Regulation of Foreign Investment in Canada

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A Practice Note discussing the legal regime governing foreign investment in companies and industries in Canada. It sets out the key legislation regulating foreign direct investment (FDI) in Canada, including the types of transactions and industries affected by that legislation and the authorization process.

Legal Framework for Foreign Investment Review in Canada
- Investment Canada Act
- Other Legislation Affecting Foreign Investment

Application of the Investment Canada Act
- Key Concepts

Notification Under the Investment Canada Act

Reviewable Investments (Net Benefit Review)
- Reviewable Investment Thresholds
- Threshold Amounts (2023)
- Stages of a Net Benefit Review
- Net Benefit Factors
- Undertakings

National Security Review
- Scope of the National Security Review Provisions
- Time Limit for Commencing a National Security Review
- Stages of a National Security Review
- Meaning of "Injurious to National Security"
- Judicial Review

Penalties for Non-Compliance
- Demand by Minister
- Substitute Undertakings
- Court Order
- False or Misleading Information Offence
- Anti-Avoidance Provision

Industry Sectors in Canada with Additional FDI Notification or Approval
- Cultural Businesses

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Banks and Insurance Companies

Broadcasting

Airlines

Telecommunications

State-Owned Enterprises

Oil and Gas Interests

Critical Minerals: State-Owned or Influenced Investors

Critical Minerals: Chinese Investors

Russian Investors: All Sectors

Practical Implications of Foreign Investment Restrictions on Private M&A Transactions

In addition to applicable anti-trust or merger control rules potentially impacting acquisitions or investments, cross-border transactions may also trigger foreign direct investment (FDI) rules in the target's jurisdiction. Counsel representing parties in cross-border acquisitions or investments must be aware of the types of transactions or protected industries that may trigger foreign investment notification or approval requirements, and the potential impact on the deal timeline or the parties' ability to close the transaction.

Canada's foreign investment review legislation, the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp) (ICA), embodies a generally welcoming approach to FDI. Although every investment by a non-Canadian to establish or acquire a Canadian business must be notified to the government, only acquisitions above certain thresholds require approval before closing. Those thresholds are deliberately set much higher for most investors than notification thresholds under Canada's *Competition Act*, R.S.C. 1985, c. C-34.

This Note provides an overview of the legal regime governing foreign investment in companies and industries in Canada. It sets out the key legislation regulating such investments, the various types of foreign investment transactions that are subject to regulation, the roles and powers of the relevant regulatory authorities, and the penalties for non-compliance.

This Note focuses on transactions where a foreign entity buys, or takes a stake in, a company incorporated in Canada or its business and assets. It does not comment on any specific restrictions in Canada relating to:

- Foreign acquisition of real estate.
- Merger control, anti-trust, and competition law which is not dependent on the nationality of the acquiror or investor.
- Multinational free trade agreements or bilateral investment treaties.

For more information on regulations affecting foreign real estate transactions in Canada, see Country Q&A, Investing in Canada: Question 13.

For more information on merger control rules and competition law affecting acquisitions in Canada, see Practice Note, Corporate Transactions and Merger Control in Canada: Overview.

Legal Framework for Foreign Investment Review in Canada

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Investment Canada Act

The ICA governs Canada's foreign investment regime. It applies to nearly all investments in a Canadian business by a non-Canadian, whether that investment is to start a new business or acquire an existing one.

The ICA establishes a three-part framework:

- Notification.
- Reviewable investments (net benefit review).
- National security review.

(See Application of the Investment Canada Act.)

Under the ICA, most investors benefit from a high threshold before an acquisition requires pre-closing approval.

Other Legislation Affecting Foreign Investment

Competition Act

An acquisition of a business in Canada, whether direct or indirect, is notifiable under the *Competition Act* if it exceeds the notification thresholds in that Act. If the Competition Bureau reviews a transaction and assesses that it is likely to lead to a substantial prevention or lessening of competition in Canada, it can seek an order from the Competition Tribunal either to:

- Block, in whole or in part, a proposed transaction.
- Require divestitures or dissolution in respect of a completed transaction.

For more information on merger control rules and competition law affecting acquisitions in Canada, see Practice Note, Corporate Transactions and Merger Control in Canada: Overview.

Sector-Specific Restrictions on Foreign Ownership

Other statutes establish sector-specific restrictions on foreign ownership. Examples include:

- Airlines must be "Canadian" pursuant to the *Canada Transportation Act*, S.C. 1996, c. 10. Among other things, at least 51% of their voting shareholders must be Canadian, and no foreign airline can own more than 25% of a Canadian airline.
- Telecommunications carriers must be "Canadian-owned and controlled" under the *Telecommunications Act*, S.C. 1993, c. 38. Among other things, 80% or more of the members of their board of directors and their voting shareholders must be Canadian.
- Broadcasting licences can only be issued to Canadians, pursuant to a direction to the Canadian Radio-television and Telecommunications Commission. To meet this requirement, a broadcaster's chief executive officer and at least 80% of its voting shareholders must be Canadian.

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For more information on sector-specific restrictions, see Industry Sectors in Canada with Additional FDI Notification or Approval.

Incentives for Foreign Investment

Canada's federal government maintains several incentive programs to encourage economic activity in Canada, including the following:

- Tax incentives to encourage the filming of television shows and films in Canada.
- Tax credits for research and development.
- Economic development agencies that promote investment in regions, including:
  - Pacific Economic Development Canada (PacifiCan) (which promotes development in British Columbia);
  - Prairies Economic Development Canada (PrairiesCan) (which promotes development in Alberta, Saskatchewan, and Manitoba); and
  - the Atlantic Canada Opportunities Agency (ACOA) (which promotes development in Newfoundland, Nova Scotia, Prince Edward Island, and New Brunswick).

Application of the Investment Canada Act

The ICA applies to nearly all investments by non-Canadians in Canadian businesses or entities. In particular:

- **Notification.** All investments by a non-Canadian investor to start or acquire a Canadian business must be notified to the Investment Review Division (IRD) of Innovation, Science and Economic Development Canada (ISED) (section 11, ICA). There is no de minimis deal value threshold below which notification is not required. Minority investments are not notifiable. Notification can occur any time before closing and up to 30 days after closing. (See Notification Under the Investment Canada Act.)
- **Reviewable investments (net benefit review).** Acquisitions of a Canadian business by a non-Canadian investor that exceed certain thresholds (based on the value of the acquired business) must be approved before they can be closed (section 14, ICA). To be approved, the investment must provide a "net benefit to Canada." The thresholds vary based on several criteria. The threshold in 2023 for most investors is CAD1.287 billion in enterprise value. (See Reviewable Investments (Net Benefit Review).)
- **National security review.** All investments by a non-Canadian to start or acquire a Canadian business, or to acquire an interest in a Canadian entity, can be subject to a national security review (section 25.1, ICA). The government can review and block investments that it determines could be injurious to national security. There is no deal-value threshold for a national security review. (See National Security Review.)

Key Concepts

The ICA relies on the following key concepts:

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- **Non-Canadian.** A non-Canadian is an individual, government, government agency, or entity (corporation, partnership, trust, or joint venture) that is not Canadian or Canadian-controlled (section 3, ICA). Section 26 of the ICA contains a complicated set of rules for determining whether an entity is Canadian. These rules look at the nationality of the people who ultimately control the entity. For example, if the majority of a corporation's voting shares are owned by Canadians, the corporation is considered to be Canadian-controlled.

  It is usually impossible to determine the nationality of a public company's voting shareholders, so the ICA looks to the board of directors. If two-thirds of the board are Canadian, then the company is Canadian-controlled.

- **Business.** A business is "any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit" (section 3, ICA). As a result, resource properties such as oil and gas properties and mines that are still at the exploration stage are not considered by the government to be businesses because they are not yet capable of generating revenue.

- **Canadian business.** To be a Canadian business, a business must meet all of the following four requirements:

  - it must be carried on in Canada;
  - it must have a place of business in Canada;
  - it must have employees (or independent contractors) in Canada; and
  - it must have assets in Canada that are used in carrying on the business.

  (Section 3, ICA.)

Because the definition of "Canadian business" is much broader than the requirements to be a Canadian-controlled entity, it is entirely possible that a company that is incorporated and headquartered in Canada could be considered a non-Canadian when buying another company, even though the same company would be considered a Canadian business if it were being acquired.

Notification Under the Investment Canada Act

Any non-Canadian that establishes a new Canadian business or acquires control of an existing Canadian business must file a notification with the IRD (section 11, ICA). The notification can be filed any time before the transaction closes and must be filed within 30 days after the transaction closes.

The notification must contain the information set out in Schedule I of the *Investment Canada Regulations*, SOR/85-611 (IC Regulations). The notification form is available as an editable PDF on the ISED website (Government of Canada: Investment Canada Act: Forms).

In general terms, the IC Regulations require the non-Canadian investor to disclose:

- Information about who controls it.
- Whether any foreign state has an ownership interest in the investor.
- Whether any foreign state has the power to appoint members to the investor's board of directors or appoint the investor's officers.

The IC Regulations also require certain information about who controls the Canadian business.

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After the notification has been filed, the IRD certifies that it has received a complete notification and advises that the investment is not reviewable (section 13(1), ICA).

If the IRD considers that the notification is incomplete, it specifies the information it needs to complete the notification (section 13(2), ICA).

Usually, the receipt of a notice from the IRD under section 13 is the end of the matter. This notice is known as a section 13 notice. However, the government can commence a national security review of the investment within 45 days of the section 13 notice (section 25.2, ICA; section 2, IC Regulations) (see National Security Review).

Additionally, the government can order a net benefit review of investments in cultural businesses (section 15, ICA) (see Cultural Businesses).

For a checklist that sets out the information required to complete a notification, see Investment Canada Act Notification Form Checklist. See Practice Note, Investment Canada Act Notifications for further discussion of:

- The timing for filing a notification.
- The information that must be included in a notification and the confidentiality of this information.
- When a notification may trigger a net benefit review or a national security review.

Reviewable Investments (Net Benefit Review)

Acquisitions of control of Canadian businesses that are above certain thresholds must be authorized by the Minister of Innovation, Science and Industry (Minister) before the parties can close them.

These investments are subject to a net benefit review by the Minister. With the exception of a cultural business, investments to establish a new Canadian business are never subject to a net benefit review.

Transactions that are subject to review cannot be closed until the Minister is satisfied (or deemed to be satisfied) that the investment is likely to be a net benefit to Canada.

Reviewable Investment Thresholds

The ICA sets a general review threshold of CAD5 million in asset value of the acquired business (section 14(3), ICA).

Nearly all investors benefit from a higher threshold. The higher thresholds are usually expressed in terms of the enterprise value of the acquired business and vary based on the interplay of five criteria:

- Whether the target is a cultural business.
- Whether the acquisition is direct or indirect.
- Whether the investor is from a World Trade Organization (WTO) member state or a country with whom Canada has a trade agreement.
- Whether the target is already owned by a WTO investor or trade agreement investor.

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- Whether the investor is a state-owned enterprise (SOE).

The threshold is revised around the beginning of every year based on Canada's GDP growth (see Threshold Amounts (2023)).

For additional discussion of the thresholds that apply, depending on these criteria, see Practice Note, Investment Canada Act Thresholds for Review.

Enterprise Value

The enterprise value of the acquired business is calculated differently for public and private companies:

- For public companies, it is the company's market capitalization, plus its liabilities, minus its cash and cash equivalents (section 3.3, IC Regulations).
- For private companies, the acquisition value (usually, the purchase price) is used in place of the market capitalization (section 3.4, IC Regulations).

Cultural Businesses

Cultural businesses include the publication, distribution, sale, or exhibition of books, magazines, films, and music (section 14.1(6), ICA). Acquisitions of cultural businesses generally do not benefit from a higher threshold, but are instead subject to the general threshold of CAD5 million (section 14.1(5), ICA).

Direct and Indirect Acquisitions

An acquisition of shares or assets of a Canadian corporation or other entity is a direct acquisition. An acquisition of a foreign entity that owns a Canadian entity is an indirect acquisition.

A CAD50 million asset value threshold rather than a CAD5 million asset value threshold applies to indirect acquisitions where:

- There is another foreign subsidiary between the corporation that is acquired and the Canadian business.
- The Canadian assets are not more than 50% of the value of the assets of all entities.

For example, where an investor buys foreign corporation A, which owns foreign corporation B, which owns Canadian corporation C, and corporation C's assets are less than 50% of the assets of the entire group. (See Threshold Amounts (2023).)

Investor Nationality

The ICA establishes two categories of non-Canadian investors that benefit from higher thresholds:

- **WTO investor:** an investor controlled by nationals or permanent residents of WTO member countries (section 14.1(6), ICA).
- **Trade agreement investor:** an investor controlled by nationals of countries that are parties to trade agreements with Canada (including, notably, the US, Mexico, members of the EU, and the UK) (section 14.11(6), ICA).

WTO and trade agreement investors benefit from higher thresholds when acquiring a Canadian business (sections 14.1(1) and 14.11(1), ICA). Because 164 countries are members of the WTO, most investors qualify as WTO investors.

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If the business being acquired is already controlled by a WTO or trade agreement investor, then the investor also benefits from a higher threshold, even if the investor is neither a WTO investor nor a trade agreement investor.

The rules used to determine whether an entity is a WTO investor or a trade agreement investor are essentially the same as those used to determine whether the investor is Canadian-controlled. For example, if two-thirds of a public company's board are nationals of WTO countries or Canada, then the company is a WTO investor.

State-Owned Enterprise (SOE)

Governments of foreign states and their agencies, and entities that are controlled or acting under the direction or influence of foreign governments or agencies of foreign governments, are SOEs (section 3, ICA). Thresholds for SOEs that are WTO investors are less than half of those set for non-SOE WTO investors.

Threshold Amounts (2023)

Nearly all investors qualify as a trade agreement investor or a WTO investor, or both.

The following are the threshold amounts for 2023.

Table 1: Acquisition of a Non-Cultural Canadian Business

Category of non-Canadian investor	Reviewable investment threshold	
Non-SOE investors	**Direct acquisition**	**Indirect acquisition**
Trade agreement investor (or any non-SOE investor where the Canadian target business is already owned by a trade agreement investor)	CAD1.931 billion enterprise value	Exempt if trade agreement investor is also a WTO investor
WTO investor (or any non-SOE investor where the Canadian target business is already owned by a WTO investor)	CAD1.287 billion enterprise value	Exempt
Other non-SOE investors	CAD5 million asset value	CAD5 million or CAD50 million asset value
SOE investors	**Direct acquisition**	**Indirect acquisition**
WTO investor (or any SOE investor where the Canadian target business is already owned by a WTO investor)	CAD512 million asset value	Exempt
Other SOE investors	CAD5 million asset value	CAD5 million or CAD50 million asset value

Table 2: Acquisition of a Canadian Cultural Business

Category of non-Canadian investor	Reviewable investment threshold	
Non-SOE investors	**Direct**	**Indirect**
WTO investor (or any non-SOE investor where the Canadian target	CAD5 million asset value	CAD5 million or CAD50 million asset value

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cultural business is already owned by a WTO investor)		
Other non-SOE investors	CAD5 million asset value	CAD5 million or CAD50 million asset value

Stages of a Net Benefit Review

A net benefit review proceeds in three stages:

- Application.
- Review.
- Representations and undertakings.

Application for a Net Benefit Review

The non-Canadian investor must file an application with the Director of Investments before closing (section 17, ICA). The transaction cannot be closed until it is approved, or deemed to be approved, by the Minister (section 16, ICA).

For a checklist that sets out the information required to complete an application for a net benefit review, see Investment Canada Act Application for Review Form Checklist. For additional discussion about applications for review under the ICA, see Practice Note, Investment Canada Act Applications for Review.

Net Benefit Review Process

During the review process, the non-Canadian investor must provide any other information that the Director of Investments considers necessary. Additionally, the non-Canadian investor can provide undertakings to the Minister (section 19(1)(c), ICA) (see Undertakings). Provincial governments can also make representations to the Minister (section 19(1)(d), ICA).

The Minister has 45 days to make a preliminary decision (section 21, ICA). This can be extended unilaterally by a further 30 days, or for a longer period by agreement (section 22, ICA). If the Minister commences a national security review, the net benefit review is automatically extended until 30 days after the national security review is completed (section 21(2)-(8), ICA).

If the Minister is satisfied that the investment is likely to be of net benefit to Canada, the Minister sends a notice to that effect to the investor (section 22, ICA). If the Minister is not satisfied that the investment is likely to be of net benefit to Canada, the Minister sends a notice to the investor advising the investor of its right to make representations and submit undertakings (section 23, ICA) (see Representations and Undertakings).

If the review period expires without the Minister sending either notice, then the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada (section 22(4), ICA).

Representations and Undertakings

If the Minister notifies the non-Canadian investor that it is not satisfied that the investment is likely to be of net benefit to Canada, the investor has the right to make representations and to submit undertakings within 30 days (section 23, ICA) (see Undertakings). This period can be extended by agreement (section 23, ICA).

The Minister must decide within a "reasonable time after the expiry of the period for making representations and submitting undertakings" whether to permit the transaction (section 23(3), ICA).

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Net Benefit Factors

The ICA sets out the following factors for determining whether a transaction is likely to be of net benefit to Canada:

- Effects on the level and nature of economic activity in Canada, including:
  - employment;
  - resource processing;
  - utilization of parts, components, and services produced in Canada; and
  - exports from Canada.
- The degree of participation by Canadians in the Canadian business.
- Effects on productivity, industrial efficiency, technical development, innovation, and product variety in Canada.
- Effects on competition in Canada.
- Compatibility with national industrial, economic, and cultural policies.
- Contribution to Canada's ability to compete in world markets.

(Section 20, ICA.)

See Practice Note, The "Net Benefit" Test for additional discussion of:

- The specific statutory criteria.
- How the net benefit test is applied in practice.
- Net benefit assessments as applied to SOEs and cultural businesses.
- Acquisitions where the net benefit test was not met.

Undertakings

Transactions that reach the representations and undertakings stage of a net benefit review usually require undertakings to obtain approval.

In principle, undertakings should relate to the factors for assessing whether an investment is likely to be of net benefit to Canada. For example, investors are frequently asked to guarantee to maintain a certain level of business operations or employment. However, because of the political nature of the investment review process, they can involve anything that is a current government concern. For example, investors might be asked to give undertakings on diversity, equity, and inclusion in its employment practices, or on relationships with indigenous groups.

The ICA does not specify for how long undertakings must remain in force, though general practice is three years. Parties must specify this when making or negotiating the undertaking.

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Undertakings are enforceable (see Penalties for Non-Compliance).

For additional discussion of the types of undertakings required for approval of an investment, see Practice Note, Net Benefit Undertakings.

National Security Review

The Minister can commence a national security review of any transaction that comes within the scope of the national security review provisions where there are "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security" (section 25.2, ICA).

A national security review can lead to various orders from the Governor in Council (the federal cabinet), including an order prohibiting an investor from completing the investment or requiring the investor to divest itself of the investment.

Scope of the National Security Review Provisions

Three types of investments by a non-Canadian come within the scope of the national security review provisions:

- Establishment of a new Canadian business.
- Acquisition of control of a Canadian business.
- Acquisition of all or part of, or establishment of, an entity carrying on operations in Canada.

(Section 25.1, ICA.)

Taken together, these categories cover any investment, whether direct or indirect, in a Canadian business or corporation, including minority investments.

The national security review provisions include more investments within their scope than the notification provisions in the ICA. As a result, some transactions that are not notifiable under the ICA may still be subject to a national security review. For example, an acquisition of a Canadian entity that is not a "business" (for example, an early-stage resource project), or a minority investment in a Canadian entity, would not be notifiable, but could be subject to a national security review.

Some transactions involving Canadian entities may still fall outside of the scope of the national security review provisions. For example:

- The sale by a Canadian entity of a foreign subsidiary corporation or asset.
- A minority investment in a foreign subsidiary of a Canadian entity.

Time Limit for Commencing a National Security Review

The *National Security Review of Investments Regulations*, SOR/2009-271 (NSR Regulations) provide for relatively short periods during which the Minister can commence a national security review. Where a notification or net benefit review application has been filed, the Minister has 45 days from the date that a complete notification is received to trigger a national security review (section 2, NSR Regulations).

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Although minority investments in Canadian firms are not notifiable or subject to a net benefit review, they can be subject to a national security review. The NSR Regulations provide for a voluntary notification of these investments. If a voluntary notification is made, the Minister has 45 days from the date that a complete notification is received to trigger a national security review. If no voluntary notification is made, the Minister has five years from the date of the investment to trigger a national security review (section 2, NSR Regulations).

Stages of a National Security Review

A national security review proceeds in three stages:

- Initial review.
- Formal review.
- Decision by the Governor in Council (the federal cabinet).

The national security review provisions contain three slightly different substantive tests, depending on the stage of the review.

Initial Review

The national security review process starts with the Minister issuing a notice to the investor that a review may be ordered (section 25.2(1), ICA). This notice is known as a section 25.2 notice. If the transaction has not yet closed, the investor may not close it (section 25.2(2), ICA).

To commence an initial review under section 25.2 of the ICA, the Minister must have "reasonable grounds to believe" that the investment "could be injurious to national security." The Minister (that is, the IRD) can require any information that it considers necessary from the investor for the purposes of determining whether reasonable grounds exist (section 25.2(3), ICA).

This stage of the review lasts 45 days. The Minister can either close the file at this stage or proceed to the next stage, which is a formal review under section 25.3 of the ICA.

Formal Review

To proceed to a formal review under section 25.3 of the ICA, the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, must "consider that the investment could be injurious to national security." The formal review begins with the Governor in Council issuing an order for the review of the investment (section 25.3, ICA).

Once the order has been made, the Minister sends a notice (called a section 25.3 notice) to the investor. The Minister is not required to send a copy of this notice to the Canadian business being sold or to the seller.

The investor has the right to make representations (section 25.3(4), ICA). The seller does not have this right. The IRD can require the investor and any "other person or entity" (in practice, the Canadian business that is being sold and the seller) to provide "any prescribed information, or any other information that the Minister considers necessary for the purposes of the review" (section 25.3(5), ICA).

The formal review lasts for an initial 45 days (section 25.3(6), ICA; section 5, NSR Regulations). The IRD can extend this for a further 45 days (section 25.3(7), ICA; section 5.1, NSR Regulations). The review period can be extended beyond these deadlines with the investor's consent (section 25.3(7), ICA).

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At the end of the formal review, the Minister must consult with the Minister of Public Safety and Emergency Preparedness and either terminate the review or refer the matter to the Governor in Council (section 25.3(6), ICA).

To terminate the review, the Minister must be "satisfied that the investment would not be injurious to national security" (section 25.3(6), ICA). In that case, the Minister sends a notice to the investor that no further action will be taken. The investor is then permitted to complete the investment.

However, if "the Minister is satisfied that the investment would be injurious to national security," or if "the Minister is not able to determine whether the investment would be injurious to national security," then the Minister must refer the investment to the Governor in Council (section 25.3(6), ICA).

Decision by the Governor in Council

The Minister can refer the matter to the Governor in Council for a decision. The Governor in Council can by order "take any measures in respect of the investment" that it considers advisable to protect national security, including:

- Directing the investor not to implement the investment.
- Allowing the investment on written undertakings or conditions.
- Requiring the investor to divest itself of control of the Canadian business or of the investment in the entity.

(Section 25.4(1), ICA.)

National security reviews involve a mix of administrative and political factors. During a national security review, the investor deals with civil servants in the IRD and perhaps also the ISED. However, the decisions are made by elected officials, namely the Minister and the federal cabinet.

Meaning of "Injurious to National Security"

The ICA does not define "national security" or outline what could constitute grounds to conclude that an investment could be injurious to national security.

The government has published *Guidelines on the National Security Review of Investments* that list some of the factors it considers in making determinations under the national security review provisions. These factors include the transaction's impact on:

- Canada's defence.
- The transfer of sensitive technology or know-how outside Canada.
- The supply of critical goods and services.
- The supply of critical minerals and critical mineral supply chains (critical minerals are those listed on the government's Critical Minerals List).
- The security of Canada's critical infrastructure.
- Foreign surveillance or espionage.
- Current or future intelligence or law enforcement operations.

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- Canada's international interests.
- Involvement of illicit actors such as terrorists, organized crime, or corrupt foreign officials.
- Access to sensitive personal data that could be leveraged to harm Canadian national security.

The guidelines warn that investments may present national security concerns even if none of these factors are present.

The government has also issued policies and guidelines dealing with specific types of investors and certain economic sectors. It has stated that the following support a finding that there are reasonable grounds to believe that the investment could be injurious to Canada's national security:

- The existence of ties between an investment and an individual or entity associated with, controlled by, or subject to influence by the Russian state (Government of Canada: Policy Statement on Foreign Investment Review and the Ukraine Crisis (8 March 2022)).
- Investments by foreign state-owned or state-influenced investors (Government of Canada: Policy Regarding Foreign Investments from State-Owned Enterprises in Critical Minerals under the *Investment Canada Act*).

The fact that decisions under the national security review provisions are made by elected officials (the Minister and the federal cabinet) means that political calculus, including the public perception of any outcome, inevitably plays some role in the decision-making.

For additional discussion of the criteria relevant to a determination that an investment is injurious to national security, as well as the process, timelines, and information required for a national security review, see Practice Note, National Security Reviews.

Judicial Review

Decisions of the Minister and of the Governor in Council under the national security review provisions can only be challenged by judicial review in the Federal Court of Canada.

Penalties for Non-Compliance

Demand by Minister

The Minister can send a demand to a non-Canadian investor that has (among other things):

- Failed to give notice of an investment as required under section 11 of the ICA.
- Failed to file an application for a net benefit review.
- Breached an undertaking (whether given in the context of a net benefit review or a national security review).

(Section 39, ICA.)

The demand requires the investor to cease the contravention or show cause why there is no contravention.

Substitute Undertakings

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Where a non-Canadian investor has failed to comply with an undertaking given in the context of a net benefit review (but not a national security review), the Minister can accept a substitute undertaking from the investor (section 39.1, ICA).

However, a non-Canadian investor that finds that it cannot comply with its undertakings should not wait until it gets a demand letter. Rather, it should advise the IRD of the situation and negotiate substitute undertakings if appropriate.

Court Order

If the non-Canadian investor fails to comply with the demand, the Minister can seek a variety of court orders. These include:

- A divestiture order.
- An order that the investor comply with its undertakings.
- Penalties of up to CAD10,000 per day.
- Orders relating to the shares or assets acquired by the non-Canadian investor, including disposition.

(Section 40, ICA.)

Failure to comply with a court order is punishable as a contempt of court (section 40(4), ICA).

False or Misleading Information Offence

Section 42 creates an offence for anyone who knowingly provides false or misleading information. This is the only offence provision in the ICA.

The offence is a summary conviction offence. The maximum penalty is imprisonment for two years less a day, or CAD5,000.

Anti-Avoidance Provision

The ICA contains an anti-avoidance provision. Where "the Minister believes that a non-Canadian, contrary to [the ICA] … has entered into any transaction or arrangement primarily for a purpose related to [the ICA]," the Minister can send a notice demanding the non-Canadian "to cease the contravention, to remedy the default, to show cause why there is no contravention of the Act or regulations" (section 39(1)(g), ICA).

If the non-Canadian fails to do this, the Minister can seek a court order under section 40 of the ICA (see Court Order).

There is no case law interpreting this provision. Even so, it seems likely that its scope is extremely narrow:

- It applies only to a non-Canadian. It likely would apply only to the buyer, and not to actions taken by the Canadian business that is the subject of the transaction.
- It is not sufficient that the non-Canadian entered into a transaction "primarily for a purpose related to [the ICA]," but that the non-Canadian must have done so "contrary to [the ICA]."

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Industry Sectors in Canada with Additional FDI Notification or Approval

Cultural Businesses

The ICA defines five categories of cultural businesses:

- **Books, magazines, and newspapers:** the publication, distribution, or sale of books, magazines, periodicals, and newspapers (but not printing or typesetting).
- **Films:** the production, distribution, sale, or exhibition of film or video recordings.
- **Music:** the production, distribution, sale, or exhibition of music.
- **Radio and television:** radio, television, cable, and satellite broadcasting.

(Section 14.1(6), ICA.)

A transaction that involves any cultural business is subject to the ICA provisions relating to cultural businesses. This includes transactions involving entities that operate a cultural business, even if the cultural business is not their main business.

The threshold for review of acquisitions of cultural businesses is CAD5 million for most investors, except for some indirect transactions (see Reviewable Investment Thresholds).

However, the government can order a review of any investment in a cultural business, even if it involves an acquisition below the CAD5 million threshold or the establishment of a new cultural business (section 15, ICA).

Investments in cultural businesses are reviewed by the Minister of Canadian Heritage, not the Minister of Industry. Notifications and applications for review are filed with the Department of Canadian Heritage (Canadian Heritage).

Where a transaction involves a Canadian business that carries on cultural as well as non-cultural activities, dual filing requirements apply as follows:

Type of transaction	Transaction details	IRD filing requirements	Canadian Heritage filing requirements
Establishing a new Canadian business	N/a	Notification	Notification
Acquisition of existing Canadian business	Below CAD5 million cultural business threshold	Notification	Notification
	Above CAD5 million cultural business threshold but below threshold for non-cultural businesses	Notification	Application for review
	Above threshold for non-cultural businesses	Application for review	Application for review

The information requirements for acquisitions of cultural businesses are largely the same. However, Canadian Heritage has issued draft guidelines recommending that non-Canadian investors provide supplementary information when filing a notification to establish a new or acquire an existing Canadian cultural business (Government of Canada: Draft guidelines on notifications – Cultural sector investments).

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Canadian Heritage also suggests that a non-Canadian proposing to buy a cultural business in Canada can offer the following net benefit undertakings:

- Commitments to the creation, production, distribution, marketing, and preservation of Canadian cultural products in Canada, through traditional and new media.
- Commitments to:
  - nurturing new Canadian talent;
  - employing diverse Canadians;
  - autonomy for executives of Canadian companies;
  - learning opportunities for staff; and
  - partnerships or alliances with Canadian companies or learning institutions, particularly in relation to enhancing Canadian infrastructure through technology, know-how, e-commerce, training, internships, and so on.
- Commitments to providing philanthropic contributions or in-kind gifts to cultural training institutions, studies, and initiatives designed to enhance Canada's civic life.
- Commitments to the distribution and marketing of Canadian cultural products, and sponsorship of events and initiatives that showcase Canadian talent and stories.

For additional discussion of the circumstances under which a review of an investment involving a Canadian cultural business can be required and the review process, including possible dual filing requirements, see Practice Note, Review of Canadian Cultural Business Investments.

Banks and Insurance Companies

A foreign bank is generally prohibited from carrying on business as a bank in Canada unless it is an authorized foreign bank (section 510, *Bank Act*, S.C. 1991, c. 46). The *Bank Act* provides for foreign banks to apply for authorization to carry on business as a bank in Canada (Part XII.1, *Bank Act*).

Similarly, a foreign entity is prohibited from insuring a risk in Canada unless it is authorized to do so (section 573, *Insurance Companies Act*, S.C. 1991, c. 47).

Broadcasting

Broadcasting licences can only be issued to Canadians, pursuant to the *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR/97-192. To meet this requirement, a broadcaster's chief executive officer and at least 80% of its voting shareholders must be Canadian.

Airlines

An airline that wishes to operate a domestic service must be Canadian (section 61, *Canada Transportation Act*). Among other things, at least 51% of its voting shareholders must be Canadian, and no foreign airline can own more than 25% of a Canadian airline (section 55(1), *Canada Transportation Act*).

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Telecommunications

Telecommunications carriers must be Canadian-owned and controlled pursuant to the *Telecommunications Act*. Among other things, 80% or more of the members of their board of directors and their voting shareholders must be Canadian (section 16, *Telecommunications Act*).

State-Owned Enterprises

The government has published guidelines on investment by SOEs (Government of Canada: Guidelines: Investment by state-owned enterprises: Net benefit assessment (SOE Guidelines)).

The government considers the governance and commercial orientation of an SOE investor in conducting a net benefit review. The government requires SOE investors "to address in their plans and undertakings, the inherent characteristics of SOEs, specifically that they are susceptible to state influence." They must also "demonstrate their strong commitment to transparent and commercial operations." (SOE Guidelines.)

In reviewing the transaction, the government considers whether the SOE investor adheres to:

- Canadian standards of corporate governance.
- Canadian laws and practices.
- Free market principles.

The government also assesses whether the SOE investor is likely to operate commercially.

The SOE Guidelines also suggest that the SOE investors give specific undertakings, such as:

- Appointing Canadians as independent directors.
- Employing Canadians in senior management positions.
- Listing shares on a Canadian stock exchange.

See Practice Note, Investments by State-Owned Enterprises for additional discussion of:

- The circumstances under which a review of an investment involving an SOE can be required.
- The factors examined in the context of a net benefit assessment of an investment by an SOE.
- The types of undertakings that may be required.

Oil and Gas Interests

The government has issued guidelines on the acquisition of oil and gas interests (Government of Canada: Guidelines: Acquisitions of Oil and Gas Interests).

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The guidelines clarify when an oil and gas interest is a "business," and when an acquisition of control has occurred in joint ventures, non-unitized properties, and unitized properties.

Critical Minerals: State-Owned or Influenced Investors

In 2022, the government adopted a Policy Regarding Foreign Investments from State-Owned Enterprises in Critical Minerals under the *Investment Canada Act* (Critical Minerals Policy).

The government has identified 31 minerals as "critical for the sustainable economic success of Canada." The government considers that investments in critical minerals supply chains by state-owned or state-influenced entities carry a greater inherent risk to Canada's growth, prosperity, and security. This is because state-owned and state-influenced investors "can be motivated by non-commercial imperatives that are contrary to Canada's interests" (Critical Minerals Policy).

The government only approves investments in critical minerals by a foreign SOE that are above the net benefit review thresholds on an exceptional basis.

The government examines the following factors in making this determination:

- The extent to which a foreign state is likely to exercise direct operational and strategic control over the Canadian business because of the transaction.
- The degree of competition that exists in the sector, and the potential for significant concentration of foreign ownership in the sector because of the transaction.
- The corporate governance and reporting structure of the foreign SOE, including whether it adheres to Canadian standards of corporate governance and to Canadian laws and practices, including free market principles in its Canadian operations.
- Whether the Canadian business to be acquired is likely to continue to operate commercially. This can include considerations such as:
  - where products will be exported or processed;
  - the participation of Canadians in its operations in Canada and elsewhere;
  - the impact of the investment on productivity and industrial efficiency in Canada;
  - support of ongoing innovation and research and development in Canada; and
  - appropriate levels of capital expenditures to maintain the Canadian business in a globally competitive position.

The government also considers that investments by foreign state-owned or state-influenced investors "will support a finding by the Minister that there are reasonable grounds to believe that the investment could be injurious to Canada's national security" (Critical Minerals Policy). This policy applies regardless of the value of the investment. (See Meaning of "Injurious to National Security".)

The government examines the following factors in determining whether a particular transaction would be injurious to national security:

- The size, scope, and location of the Canadian business.

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- The nature and strategic value to Canada of the mineral assets or supply chain involved.
- The degree of control or influence an SOE would likely exert on the Canadian business, the supply chain, and the industry.
- The effect the transaction may have on the ability of Canadian supply chains to exploit the asset or access alternative sources (including domestic supply).
- The current geopolitical circumstances and potential impact on allied relations.

Critical Minerals: Chinese Investors

The Canadian government is moving toward a policy of not allowing Chinese state-owned or state-influenced enterprises to invest in any Canadian-based critical minerals companies. The government now treats any company based in China as state-influenced, which in turn means that the company would meet the definition of an SOE in the ICA. As a result, the policy effectively prohibits investments by Chinese companies in Canadian critical minerals companies.

Russian Investors: All Sectors

After Russia invaded Ukraine, the Minister announced that investments by Russian investors that are above the net benefit review thresholds will be found to be of net benefit to Canada "on an exceptional basis only."

The Minister also announced that the existence of ties between an investment and an individual or entity associated with, controlled by, or subject to influence by the Russian state supports a finding that there are reasonable grounds to believe that the investment could be injurious to Canada's national security. This applies regardless of the value of the investment.

(See Policy Statement on Foreign Investment Review and the Ukraine Crisis.)

Practical Implications of Foreign Investment Restrictions on Private M&A Transactions

For most transactions, Canada's foreign investment review regime only involves filling out a notification form.

Even so, there are pitfalls. The Canadian government is taking an increasingly hawkish view of investments by investors from "non-like-minded countries" (principally, China). More economic sectors are likely to be considered important from a national security standpoint in the coming years. National security concerns can also arise from matters incidental to the business being acquired. For example, a business that is not involved in any critical sectors, but is located near a military base, might be the subject of a national security review.

Therefore, counsel to parties in any transaction that involves a Canadian business or corporation should engage Canadian counsel to determine whether:

- The transaction is notifiable in Canada.
- The transaction is reviewable in Canada.
- The transaction involves a cultural business.
- The transaction involves any business in Canada that is subject to foreign ownership restrictions.

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- The transaction has the potential to raise national security concerns, and if so, whether a voluntary pre-closing notification should be filed.

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