# FOREIGN INVESTMENT SCREENING UNDER CANADA'S *INVESTMENT CANADA ACT*

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## Introduction

After many years of relative obscurity, foreign investment screening in Canada has steadily increased in importance, finally fully coming back into the spotlight. Notably, the high-profile rejection of BHP Billiton's attempt to acquire Potash Corporation of Saskatchewan, Inc. ("PotashCorp") made front page news in Canada and abroad in 2010. Although Canada maintains an open — even eager — attitude towards foreign investment, a variety of new pressures have emerged that are leading to changes in the generally benign screening approach and attitudes that have prevailed since the *Investment Canada Act* ("ICA" or the "Act") liberalized foreign investment review in Canada in 1985.

There has been some recognition recently that the screening thresholds were becoming too strict, and thus too many foreign investors were being unnecessarily burdened with onerous screening requirements. After studying the matter, the Competition Policy Review Panel (which was formed by the Government of Canada in July 2007 with a mandate to review Canada's competition and foreign investment policies) recommended in 2008 that these thresholds be liberalized and that certain strict thresholds for several sensitive sectors be eliminated.[2] In response to these recommendations, the government implemented amendments to the *Investment Canada Act* early in 2009, and new regulations amending the *Investment Canada Regulations*[3] are in the process of finalization.[4] However, increasingly, the government has demonstrated a tougher attitude towards foreign investors and foreign investments that raise public policy concerns. One of the most notable such concerns in the post-September, 2011 era is, understandably, national security. With amendments to the ICA in 2009, the government gave itself new powers to screen investments that might be injurious to national security. The government has also applied the existing screening rules with new vigour, leading to rejections of two high-profile acquisitions (the proposed sale of the Information Systems Business of MacDonald, Dettwiler and Associates Ltd. to Alliant Techsystems Inc. in 2008,[5] and BHP Billiton's attempt to acquire Potash Corp. in 2010), as well as the first-ever legal action against an investor for failing to live up to its undertakings that were a condition of investment approval.[6] It is apparent that Canada's

approach to foreign investment review is becoming increasingly vigorous, with a greater willingness to take enforcement action, even as the thresholds are being increased and certain sectors liberalized.

This paper will survey the evolution of the *Investment Canada Act*, starting with a brief history of the ICA and a description of the legal framework for foreign investment screening under the Act. This will be followed by a look at the requirements and processes under the ICA as they currently exist, including changes that have (and are) being implemented. We will then review developments relating to State Owned Enterprises and the national security additions to the ICA, and offer our thoughts as to how they will be applied. Following that, we review recent high-profile cases that demonstrate Canada's increasingly vigorous approach to foreign investment screening, and offer our predictions on what the future holds.

## History of the ICA

Beginning in the 1960s, Canadians increasingly expressed concern about the level of foreign investment in the country and its impact on the Canadian economy. These concerns were based on a perception of high and increasing levels of foreign investment in Canadian industry and natural resources, primarily from U.S.-based companies. In response, the federal government sponsored a number of studies to investigate the level and implications of foreign investment in Canada.

Based on the recommendations in the ensuing reports, the federal Parliament passed the *Foreign Investment Review Act* ("FIRA") in 1974. FIRA established the Foreign Investment Review Agency, a government department that reviewed direct foreign investment proposals before they could proceed, with final approval resting with the Governor-in-Council (that is, the federal Cabinet). Both foreign takeovers of existing Canadian businesses and the creation of new foreign-owned businesses in Canada were subject to scrutiny. In order to be acceptable, a foreign investor had to demonstrate that the proposed transaction was likely to be of significant benefit to Canada. Review under FIRA was not intended to reduce foreign ownership, but instead to increase the benefits that Canadians would obtain from foreign investments.

FIRA was controversial from the outset. Within Canada, FIRA was criticized because it failed to limit or even review the expansion of existing foreign-controlled businesses, and it did not address the establishment of "related businesses" by a foreign investor already established in Canada. Internationally, Canada was criticized, particularly by the United States, with allegations that foreign takeovers were deliberately and unjustly being blocked in favour

of Canadian purchasers and interests, and that excessive undertakings were being imposed as a condition of allowing foreign investment.

These criticisms, combined with the recession of the early 1980s, led the incoming Conservative government to move away from the policy of economic nationalism enshrined in FIRA. In 1985, the incoming government changed the focus of foreign investment review in order specifically to encourage foreign investment, leading Prime Minister Brian Mulroney to declare that "Canada is open for business again."

FIRA was amended and renamed the "Investment Canada Act." In contrast to FIRA, the ICA expressly stated that its purpose was to "encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada." Although the investment review process from FIRA was largely retained, the ICA raised the thresholds for review, shortened the timeframe for review, and improved the efficiency of the review process in comparison to the procedure under FIRA. Significantly, the burden was also lowered in that foreign investors need now show only "net" (as opposed to "significant") benefit to Canada.

Following the enactment of the ICA, the Canadian government exhibited a relaxed and facilitative approach to foreign investment (although the intensity of scrutiny under the ICA has been increasing over the past decade). In 2007, increasing public concern about the "hollowing out" of corporate Canada – for example, through the foreign takeovers of several prominent Canadian companies such as the Hudson's Bay Company, La Senza, and Four Seasons Hotels – as well as pressure from the political opposition, led the government to establish the Competition Policy Review Panel (the "Panel") in 2007 with a mandate to review key elements of Canada's competition and investment policies, gauge their efficacy, and make recommendations as to reforms.

In June 2008, the Panel issued its final report, *Compete to Win*.[7] The report was generally critical of Canada's competitiveness compared to its major trading partners, and placed some of the blame on obsolete or inappropriate rules that restricted foreign investment. In response, the government sponsored amendments to the ICA and these were passed by Parliament in March 2009. The amendments reduced and clarified some of the restrictions on foreign investment, but also imposed some new burdens, most notably through a national security screening mechanism. In the following sections we will describe the ICA in its present form, which reflects the 2009 amendments.

## The Legal Framework of the ICA

The ICA is a complex statute. At its core, however, it contains two straightforward procedures:

(a) Non-Canadian investors that propose to make sizeable investments in Canadian businesses are required to submit their proposed investments for review and approval by the Canadian government; and

(b) Non-Canadian investors that propose to make smaller investments in Canadian businesses, or to start up new Canadian businesses, are required to give notice of their proposed activities to the Canadian government.

A non-Canadian investor includes a Canadian-incorporated entity that is ultimately controlled by one or more non-Canadians.

Once the foreign investor submits a completed review application or notice, as applicable, the government screens the investment for the following purposes:

(a) In the case of an investment subject to the review/approval procedure, it is assessed to determine if it is "likely to be of net benefit to Canada."

(c) In the case of an investment that is subject to the notification procedure (rather than review), if it is in a "cultural business," the notice may trigger a government decision to require a review/approval procedure. Thus, the investment will be assessed for its net benefit to Canada. Notifiable investments in non-cultural businesses – obviously the vast majority of businesses – are not assessed for their net benefit to Canada.

(d) As of March 2009, all investments are also assessed to determine if they could be injurious to national security.

Subject to certain exemptions, the ICA applies to investments by non-Canadians to establish a new Canadian business or to acquire control of an existing Canadian business.[8] Although this sounds simple and straight-forward, the reality is quite different: the ICA contains exclusions, presumptions, exceptions and a host of definitions that must be considered. Moreover, because the ICA has grown over the years as new concepts have been added and modified, the organization of the statute is confusing.

The ICA sets out an extensive list of activities that are exempt from the operation of the statute. Some are predictable and others are not. The exemptions include, among others, an ordinary course acquisition of voting shares by a trader in securities, an acquisition in the course of realizing on security for a loan, and a corporate reorganization where the ultimate control does not

change.[9] The latter could, and probably should, be the subject of much elaboration, but unfortunately is only addressed in a few words. Exempt transactions, of course, do not incur either review or notice obligations.

A "non-Canadian" is unsurprisingly defined to be: "not a Canadian." A "Canadian" means an entity that is "Canadian-controlled."[10] The ICA sets out a number of tests and presumptions for determining Canadian-controlled status.[11] For example, an entity will be Canadian-controlled where Canadians own a majority of the voting interests in the entity.

A "Canadian business" is defined as a business carried on in Canada that has a place of business in Canada, individuals in Canada that are employed in connection with the business, and assets in Canada used to carry on the business.[12] A Canadian business does not lose that status simply because it is partly carried on in another country.[13] Indeed, a business is still a "Canadian business" even if it is already foreign-controlled. That said, the business must satisfy the four Canada-focused criteria to be caught by the ICA. Further, a part of a business will be considered to be a Canadian business if it is capable of being carried on as a separate business.[14]

The term "business" is also defined in the ICA and means any undertaking capable of generating profit and being carried on in anticipation of profit.[15] The business must therefore be actively earning revenues or be in a position to produce revenues from the sale of goods or services.[16] Mere assets will not necessarily constitute a business for ICA purposes. The boundary can sometimes be tricky to assess; for example an undeveloped oil, gas and mineral property is generally not considered to be a business, but a drilled or developed property generally is considered to be a business, even if revenues are a long way off.[17] A Canadian-based head office (even if the commercial activities of the entity occur outside of Canada) is generally considered to be a "Canadian business," including its global operations.

The phrase "new Canadian business" is also defined in the ICA.[18] As one would intuitively expect, a new Canadian business is one that is unrelated to an existing business carried on in Canada by the non-Canadian.[19] However, a more stringent requirement applies in the cultural business sphere.[20] In that case, a new Canadian business is defined to include a business activity that is related to an existing business, but where the new business activity is cultural in nature. Thus, a non-Canadian that operated a dental technician training college in Canada would likely be found to have established a new Canadian business by beginning to publish and sell books or videos on the dental technician topics that are taught at the college.

The phrase "to acquire control of a Canadian business" leads to what can be the most complicated analysis under the ICA. A non-Canadian can acquire control by acquiring voting shares or assets or by the acquisition of an entity that either carries on or controls an entity carrying on a Canadian business.[21] For corporations, the acquisition of a majority of the voting shares is deemed to constitute the acquisition of control, and the acquisition of one-third or more of the voting shares is presumed to be the acquisition of control, although this can be rebutted by control-in-fact evidence. For an entity that is not a corporation, the acquisition of a majority of the ownership interests is deemed to be the acquisition of control. Notwithstanding these deeming and presumption provisions, in the case of cultural industries, the Minister can look at control-in-fact evidence and make a determination that an acquisition of control has taken place.[22]

After determining that the ICA applies to an investment, the next step is to determine the procedure that will be followed to screen the transaction. As noted earlier, new investments and small acquisitions require the filing of a simple notification, whereas larger acquisitions (and acquisitions of cultural businesses) require a more onerous review procedure. In order to determine whether a review is required, one must examine the size of the investment, whether the investor or the vendor is controlled in one or more countries that are members of the World Trade Organization ("WTO") (other than Canada), whether the acquisition of control is direct or indirect, and whether the target is a cultural industry.[23]

For a direct acquisition with a WTO investor or vendor and where the target is not a cultural business, the threshold for review is currently C$330 million. For a direct acquisition with a non-WTO investor and vendor or where the target is a cultural business,[24] the threshold is C$5 million.

For an indirect acquisition of control of a Canadian business (*i.e.*, acquisition of control of a corporation outside of Canada that controls an entity carrying on a Canadian business), where there is a WTO purchaser or vendor and the target is not a cultural business, there is no review requirement (although notification is required). For an indirect acquisition, where there is a non-WTO purchaser and vendor or where the target is a cultural business, the threshold is C$50 million, except where Canadian assets account for more than 50% of the target's assets, in which case the threshold is C$5 million.

In the case of a new investment or acquisition where the target is a cultural business, the Minister can require a review if he sends a notice to the investing non-Canadian within 21 days of the ICA notification being filed.[25]

The most important review threshold is the threshold for acquisitions where either the purchaser or vendor is non-Canadian from a WTO country and the target business has no cultural activities ( for 2012, this is C$330 million based on the value of the target's assets). This is the threshold that is relevant most frequently in circumstances where a review is necessary. On a date (as of the time of writing) that is still to be fixed, this figure will increase significantly to C$600 million, rising to C$800 million two years later, and then to C$1 billion two years after that. Thereafter, it will increase pursuant to a formula that is linked to the growth of the Canadian economy. Moreover, for targets that are public companies, the basis of the calculation will change from value of assets to "enterprise value." These changes are expected to be set out in regulations that are under development.[26]

The calculation of the value of assets for the purpose of the ICA review thresholds is set out in the *Investment Canada Regulations* ("ICR").[27] The approach is to take the value shown on the audited financial statements for the latest financial year, although unaudited statements can be used where audited statements are unavailable. The ICR also sets out the information that must be submitted in a notification or a review application.[28]

With respect to the move to an assessment of "enterprise value," it is anticipated that the definition will key off of market capitalization for public companies, and a formula to determine market value for private companies. And although the financial threshold will increase, because enterprise value seeks to determine the market value of a business, there may not be a significant resulting decrease in the number of filings, as we might otherwise expect.

A notification contains a modest amount of information and can be filed before or up to 30 days following the implementation of the investment.[29] Following receipt of the notice, the Ministry assesses it for completeness and issues a receipt. If the Ministry decides that a review is warranted, the investor will be so advised. Eventually, basic details identifying the investor, the target and the nature of the target's business will be disclosed on the Ministry's website.[30]

A review application ("Application for Review") is a much more detailed document than a notification, and requires significant care in its preparation. It typically focuses on four main components: data that is specifically required for the application form as stipulated by the government;[31] "supplementary" information;[32] in most cases, a submission that outlines why the proposed investment is likely to be of net benefit to Canada; and the investor's plans for the business.

The investor's plans for the business are undoubtedly the most important element of any Application for Review, and should include reference to a

number of factors set out in section 20 of the Act,[33] as well as to the current operations of the Canadian business. Among other things, plans related to employment, participation of Canadians in the business, and capital investment should be discussed.[34] The Application for Review form suggests that applicants should provide three-year projections for the Canadian business for, for example, employment, sales, capital expenditures and exports. The plans are the key source of information upon which the Minister assesses whether the proposed investment is likely to be of net benefit to Canada. Furthermore, the plans are the primary input for the development of the undertakings that the investor is usually (these days) required to provide in order to secure ICA approval.

Most review applications are examined by the Investment Review Division ("IRD") of the Ministry of Industry (Industry Canada). Where cultural industries are involved, however, the review is conducted by the Cultural Sector Investment Review Office ("CSIR") of the Ministry of Canadian Heritage (Heritage Canada). Both departments will be involved where the target conducts cultural and other businesses.[35]

The purpose of a review is to satisfy the relevant Minister that the investment "is likely to be of net benefit to Canada." The ICA requires that the review be completed within 45 days, although the Minister can unilaterally extend this by an additional 30 days.[36] As will be discussed below, these time periods can be further extended if national security issues surface. As well, the investor and the government can agree to extend the review period, and this does happen regularly.

During the review period, the government officials consider the application and the net benefit submissions of the foreign investor. Other federal government departments and affected provincial governments will be consulted. Very commonly, the applicant will be asked to submit written undertakings in support of these submissions; for instance, as to employment levels and location of important offices and facilities. This can lead to intensive negotiations between the applicant and the government. When finalized, these undertakings are legally enforceable by the government.[37]

Undertakings typically last for three years although they can be longer. During that period, the government can ask for status reports;[38] this is usually done at the 18-month mark. Where market conditions change such that the investor cannot reasonably be expected to abide by the undertakings, the government will sometimes negotiate amendments, although there is no legal requirement for the government to do so.

As one example of the government's increasing enforcement activity in the

area of foreign investment, in 2009, it took its first-ever legal action against an investor for failing to live up to its undertakings. In 2007, U.S. Steel acquired Stelco for $2 billion. As a condition of approval, U.S. Steel gave an undertaking to maintain employment for a certain number of employees and sustain steel production at a specific level. However, U.S. Steel ceased production at the Stelco facilities. Following an unsuccessful attempt by the Minister of Industry to reopen the plant, in July 2009, the Attorney General of Canada filed an application with the Federal Court for an order directing U.S. Steel to comply with its undertakings.[39] In response, U.S. Steel moved to challenge the validity of the enforcement proceedings on the basis that they contravened its rights under the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. On June 14, 2010, the Federal Court of Canada dismissed U.S. Steel's motion. U.S. Steel filed a notice of appeal of this decision and sought to stay the Attorney General's application pending disposition of the appeal. On July 23, 2010, the Federal Court of Appeal dismissed U.S. Steel's motion to stay the application.

Although the action for breach of undertakings was ultimately settled out of court, the lengthy enforcement battle against U.S. Steel was perhaps the impetus for the government's recent announcement that in the future, it would be willing to enter into mediation to resolve issues that arise when an investor is unable to fulfill its undertakings.[40]

Incidentally, the government recently proposed a legislative change that would allow the Minister to accept security for the payment of penalties in order to secure an investor's obligations under written undertakings.[41] Written undertakings are typically required to get a transaction approved.

ICA reviews involving cultural businesses will take into account government policies that limit investment by non-Canadians in such businesses. These policies apply to the publication, distribution or sale of books, magazines and periodicals, and the production, distribution, sale or exhibition of film or video products or audio or video music recordings.[42] As a practical matter, a non-Canadian investor will find it difficult to obtain ICA clearance to acquire or establish a Canadian business in a number of these sectors. In other cultural businesses as well, and notwithstanding the lack of a particular sector policy, a non-Canadian investor will often find it a challenge to gain ICA clearance. The Ministry has issued guidelines with respect to the types of issue and the undertakings that applicants should be prepared to address during the review process.[43]

Once the IRD or the CSIR is in a position to recommend an investment, a report, together with the undertaking agreement is sent to the Minister for

consideration. The Minister, if he or she accepts the recommendation, will then approve the transaction. Where the Minister requires further information or is dissatisfied with any aspect of the proposed investment, the matter may be referred back to the IRD or the CSIR for further consideration.

When an investment is finally approved, the investor is informed and basic details identifying the investor, the target and the nature of the target's business will be disclosed on the Ministry's website.[44] Along with the aforementioned proposed changes, the government has also recently proposed legislation which would permit the Minister of Industry to give reasons for any rejection under the ICA, whether initial or final. Presently, the Minister is only able to give written reasons in the event of a final rejection.[45]

Section 36 of the ICA provides that information obtained by the Minister is privileged and neither he nor his staff are permitted knowingly to communicate or allow to be communicated any such information. These confidentiality protections are subject to certain exceptions, including information contained in any written undertaking given to the government (even though in practice the undertaking may contain quite sensitive information).[46] Despite the government's right to disclose certain information, it has been government policy not to exercise the right of disclosure without investor consent. It is therefore common for the investor and the government to negotiate and agree on what information can be made public. The Minister has a desire to communicate to the public the outcome of a review and the basis for his or her conclusions, whereas the investor typically has an interest in keeping most of the information confidential. Usually the officials and the Minister are amenable to striking a compromise that balances the interests of both sides. It is not unusual for the scope and content of press releases and speaking notes to be discussed and reviewed in advance.

In the event that the Minister rejects the approval and issues a notice to the effect that the transaction will not be approved, the investor has an additional 30 days to make further submissions or provide additional undertakings in the hope of securing approval. Rejections of investments, even on a preliminary basis, are rare. Indeed, in recent years, the Minister has disapproved only two transactions, although there have been rumours that other transactions were abandoned when it became clear that ICA approval would not be obtained. On May 8, 2008, the Minister of Industry decided that the over C$1 billion dollar sale of the Information Systems Business of MacDonald, Dettwiler and Associates Ltd. to U.S.-based Alliant Techsystems Inc. was not likely to be of net benefit to Canada.[47] Although no formal reasons were given, many believe that the government was concerned about the loss of Canadian control over satellite

technology (developed with government financial support) that could be used for surveillance of Canada's northern territory. And in November 2010, BHP Billiton withdrew its unsolicited takeover bid for PotashCorp after the Minister delivered a preliminary notice of rejection of the bid. It should be noted, too, that the national security review process introduced in March 2009, which provides the government with formal powers to prohibit or unwind foreign investments on the basis of national security concerns, has been invoked at least once, as discussed further below.

### State Owned Enterprises

One area of focus for the government has been foreign investment by state-owned enterprises ("SOE"), which are enterprises that are controlled directly or indirectly by foreign governments. A 2006 government study, *Advantage Canada: Building a Strong Economy for Canadians*,[48] identified the concern that some foreign investments by SOEs with non-commercial objectives and unclear corporate governance and reporting may not benefit Canada, and it called for a principled approach in dealing with this concern. The government then issued SOE guidelines (the "Guidelines") in December 2007 to clarify how investments by SOEs would be addressed.[49]

Although the same ICA principles apply to these transactions, the Guidelines make it clear that when assessing net benefit to Canada, the Minister will examine the corporate governance and reporting structure of the SOE. This examination will evaluate whether the non-Canadian adheres to Canadian standards of corporate governance such as commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders, and to Canadian laws and practices. The examination also looks at how and the extent to which the non-Canadian is owned or controlled by the state.

The Guidelines indicate that the Minister will assess whether the Canadian business being acquired will continue to be able to operate on a commercial basis with respect to indicia such as where exports are sold, where processing takes place, the participation of Canadians in operations, and the capital expenditures to maintain the Canadian business. A SOE should therefore anticipate that it will be required to provide undertakings beyond those normally expected of a privately-owned company. Indeed, the Guidelines go on to suggest undertakings that SOEs may offer to demonstrate net benefit, including the appointment of Canadians to boards of directors, employing Canadians in senior management positions, incorporation of a company in Canada, or a listing of shares on a Canadian stock exchange.

Recent examples of investments by SOEs that have received approval include PetroChina Co. Ltd.'s purchase of the majority interest in two oil sands assets controlled by Athabasca Oil Sands Corp. for $1.9 billion,[50] Korea National Oil Corp.'s acquisition of Harvest Energy Trust,[51] and China Petroleum & Chemical Corp., or Sinopec's, acquisition of ConocoPhillips Co.'s minority stake in Syncrude Canada Ltd.[52]

## The Recent Add-on for National Security Screening

In March 2009, Parliament amended the ICA to give the federal government the power to vet investments by non-Canadians on national security grounds.[53] Canada joins countries including the United States, Australia and Germany in having explicit procedures to review, adjust, and if necessary, reject, foreign investments that are perceived to be injurious to national security.

The scope of the review is potentially very broad. There is no minimum investment threshold. A review can be undertaken even for a minority investment in an existing business or for the start-up of a new business – neither of which would otherwise be subject to the usual "net benefit" review (nor, for the minority investment, to notification). To date, there is no list of sensitive sectors where a review is more likely; nor is there a formal procedure as there is in the United States under the Committee on Foreign Investment in the United States ("CFIUS") regime to "voluntarily pre-clear" potentially sensitive transactions. That being said, pre-clearance is possible for acquisitions of control if proper notice thereof is made to the Minister of Industry prior to the implementation of the investment, and the time period for issuance of a national security review notice is allowed to expire prior to closing.

The criteria for evaluating a particular transaction are quite vague: the government need only be satisfied that it has "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security." The terms "injurious" and "national security" are not defined.

Moreover, the remedies are very broad. The government can block a pending transaction or allow it to proceed subject to conditions. It can also order divestitures for completed transactions.

The entry point for national security screening will, in most cases, be the notification and review processes under the ICA. Under regulations issued in 2009,[54] the Minister must initiate action (a) for a reviewable matter, within45 days after the review application is certified as complete, (b) for a notifiable matter, within 45 days after certification of the notification, and (c) in all other cases, within 45 days after the investment is implemented. A prudent investor in a transaction that raises potential concerns would therefore typically

not implement an investment until 50 days or so after the initial notice or application.[55]

The Minister initiates a national security review by sending notice to the non-Canadian investor. The Minister can, and likely will, also send a request for information. Following this preliminary procedure, the Minister can either terminate screening or issue another notice, this time ordering a full national security review of the investment. The national security review process can take up to 130 days from the initial notice (or longer if the investor agrees to an extension).[56]

The Minister can demand information from the non-Canadian or from any other person involved in the transaction. The investor will also be given the opportunity to make representations to the Minister. The Minister digests the information, consults the Minister of Public Safety and Emergency Preparedness and other agencies and then sends a report to the Governor-in-Council (*i.e.,* the federal Cabinet) with recommendations. Cabinet then makes a decision and issues an order that can block the investment, authorize the investment on conditions, or require divestiture (in the case of a completed investment).

As noted earlier, once the national security screening process begins, the deadlines for Ministerial decision-making in an ICA "net benefit" review are postponed.[57] Thus, the two procedures become, in effect, merged and will presumably lead to a synchronized outcome.

To provide some greater degree of predictability to potential investors and their targets, note that both the U.S. and Australia (but not Canada) have provided guidance on the types of transactions that are more prone to national security attention; this guidance can likely be a useful starting point for Canadian assessments as well. What follows is a non-official amalgam of this guidance but omitting sectors that are not likely to be a concern in Canada ( for example, where Canadian ownership and control rules apply, such as in the broadcasting, telecommunications and airline industries):

- Target companies involved in government contracting such as military, law enforcement, telecommunications technology, aerospace, radar, information technology and classified work generally.
- Target companies in the transportation, energy, nuclear, uranium mining or advanced technology sectors or that sell export-controlled products.
- Purchasers that are state-owned companies and where investment decisions are not clearly independent of government.

Although Canada does not yet have a pre-clearance procedure, it is inevitable

that a process will develop. The early acquisitions will likely clear a path through the federal bureaucracy that others will then follow.

As mentioned above, national security concerns were expressed in connection with the proposed acquisition of Forsys Metals by George Forrest International (GFI). Forsys Metals is a Canada-based mineral exploration company with uranium projects in Namibia. In August 2009, GFI received notification from Industry Canada pursuant to the national security provisions of the ICA, that it was prohibited from implementing the investment pending further notice[58].

## Conclusions

Although Canada has benefitted mightily from foreign investment, it retains a perhaps surprising degree of skepticism that foreign investment is always beneficial. In the 1970s, this skepticism led to close monitoring of foreign investment, and commitments by investors to undertake government-mandated measures such as supporting R&D and maintaining specified employment levels. In the 1980s, the pendulum swung in the other direction: although foreign investment was still monitored, the welcome mat was more clearly in evidence. Now, a more nuanced approach to foreign investment appears to be at work. Most foreign investment is welcome, and consequently most transactions will encounter no opposition from the ICA process (although undertakings will likely be extracted from the investor). However, more often than before, the government appears willing to push back against investments that are contrary to evolving public policy, such as concerns about national security or foreign state-owned investors, and against investors that fail to live up to their commitments, even if this blemishes Canada's investment-friendly reputation.

An interesting situation that some say provided a gauge of the government's current approach to foreign investment is the rejection of BHP Billiton's takeover bid of Potash Corp.[59] However, that transaction gave rise to many questions surrounding the government relations approach utilized. From a practical viewpoint, due to the increased vigour with which the ICA is being applied, one suggestion is to consider whether the use of additional advisers would be appropriate. In most cases the investor will have legal and financial advisers engaged in respect of a proposed transaction. However, in some complex or sensitive cases, the talent and experience of public relations and government relations experts are invaluable. Careful consideration should be given, as soon as possible, to engaging experts whose "soft touch" can make the processing of a file much smoother for both investor and government alike.

As attitudes to foreign investment have evolved, so has the ICA. An already complex statute has become lengthier and more complicated. The process of

compliance has become more time-consuming and more expensive, even as the percentage of transactions that are subject to the onerous review process has decreased.

However, most experts in this area will agree that a careful and thoughtful strategic approach will invariably result in the successful clearance of a foreign investment in Canada in all but the most egregious circumstances.

**ENDNOTES**

[1] Oliver Borgers is a partner in McCarthy Tétrault LLP's Competition Law Group, which specializes in foreign investment and competition law. Emily Rix is a former member of the Group. The comments in this paper, which we believe are accurate and reliable, are necessarily of a general nature. Clients are urged to seek specific legal advice on matters of concern and should not rely solely on the information provided herein.

[2] The Competition Policy Review Panel's June 2008 report, *Compete to Win*, is available at www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home

[3] SOR/85-611

[4] See www.gazette.gc.ca/rp-pr/p1/2009/2009-07-11/html/reg2-eng.html. The *Regulations Amending the Investment Canada Regulations* were published for comment in the Canada Gazette Part I, Vol. 143, No. 28 on July 11, 2009. These regulations have not yet been registered.

[5] See Industry Canada press release: "Minister of Industry Confirms Initial Decision on Proposed Sale of Macdonald, Dettwiler and Associates Ltd. to Alliant Techsystems Inc.," May 8, 2008, at www.ic.gc.ca/eic/site/ic1.nsf/eng/04219.html

[6] In July 2009, the Attorney General of Canada filed an application with the Federal Court for an order directing U.S. Steel to comply with undertakings it gave as a condition of approval of its 2007 acquisition of Stelco Inc. See Industry Canada press release "Industry Minister Clement Takes Further Steps to Hold U.S. Steel to Its Investment Canada Act Commitments," July 17, 2009, at www.ic.gc.ca/eic/site/ic1.nsf/eng/04836.html

[7] The report is available at www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home

[8] ICA, s. 11

[9] ICA, s. 10

[10] ICA, s. 3. A definition of "Canadian" individuals is also provided.

[11] ICA, s. 26 and 27

[12] ICA, s. 3

[13] ICA, s. 31(1)

[14] ICA, s. 31(2) and Interpretation Note No. 2

[15] ICA, s. 3

[16] Interpretation Note No. 4

[17] *Ibid*

[18] ICA, s. 3

[19] The government has issued Related-Business Guidelines to assist in determining if a new business is related to an existing business. See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#admin

[20] ICA, s. 15(a) and Regulations s. 8 and Schedule IV

[21] ICA, s. 28
[22] ICA, s. 28(4). The Minister can make such a determination retroactively. See s. 28(6).
[23] ICA, s. 14 and s. 14.1
[24] See ICA, s. 14.1(5) which carves out an exception for the higher WTO investor threshold in the case where the target is a cultural business.
[25] ICA, s. 13(2)
[26] See www.gazette.gc.ca/rp-pr/p1/2009/2009-07-11/html/reg2-eng.html
[27] SOR/85-611
[28] See Schedules I, II and II to the ICR.
[29] ICA, s. 12. That said, the proposed new regulations will increase the information that must be submitted.
[30] See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00014.html
[31] The proposed new regulations will update and expand the Application for Review requirements. See Schedule II of the proposed *Regulations Amending the Investment Canada Regulations*, C. Gaz. 2009.I.2064. See www.gazette.gc.ca/rp-pr/p1/2009/2009-07-11/html/reg2-eng.html
[32] See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00076.html. The IRD website sets out supplementary information that the officials strongly suggest be submitted with the Application for Review form. The investor is encouraged to provide as much of the requested supplementary information as is reasonably possible in order to avoid later delays in the process when the government officials inevitably ask for this information to complete their file.
[33] The factors set out in ICA, s. 20 are as follows:

(*a*) the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;
(*b*) the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;
(*c*) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
(*d*) the effect of the investment on competition within any industry or industries in Canada;
(*e*) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
(*f*) the contribution of the investment to Canada's ability to compete in world markets.

[34] ICR, Schedule II, s. 15. The Application for Review form prepared by the officials (see http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00063.html) adds some suggested subjects that could be covered under the "plans" section including productivity, efficiency, technological development and international competitiveness.
[35] For more information on dual filing requirements, see www.ic.gc.ca/eic/site/ica-lic.

nsf/eng/lk00052.html
[36] ICA, s. 21-22. During the review period there are usually four key stages that occur: intergovernmental consultation; provision of additional information to the government representatives; negotiating the content and scope of written undertakings to be given to the government, if any; and the formal Ministerial approval process.
[37] ICA, s. 39(1)(e)
[38] ICA, s. 25
[39] See Industry Canada press release "Industry Minister Clement Takes Further Steps to Hold U.S. Steel to Its Investment Canada Act Commitments," July 17, 2009, at www.ic.gc.ca/eic/site/ic1.nsf/eng/04836.html
[40] See http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#MediationGuideline
[41] See http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?billId=5514128&Mode=1&View=8&Language=E
[42] See the Ministry of Canadian Heritage website at www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/index-eng.cfm
[43] See www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/net-eng.cfm
[44] See www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00014.html
[45] As seen in 2010, the Minister issued an initial rejection of BHP Billiton Ltd.'s bid for Potash Corp. and BHP then withdrew its bid. The Minister was not required in that case to issue a final rejection and therefore no reasons were ever given.
[46] ICA, s. 36(4)(b)
[47] See www.ic.gc.ca/eic/site/ic1.nsf/eng/04219.html
[48] Available online: Department of Finance, http://www.fin.gc.ca/ec2006/pdf/plane.pdf
[49] Industry Canada, Guidelines "Investment by state-owned enterprises - Net benefit assessment" (December 7, 2007), available online: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html
[50] See http://www.aosc.com/upload/media_element/24/01/joint-venture-transaction-closes.pdf
[51] See http://cnrp.marketwire.com/cnrp_files/20091222-1222hte.pdf
[52] See http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/sinopec-free-to-buy-into-syncrude/article1618216/
[53] ICA, Part IV.1
[54] *National Security Review of Investments Regulations*, SOR/2009-271 ("NSRIR")
[55] Because in at least one case (see subsection 25.3(2)) the investor may only become aware of an order for review after it has been made (because the Minister's obligation to give notice thereof only arises after the order has been made on a "without delay" basis), it is prudent in our view to wait at least five days after the expiration of the 45 day period before consummating the transaction, in order that any notice issued can be received.
[56] ICA, Part IV.1 and NSRIR
[57] ICA, s. 21
[58] See http://www.theglobeandmail.com/report-on-business/forsys-drops-after-industry-canada-puts-takeover-of-firm-on-hold/article4282548/
[59] See http://www.theglobeandmail.com/globe-investor/potash/tories-reject-bhp-bid-for-potash-corp/article1784212/.