquisition of control of the offshore parent of a Canadian business). Although the test is complex, a WTO investor is most commonly found to exist where an entity is

controlled by persons who are citizens of one or more states that are members of the World Trade Organization. See below for the definition of a "cultural business".

Q | What if there is only a head office and perhaps a stock exchange listing in Canada and the operating assets are located outside of the country?

A | Generally speaking, this fact is insufficient to exempt a transaction from a review, if otherwise required. Even if all operations are offshore, the existence of the Canadian head office will usually be sufficient to constitute a "Canadian business" under the ICA.

Q | Are there sensitive sectors?

A | Formally, there is now just one sensitive sector: cultural businesses. Substantially lower thresholds for review apply to acquisitions of control of a Canadian cultural business: C$5M based on the book value of the assets involved for direct acquisitions of control, and $50M for indirect.

In addition, certain sectors may be sensitive for the purpose of the national security review. Please see details of the national security review process below.

Q | What is a cultural business?

A | The ICA treats a Canadian business as a cultural business if it engages in any of the following activities (however small a part of the business these activities may form):

- 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,
- 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, or
- 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.

Q | What if the business is only involved in cultural products to a de minimis extent?

A | There is no de minimis exemption, in the view of Heritage Canada, the department responsible for administering the ICA provisions in respect of cultural businesses.

Q | Are there special issues for cultural products?

A | Yes, there are a number of unique cultural considerations. The review threshold drops in most cases to C$5M (book value of assets). In some cases reviews can be ordered where the asset value is below C$5M or when the test for an "acquisition of control" has not been met. Also, Heritage Canada conducts the review of acquisitions of cultural businesses. Policy considerations of Heritage Canada may play a role in the review. Transactions involving certain cultural sectors are subject to policies that acquisitions will not be approved except in exceptional cases. The policies are not always applied.

Q | What must be done to get approval if an economic or cultural review is required?

A | An application for review must be filed with the applicable governmental agency. The application must explain the purchaser's plans for the business for the next few years, in detail. In most cases it will be necessary to give the Canadian government legally binding undertakings regarding the future operation of the business.

Q | What kinds of undertakings must be given?

A | This varies with the circumstances of each transaction. Generally speaking, undertakings cover Canadian employment levels (number of persons), capital expenditure and research and development expenditure levels, the preservation of a Canadian head office, the role of Canadians in senior management and the board of directors, and a wide range of other factors. Undertakings usually run for three to five years after closing, but can be longer for very important businesses. Undertakings specific to governance issues are common for investors who are SOEs.

Q | What is the test for approval?

A | The Minister must determine that the transaction will likely be of net benefit to Canada.

Q | Is the approval process onerous?

A | The process may initially be concerning to foreign investors who are unfamiliar with it. However, the government agency conducting the review has extensive experience and will endeavour to reach an outcome that is acceptable to the investor while still providing a sufficient basis for the Minister to properly approve the transaction. As discussed in this FAQ, high profile transactions are likely to experience a much higher degree of scrutiny.

Q | Is the review process public?

A | No. At present the investment review process is conducted in strict confidence as required by the ICA. It is important to note that it is common on more significant transactions for the investor (at the request of the government), or the government in some cases, to issue a press release at the end of the process that discloses information regarding the main elements of the undertakings given by the investor. Following the 2010 decision to reject BHP Billiton's proposed acquisition of PotashCorp (discussed below) and again during the debate over CNOOC Ltd.'s bid for Nexen, however, there were repeated Opposition calls for greater transparency, including demands for public hearings. Amendments in 2012 permit the government to publish reasons even for preliminary decisions.

Q | How long does a review take?

A | There is an initial deadline of 45 days; however, a typical review usually takes 60 – 75 days, and longer reviews are not uncommon.

Q | Are there special rules applicable to state-owned enterprises ("SOEs")?

A | SOE investments are reviewed according to the same law that applies to private investors. That said, in 2007 the government issued guidance as to particular issues it will consider when reviewing SOE transactions, and government and media scrutiny of SOE transactions has intensified in recent years. The SOE guidelines were amended in late 2012 at the same time that the approvals of SOE investments by Malaysia's Petronas (Progress Energy) and China's CNOOC (Nexen) were announced. In short, the Minister will need to be satisfied as to the commercial orientation of the investor and that its governance structure meets commonly accepted Canadian business norms. Undertakings will likely be required to address these issues. The SOE guidelines indicate that an acquisition of control of a Canadian oil sands business by an SOE will be approved only under exceptional circumstances, but that minority (joint venture) investments will continue to be welcome, as will SOE acquisitions of control in other sectors (if the SOE guidelines can be satisfied). As of March 2015, one such exception had been approved, permitting the re-structuring of an existing oil sands investment by an SOE.

Amendments in 2013 enabled the government to determine that minority acquisitions that do not meet the statutory tests for the acquisition of control will nonetheless give an SOE "control in fact" of a Canadian business (and thereby potentially be subject to net benefit review under the ICA). The amendments also defined SOEs as including not only those controlled by a foreign state (control is defined in terms of ownership of voting interests) but also those "influenced" directly or indirectly by a foreign state – an inherently subjective test.

As noted above, investments by SOEs from WTO-member states are subject to a different threshold for economic review than are their private-sector counterparts. Specifically, an acquisition of control of a Canadian business by a foreign SOE from a WTO-member state is subject to review if the book value of assets of the Canadian business exceed C$379M in 2017; the C$600M "enterprise value" threshold (and the expected increases thereto) does not apply to SOE investments.

Q | Has the government approved SOE investments in the past?

A | Yes. A number of such investments have been approved including by Chinese, Korean, European and Middle Eastern SOEs. As noted, Canada approved CNOOC's C$20B bid for Nexen in late 2012, along with Petronas' C$6B bid for Progress Energy.

Q | Which transactions have been rejected under the ICA?

A | Under the economic provisions of the ICA, there have been one final and two preliminary rejections to date (one of which was ultimately approved). The first, in 2008, was in respect of the proposed acquisition by a United States defence company, Alliant Techsystems Inc., of the space business of MacDonald, Dettwiler & Associates Ltd. That business developed and operated the Radarsat satellite program charged with defending Canada's north, as well as the robotic arm attached to NASA's space shuttle, and was finally rejected as not being of "net benefit" to Canada under the test.

The second rejection, in November 2010, was in respect of the proposed acquisition of Potash Corporation of Saskatchewan Inc. ("PotashCorp") by BHP Billiton Plc. There was strenuous objection to the acquisition by the province of Saskatchewan, where most of PotashCorp's mines are located, echoed by other provincial governments, as well as from other stakeholders. The Minister of Industry issued a press release on November 3, 2010 that referred to a notice that he had sent to BHP to the effect that he was not, at that time, satisfied that the proposed transaction was likely to be of net benefit to Canada and informed BHP that it had 30 days to make any additional representations and undertakings it deemed appropriate. Ten days later, the Minister issued a press release stating that he had been informed that BHP Billiton had withdrawn its application for review and that this terminated the ICA review process. The Minister stated that Canada welcomed foreign investment as being in the best interests of Canada for all the benefits it brings, including new ideas, sources of capital, and job creation. However, in the case of this particular acquisition the Minister determined, despite the offer of significant undertakings by BHP, that three of the criteria specified in the ICA were not satisfied; in particular, the criteria relating to Canada's ability to compete in world markets, productivity, efficiency and innovation in Canada, and the country's overall level of economic activity.

The third rejection, the preliminary rejection of Petronas' bid for Progress Energy in October, 2012, proved not to be the undoing of the transaction. The preliminary finding of no "net benefit" was reportedly issued as a result of a refusal by Petronas to extend the deadline for review as requested by the Minister in order to allow the government more time to issue revised SOE guidelines and to announce its decision concurrently with its decision on CNOOC/ Nexen. Ultimately, Petronas agreed to further extensions and was approved on the basis of undertakings.

Under the national security provisions of the ICA, there have been four formal rejections to date:

- a transaction involving an investment by Beida Jade Bird, a software and computer solutions company, to manufacture fire and smoke alarm systems in Saint-Bruno, Quebec,
- a telecom transaction involving the sale of Allstream to Accelero Capital, an Egypt-based investor,
- an acquisition by NavInfo Co. Ltd., a Chinese provider of digital mapping services, of PCI Geomatics Inc., a Canadian digital mapping firm), and
- in July 2015, the government ordered O-Net Communications Group Ltd., a Chinese optical networking component developer, to divest recently acquired ITF Technologies Inc. In response, O-Net filed an application for judicial review, seeking to quash the decision. At the time of writing, the O-Net application for judicial review was ongoing.

There have also been several situations where a proposed investment has been abandoned due to national security concerns. National security questions are also routinely asked as part of net benefit reviews in certain sectors and for certain investors. A revised notification form issued in 2015 also includes questions that facilitate the initial screening of all notifications for potential national security concerns.

Q | Do politics play a role under the ICA?

A | For routine transactions, politics do not play a role; however, in some high-profile cases politics may be very important. Although the factors to be considered by the Minister are specified in the ICA, they are often very broad. For example, one of the specified factors is the compatibility of the investment with national industrial, economic and cultural policies. The Minister therefore has considerable discretion when making decisions about particular investments. Also of note is that there is consultation with other federal governmental departments and affected provincial governments. Individuals and organizations may also make submissions to the government. In recent years, the ICA process has received a higher degree of political prominence, which places the Minister under a higher degree of scrutiny. Some transactions have been the subject of political debate in Parliament. Although politics can play a role in such cases, nonetheless, the Minister and his staff can be expected to take care to exercise their responsibilities within the requirements of the ICA.

Q | What is the role of governmental relations and public relations advisors?

A | In most cases, significant governmental relations and public relations efforts will not be required. However, for transactions that may raise politically sensitive issues, GR and PR strategies and careful implementation are essential. An early assessment (well before public announcement) of political risk should be made. For transactions that warrant political attention, it is often appropriate to make courtesy calls and meet with key municipal, provincial and federal officials, in order to introduce the investor and explain the rationale. Engaging with such officials at the earliest possible date often allows any concerns to be raised and addressed on a constructive basis. In these cases ongoing monitoring of the political and public reaction to a transaction is very important.

Q | How does the national security review process work?

A | There are a number of steps, but in essence the ICA allows the government to initiate a review where there are reasonable grounds to believe that an investment may be injurious to national security. Unlike the economic review provisions, there does not have to be an acquisition of control of a Canadian business – minority investments too can be scrutinized on national security grounds, and the investment need not qualify as a Canadian business. Once a national security review is commenced, a transaction may not be completed until approval is obtained. Closed transactions may be subject to remedies including divestiture orders.

Changes to the ICA's national security regulations – which came into effect as of March 13, 2015 – extended various national security timelines, allowing the government more time to decide whether to initiate a national security review, and more time to complete national security reviews. If the maximum periods under the regulations are fully utilized, a national security review could take 200 days (extendable upon consent) after an ICA notification or application for review is filed, or if no such filing is required, then after the transaction closes. If a net benefit review is also conducted, it will not conclude until 30 days following conclusion of the national security review (or longer with the consent of the investor).

Q | What factors does the Canadian government consider in a national security review?

A | In assessing a proposed or implemented investment for national security, the government will focus on the nature of the asset, business activities and the parties involved in the transaction. In particular, the government will consider the following factors:

1. The potential effects of the investment on Canada's defence capabilities and interests;

2. The potential effects of the investment on the transfer of sensitive technology or know-how outside of Canada;
3. Involvement in the research, manufacture or sale of goods/technology relating to certain controlled goods, including firearms, military training equipment, certain types of aircraft, weaponry and defence systems, etc.;
4. The potential impact of the investment on the security of Canada's critical infrastructure. Critical infrastructure refers to processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government;
5. 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;
6. The potential of the investment to enable foreign surveillance or espionage;
7. The potential of the investment to hinder current or future intelligence or law enforcement operations;
8. The potential impact of the investment on Canada's international interests, including foreign relationships; and,
9. The potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations or organized crime.

Q | Is there a voluntary filing process to deal with national security issues?

A | No. However, in some cases it is possible to provide the government with notice of the transaction before closing and obtain the benefit of a statutory prohibition on a review, once applicable time periods have expired. The government encourages early filing of the ICA notification prior to closing and advance consultations, particularly in cases where the assessment factors described above are present.

Q | Have any national security review processes been commenced?

A | Yes, we have been involved in several such cases. The government releases very limited information regarding the conduct of national security reviews. Until March 2016, a total of eight national security reviews were ordered. In three cases, the investors were directed not to implement the transaction; in two cases, the investors were ordered to divest themselves of control of the Canadian businesses; in two cases, the transaction was permitted to proceed on certain conditions that mitigated the identified national security risks; in one case, the investor abandoned the transaction before a final order was issued. It is believed that, in an unknown number of additional transactions, the investors received notices that a national security review may be ordered without subsequently resulting in national security reviews being ordered.

Q | Is there a process to enforce undertakings?

A | Yes. The ICA has enforcement provisions applicable to breaches of undertakings. Remedies include fines and divestment of the acquired business. The Attorney General of Canada (“AGC”) commenced proceedings in July, 2009 against US Steel in relation to undertakings it gave when it had acquired Stelco in 2007. The AGC alleged that US Steel had breached undertakings related to production and employment levels. US Steel vigorously defended the proceeding, arguing, among other things, that the global downturn was a critical factor that must be considered when assessing compliance. US Steel also brought a constitutional challenge regarding the ICA enforcement provision. Although its challenge was dismissed at the trial level, US Steel was pursuing an appeal when a settlement, on the basis of new undertakings, was announced in December, 2011. Amendments to the ICA enacted in 2012 also permitted the Minister to accept a performance bond as security against breaches of undertakings.

Q | Are further changes expected to the ICA and related policy?

A | Now that the "enterprise value" threshold announced in 2009 has been implemented (in 2015), no further legislative amendments are expected in the near future. As noted above, the across-the-board enterprise value threshold is expected to be directly raised to C$1 billion in 2017. In addition, when the legislation implementing CETA between Canada and the European Union comes into effect, non-SOE investments from E.U. member states, the U.S., Mexico, Chile, Peru, Columbia, Panama, Honduras and Korea in sectors other than the "cultural business" will be subject to be a higher enterprise value threshold of C$1.5 billion, to be indexed annually to GDP growth.

Q | Is the current climate favourable for foreign investment in Canada?

A | While there has been more public scrutiny and political debate of a few high-profile transactions in recent years, the Canadian government has repeatedly and clearly stated that in general it is strongly supportive of foreign investment in Canada. Early assessment of ICA issues is essential for the development of a successful strategy to obtain approval.

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