

JUST WATCH ME: PROCEDURAL FAIRNESS UNDER THE INVESTMENT CANADA ACT'S NATIONAL SECURITY REGIME¹

Kate McNeece² & Will Rooney³

What procedural protections does fairness demand for foreign investors subject to Canada's regime for the national security review of investments? This paper argues that much more is required than is presently provided. Under the Investment Canada Act, the Minister of Innovation, Science and Industry and the federal Cabinet both make decisions about whether the investment poses a potential national security threat, with minimal reasons or information provided to the investor. Legally speaking, the significance of these decisions to investors and the statutory scheme (a final, non-appealable determination) warrant greater procedural safeguards. Further, greater justification should only serve to benefit the government in the event of contested proceedings. Finally, as a practical matter, providing more information to investors about the government's concerns would only serve to improve the mitigation that investors may offer and facilitate the conditional approval of investments, a clear objective of both the existing regime and recent amendments.

Quelles protections procédurales l'équité exige-t-elle pour les investisseurs étrangers assujettis au régime canadien d'examen des investissements aux fins de la sécurité nationale? Les auteurs de cet article soutiennent que les besoins sont bien plus importants que ce qui est actuellement prévu. En vertu de la Loi sur Investissement Canada, le ministre de l'Innovation, des Sciences et de l'Industrie et le cabinet fédéral prennent tous deux des décisions quant à savoir si l'investissement porte atteinte à la sécurité nationale, avec un minimum de raisons ou d'informations fournies à l'investisseur. D'un point de vue juridique, l'importance de ces décisions pour les investisseurs et le cadre législatif (une décision définitive et sans appel) justifient des protections procédurales plus importantes. De plus, une justification mieux articulée ne devrait servir qu'à avantager le gouvernement en cas de procédure contestée. Enfin, d'un point de vue pratique, fournir davantage d'informations aux investisseurs sur les préoccupations du gouvernement ne servirait qu'à améliorer les mesures d'atténuation que les investisseurs peuvent proposer et faciliter l'approbation conditionnelle des investissements, un objectif clair du régime existant et des modifications récentes.

1. Introduction

On November 2, 2022, the Canadian government announced that it had ordered the divestiture of lithium assets acquired by three Chinese companies in three separate transactions. A statement by the Minister of Innovation, Science and Industry (the “**Minister**”) explained that this unprecedented announcement would be the prelude to greater transparency, noting that “[t]ransparency and certainty are core principles for the government’s modernization efforts where the [*Investment Canada Act* (“*ICA*”)] is concerned”, and that the government “will continue to announce outcomes of such orders going forward.”⁴ Just over a month later, on December 7, 2022, the Minister proposed a bill setting out a suite of amendments to the *ICA*, with transparency again being a stated aim (the “**Amendments**”).⁵ On March 22, 2024, the Amendments were passed by the House of Commons, with select amendments coming into force on September 3, 2024.

This paper argues that additional steps to promote transparency in the administration of the *ICA* are both welcome and necessary, especially in light of the new Ministerial powers granted by the Amendments. Greater transparency in the national security review of investments, specifically as it relates to the information the government provides to investors over the course of a review, ought to be pursued for three principal reasons. First, procedural fairness requires greater justification of *ICA* national security decisions than is presently provided. Second, it is in the government’s interest to provide more robust reasons in order to ensure its decisions withstand judicial review. Third, greater transparency can assist the government in balancing its statutory objective to encourage investment in Canada with its responsibility to protect national security. Equipping investors with better information will ensure that *ICA* enforcement does not chill investment any more than is necessary while at the same time facilitating the conditional approval of investments where appropriate (predicated on meaningful dialogue on national security issues).

This paper proceeds as follows. Section 2 details the process by which various decision-makers have evaluated investments under the pre-Amendments national security regime, describes how the Amendments alter this process, and illustrates the practical reality of the quantity and quality of information provided to foreign investors: namely, that investors are often left largely in the dark about the government’s concerns.

Section 3 details the basic legal framework for procedural fairness. It reviews two related species of procedural fairness that support greater disclosure to investors who are subject to national security review. The first is the duty to provide reasons. The second is the principle that those subject to administrative proceedings are entitled to know the case to be met.

Section 4 argues that more and better information ought to be provided to investors throughout the national security review process. First, as a matter of first principles regarding procedural fairness, the information provided at present is inadequate. A substantial duty of procedural fairness, supported by the importance of these decisions to investors and the absence of a statutory route of appeal, militates in favor of greater reasons. While the need to withhold certain privileged information is obviously a factor to be considered, this argument has its limits.

Second, given the increasing centrality of reasons to substantive judicial review, it is in the government's interest to provide more robust reasons beyond the minimum required by procedural fairness principles. The Amendments specifically contemplate more frequent contested national security proceedings, and provide the ideal opportunity for the government to reconsider the procedure that such reviews follow.

Third, we set aside the legal arguments to apply a purposive policy lens. In particular, the Amendments establish a process by which the Minister can accept binding undertakings to allow an investment to proceed subject to conditions that mitigate national security concerns; a process which necessarily envisions a dialogue between investors and the government. Such a dialogue can only occur if the government provides investors with the information they need to productively participate in the negotiations. We argue that this process will proceed inefficiently, at best, absent greater transparency.

Section 5 concludes. The government has every reason to provide greater information to foreign investors. Legally, equipping investors with greater information is required as a matter of procedural fairness and to buttress decisions in the event of judicial review. But further, greater information exchange only stands to improve the administration of the national security process.

2. Legal Framework for the National Security Review of Investments

This section details the legal framework and practical reality of national security reviews under the *ICA* to provide the reader with a better understanding of the review process, and the rights and interests impacted at each stage. The legal framework contemplates an extended process with regular milestones in the form of decisions of the Minister and/or federal Cabinet. In practice, certain of these decision-points are the only time at which investors are given any statements as to why the government believes that a certain investment poses a threat to national security.

(a) The *ICA* National Security Regime

Under the *ICA*, the Canadian federal government has the power to review a broad range of investments by a non-Canadian with a nexus to Canada on national security grounds.⁶ In particular, the national security provisions of the *ICA* (Part IV.1) apply to any investment, whether implemented or proposed, by a non-Canadian to (a) establish a new Canadian business; (b) acquire control of a Canadian business; or (c) acquire, in whole or in part, or to establish an entity carrying on all or part of its operations in Canada if the entity has a place of operations in Canada, Canadian employees, or Canadian assets.⁷

Below, we set out the *ICA* national security regime prior to and after the Amendments. As certain of the Amendments have yet to come into force, we note throughout this piece where particular legislative changes are not yet in operation. Each of these steps impacts investors' legal interests, as detailed further below, but the statutory scheme is silent on disclosure and reasons. While at certain stages, practice has developed to fill this procedural gap, the reasons provided remain insufficient to allow investors to meet the case being made against them or meaningfully engage in mitigation discussions.

For investments subject to the mandatory filing regime under the *ICA*, the national security process begins with the filing of a complete notification or application for review on "net benefit" grounds.⁸ At any point after the notification is filed up until the review is complete, the Minister can request relevant information from persons and entities connected with the investment.⁹

The first decision-point under the *ICA* comes at the end of the prescribed period following either the receipt of a complete notification (45 calendar days) or, where a notification is not required, implementation of the

investment (5 years).¹⁰ By the end of the applicable period, the Minister must decide whether to take national security action. If the Minister does not take action, the matter is concluded.

Under the prior version of the ICA, if the Minister did take action at this stage, it could take one of two forms:

- If the Minister had “reasonable grounds to believe” that an investment “could be injurious to national security” the Minister could unilaterally extend the period of time to consider the investment by 45 days in the form of a notice (“**25.2(1) Extension**”) that a national security review may be ordered.¹¹ In the event that the investor had not implemented the investment, this notice had suspensory effect.¹²
- Alternatively, if the Minister had already concluded that the investment “could be injurious to national security”, the Minister could have, after consulting with the Minister of Public Safety, referred the matter to the federal Cabinet (the “**Initial Referral**”).¹³ (The Minister could also make such a referral following a 25.2(1) Extension.) Federal Cabinet could then order the commencement of a national security review (a “**25.3(1) Review Order**”).¹⁴ Should such a review be ordered, the Minister was required to notify the investor “without delay.”¹⁵ The 25.3(1) Review Order, like the 25.2(1) Extension, had suspensory effect.¹⁶

As a practical matter, in most cases the Minister has first issued a 25.2(1) Extension, preventing closing of a transaction that has not already closed, and extending the screening period by 45 days; and subsequently (unless satisfied during this initial period that there is no risk to national security) has obtained a 25.3(1) Review Order at the end of this period. Whether issued following a 25.2(1) Extension or at the end of the initial screening period, notice to the Investor that a 25.3(1) Review Order has been made is accompanied by a brief “Summary of Concerns”—meaning that the first instance at which any reasons justifying a suspensory national security review of an investment often comes nearly 3 months after filing of a complete notification.

The Amendments modify the outset of the process in two primary ways. First, instead of referring the matter to federal Cabinet for a 25.3(1) Review Order, under the new regime, the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, may launch an analogous “**Further Review**” of the investment provided the Minister believes that the investment “could be injurious to national security.”¹⁷ Second, the

Amendments equip the Minister with the ability to impose interim measures pending the completion of the review.¹⁸

As of November 2024, the Minister has not publicly disclosed any case in which the interim measures power has been used; however, by virtue of the power's placement in section 25.3 and government guidance, it seems clear that a 25.3(1) Review Order / order for Further Review must be issued either prior to or simultaneously with an order imposing interim measures.¹⁹ Notably, despite granting the Minister significant new powers to impact the implementation of an investment that "could be" (but has not been determined *to be*) injurious to national security, the Amendments do not codify a requirement for the Minister to provide a "Summary of Concerns" to the investor, nor do they require the Minister to provide the investor with reasons detailing why such interim measures are necessary.

Under the prior regime, where Cabinet issued a 25.3(1) Review Order, the initial statutory period for the review would be lengthened by 45 days, which could be unilaterally extended by the Minister by an additional 45 days (creating a potential total of 90 days).²⁰ Further extensions were possible with the consent of the investor. The 25.3(1) Review Order would also trigger an investor's right to make representations.²¹ This is one of the few procedural rights afforded to investors under the *ICA*'s national security regime.

Following the Amendments, a decision by the Minister to order Further Review provides the Minister with an additional 45 days to consider the investment.²² Subsequent timing is unchanged. The Minister can unilaterally extend a Further Review by an additional 45 days, and additional extensions remain possible on consent.²³ Like the 25.3(1) Review Order, initiating Further Review triggers the investor's right to make representations.²⁴ The Amendments have removed the Minister's duty to provide investors with the reasonable opportunity to make "in person" representations, and replaced them with the ability for the Investor to make "representations and submit written undertakings, within the time and in the manner specified in the notice."²⁵

A complete *ICA* national security review that did not result in unconditional approval by the Minister traditionally culminated in a referral to Cabinet. Prior to the Amendments, the Minister had limited formal legal powers to approve investments subject to conditions. By no later than the end of the national security review period, the Minister had either to determine that the investment was not likely to be injurious to national security, or, after consulting with the Minister of Public Safety, to refer the investment

to the federal Cabinet for review (the “**Final Referral**”).²⁶ No notice was required to be provided to the investor when this referral was made, or on what grounds (*i.e.*, the Minister could refer the investment to Cabinet on the basis that the Minister had concluded that the investment was likely to be injurious to national security, or that the Minister had not been able to determine whether the investment was likely to be injurious to national security, without informing the investor).

Following the Amendments, where an investment may be injurious to national security, the Minister now has the legal ability to approve the investment subject to binding undertakings without referring the investment to Cabinet.²⁷ As noted above, the Amendments do not require the Minister to provide reasons (in a Summary of Concerns or otherwise) supporting the Further Review or detailing why such binding undertakings are necessary to resolve national security concerns.

Under both the pre-Amendment and post-Amendment *ICA*, following the Final Referral, the federal Cabinet has 20 days to take action (this period cannot be extended).²⁸ The federal Cabinet may make an order requiring the investor to take any action it considers advisable to protect national security, including authorizing the investment on the basis of undertakings, terms or conditions agreed with the investor; blocking the transaction (if the review proceeds pre-closing); or requiring the investor to divest their investment, refrain from voting their interests, *etc.* (if the review proceeds post-closing) (the “**Final Order**”).²⁹ The Final Order customarily contains recitals setting out the concerns leading to the Order (though the *ICA* does not require such recitals to be included, and the concerns are again expressed in very general terms).

To recap, the key decisions under the current and post-amendment *ICA* are depicted in *Figure 1*, below.

Figure 1. Decisions under the ICA's National Security Regime

Prior ICA	Prior ICA	Amended ICA	Amended ICA	Reasons
<i>Decision</i>	<i>Description</i>	<i>Decision</i>	<i>Description</i>	<i>Description</i>
25.2(1) Extension	The Minister's decision to extend the initial period (or terminate the process), which requires the Minister to have reasonable probable grounds to believe that the investment "could be injurious to national security."	25.2(1) Extension	No change to the legal standard.	No statutory requirement to provide reasons and none traditionally provided.
Initial Referral	The Minister's initial decision to refer the matter to the federal Cabinet to order a review (or terminate the process), which requires the Minister to consider that the investment "could be injurious to national security."	Further Review	It is now the Minister's initial decision to commence a 'further review' of the investment (or terminate the process), which requires the Minister to consider that the investment "could be injurious to national security."	No statutory requirement to provide reasons; brief "Summary of Concerns" customarily provided along with notice under section 25.3(2) that an order had been made.
25.3(1) Review Order	Cabinet's decision to order a review.			
Final Referral	It was the Minister's decision to refer the matter to the federal Cabinet (or terminate the process), which required (i) the Minister to be satisfied that the investment would be injurious to national security, or (ii) on the basis of the information available, the Minister was not able to determine whether the investment would be injurious to national security.	Final Referral (or Ministerial Conditional Approval)	It is now the Minister's decision either to refer the matter to federal Cabinet, or to approve the investment subject to conditions (or to terminate the process). Referral requires that (i) the Minister be satisfied that the investment would be injurious to national security, or (ii) on the basis of the information available, the Minister is not able to determine whether the investment would be injurious to national security.	No statutory requirement to provide reasons or basis on which the referral has been made; no reasons customarily provided.

Final Order	If referred to federal Cabinet, federal Cabinet's order to block, unwind, or approve (with or without conditions) the investment.	Final Order	If referred to federal Cabinet, federal Cabinet's order to block, unwind, or approve (with or without conditions) the investment.	No statutory requirement to provide reasons; recitals customarily included in the Order in Council.
--------------------	-----------------------------------------------------------------------------------------------------------------------------------	--------------------	-----------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------

(b) The Practice

This section describes how a national security review proceeds in practice (including a public example from the pre-amendment *ICA*), with particular emphasis on the time and nature of the reasons provided (or lack thereof).

At the outset, it is important to note that the national security review of investments is an area of law driven by the government's *changing* view of what constitutes a matter of national security. The term "injurious to national security" is not defined under the *ICA* or its accompanying regulations. Instead, "national security" is a flexible standard that may reflect the prevailing concerns of the government at the time of the review. Prospective investors can look to the government's *Guidelines on the National Security Review of Investments* (the "**Guidelines**"),³⁰ which describe the government's approach to national security reviews under the *ICA* as well as prior reviews (to the extent they have become public, including through the government's annual report on the administration of the *ICA*), to understand the types of investments that could be considered sensitive.

This paper does not take issue with this framework—it may well be appropriate for "injurious to national security" to be a flexible and shifting standard, consistent with the ever-shifting national security landscape. But this context—a subject area without bright line rules or established case law—makes transparency of process all the more important. The process involves significant information asymmetries. The flexible definition of "injurious to national security" is just one example (*e.g.*, due to recent geopolitical developments, has an investor from a traditionally 'friendly' nation become a potential national security risk). In addition, owing to intelligence gathering efforts, it is reasonable to anticipate that the government will often have developed specific concerns when it chooses to launch a national security review. These concerns may relate to any number of topics (*e.g.*, one part of a company's global supply chain), but the government may not wish to share granular details with the investor.³¹

As described briefly above, under the pre-Amendments *ICA* national security regime, written reasons³² have historically been provided at just

two of the five discrete points identified in the prior section: at the outset of a formal 'review' (following a 25.3(1) Review Order), and alongside a Final Order from the federal Cabinet. Post-Amendments, these two inflection points correspond to the order for Further Review and the Final Order (or, alternatively, Ministerial Conditional Approval).

An investor subject to national security scrutiny (typically after a 25.2(1) Extension, but sometimes before) can expect to receive one or more requests for information from the Foreign Investment Review and Economic Security Branch of Innovation, Science and Economic Development Canada (the agency that administers the *ICA* on behalf of the Minister, abbreviated as "FIRES"), and in some cases may have additional engagement with FIRES, as described further below. Though an investor may be able to glean some aspects of the government's concern from the questions included in the information request(s) (which range widely in breadth and depth), disclosure is typically limited at this stage and it is only if the national security process moves to the next stage, the 25.3(1) Review Order (now Further Review), that the investor is provided with any direct indication of the government's concerns.

An investor's first indication of the government's concerns will typically come in the form of a "Summary of Concerns." The Summary of Concerns accompanies the notice communicating to the investor that Cabinet has made a section 25.3(1) Review Order (under the new regime, that the Minister has initiated Further Review). Under the post-Amendments *ICA*, any order imposing interim conditions is likely to be received simultaneously with, or after, the order for Further Review. FIRES' recent guidance explains that "a ministerial order imposing interim conditions, if any, would be delivered to the investor and any other relevant party(ies) along with the notice referred to under subsection 25.3(2),"³³ and indicates that the content of the Summary of Concerns will serve as the basis to inform undertakings and interim conditions.³⁴ This guidance also states that a deadline for the submission of national security undertakings will be included with this notice.³⁵

While we welcome the recognition within the Minister's non-binding guidance of the importance of providing some reasons in the form of a Summary of Concerns, the procedural protection provided by this 'soft law' is limited. As a practical matter, the delivery of the Summary of Concerns at this time means the investor typically must wait until at least 90 days after the filing of a complete notification (and for investors filing prior to closing, typically 45 days after suspension of the ability to close) before the

government provides any justification for the enhanced scrutiny to which the investment is subject.

Moreover, Summaries of Concerns—when finally delivered—can be brief and uninformative. They usually (a) provide a brief summary of relevant facts and (b) reference particular elements of the Guidelines that are applicable to the investment being considered. For example, in a recent litigated case (where the Summary of Concerns was made public in court records), the Summary of Concerns read:

[The Investor via its affiliates maintains] several points of presence within Canada’s telecommunications infrastructure, including providing telephony services to individual customers, and offering general ICT services to third parties in Canada.

As the Investor is a state-owned enterprise ultimately controlled by the Chinese state, this investment could result in the Canadian business being leveraged by the Investor’s ultimate controller for non-commercial purposes, such as compromise of critical infrastructure and foreign interference, to the detriment of Canada’s national security.³⁶

Equipped with the above and a few requests for information from the government, FIRES’ latest administrative policies would require an investor to make representations to support undertakings and (if applicable) to lift interim conditions within just 10 business days of receipt of the Summary of Concerns.³⁷

In the event that an investor is subject to a complete review and a Final Order from Cabinet, the statement above is all an investor will receive by way of reasons until Cabinet’s order (which would be received 90-110 days, or more, after the Summary of Concerns). During this time, the investor may receive requests for information from FIRES staff; engage with FIRES regarding these requests; and receive feedback from FIRES as to representations and informal mitigation. At the Canadian Bar Association 2024 Fall Conference, FIRES leadership indicated that they intended to be more forthcoming to suggest undertakings (and provide feedback on undertakings) during a national security review. We welcome the recognition at the FIRES level that greater transparency would benefit investors at this stage. However, an intent to provide informal oral or written feedback from the reviewing agency (who can only provide such feedback on the basis that they cannot bind the Minister’s discretion to come to a different conclusion) is no substitute for written reasons from the ultimate decision-maker (the Minister).

In the same court case noted above, Cabinet's Final Order contained two substantive elements (embedded within extended recitals stating that the procedural steps required under the *ICA* had been adhered to). The order contained a brief recitation of the same facts outlined in the Summary of Concerns:

Where [the Canadian Business]:

- (a) Maintains points of presence within Canada's telecommunications infrastructure;
- (b) Offers mobile telephone services within Canada to Canadians and individuals; and
- (c) Offers information and communication technology services within Canada to businesses within the meaning of the [*ICA*] to Canadian non-governmental organizations and individuals as well as to embassies;³⁸

Subsequently, it restated many of the same alleged national security risks as outlined in the Summary of Concerns, now slightly expanded upon:

And whereas the Minister of Industry, after consideration of all of the information collected and all of the representations made during the course of the review and after consultation with the Minister of Public Safety and Emergency Preparedness, being satisfied that the investment—by posing the following risks—would be injurious to national security, has, under subparagraph 25.3(6)(a)(i) of the Act, referred the investment under review to the Governor in Council, together with a report of the Minister's findings and recommendations on the review:

- (a) that [the Investor's ultimate parent] and its subsidiaries and affiliates may be subject to the influence or demand of, or control by, a foreign government;
- (b) that [the Investor's ultimate parent] and its subsidiaries and affiliates may disrupt or otherwise compromise Canadian critical telecommunications infrastructure; and
- (c) that [the Investor's ultimate parent] and its subsidiaries and affiliates may gain access to highly sensitive telecommunications data and personal information that could be used for non-commercial purposes such as military applications or espionage.

Therefore, Her Excellency the Governor General in Council, considering it advisable to protect national security, on the recommendation of the Minister of Industry, pursuant to subsection 25.4(1) of the *Investment Canada*

Act, makes the annexed [order for the divestment/winding-up of the Canadian business].³⁹

In this case, the foreign investor and its affiliates, companies involved in the telecommunications services sector with Chinese state ownership, merely had these facts recited back to them by the government as sources of national security risk without further explanation. This is the sparse *status quo*. Unless the Summary of Concerns is made more robust, it is not clear how Summaries of Concerns will effectively allow investors to prepare a robust and meaningful undertakings proposal, or provide effective representations concerning interim conditions, within the short 10 business day timeline required by the government.

3. Procedural Fairness, Reasons, and the Case to be Met

In the remainder of this paper, we argue that additional reasons must, and should, be provided to allow investors the full benefit of the procedural rights established by the ICA. To ground this discussion, this section first briefly details two administrative law doctrines (derived from the common law duty of procedural fairness) that are particularly important for present purposes: the duty to provide reasons and the duty to provide a party with the case to be met.

(a) The Duty of Procedural Fairness

In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada set out five principal considerations that inform an administrative decision-maker's common law duty of procedural fairness. Where an administrative body makes decisions affecting individuals' "rights, interests, or privileges," this triggers a common law duty for public bodies to treat those rights, interests, and privileges fairly—a duty of "procedural fairness."⁴⁰

In evaluating the duty of procedural fairness in this context, the Supreme Court of Canada set out five principal factors that inform the strength of the duty. They are:

- **The Nature of the Decision.** This factor evaluates whether the decision in question is of a legislative or policy nature and affects the community as a whole, or is an adjudicative decision that turns on a question of fact and law and affects the interests of a single individual. Accordingly, the "more the process provided for, the function of the tribunal, the nature of the decision-making body, and the

determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required.”⁴¹

- **The Importance of the Decision to the Individual.** The “more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”⁴² For example, at the high end, decisions that risk individual life attract a high level of procedural fairness.⁴³ Conversely, at the low end, neither risk of harm to reputation of the individual nor a plea to receive government funding result in significant procedural protections.⁴⁴
- **The Statutory Scheme Governing the Decision.** Another important consideration is the nature of the statutory scheme and the terms of the statute pursuant to which the decision-making body operates. Accordingly, the “role of the particular decision within the statutory scheme and other surrounding indications in the statute help to determine the content of the duty of fairness.”⁴⁵ Greater procedural protections will therefore be required when “no appeal procedure is provided within the statute, or when the decision is final and further requests cannot be submitted.”⁴⁶
- **The Individual’s Legitimate Expectations.** A Tribunal may be reasonably expected to follow the same procedures it has in the past, provided that the evidence of past practice is clear and unequivocal, that it has been the tribunal’s common practice, it is directly applicable in the circumstances and the person seeking to enforce it knew of it and relied on it, and it does not conflict with statutory requirements. Accordingly, the legitimate expectations of the person challenging the decision given these past procedures may also determine what procedures the duty of fairness requires. If a legitimate expectation is found to exist, “this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision.”⁴⁷
- **The Administrative Decision-Maker’s Choice of Procedure.** Tribunals are given reasonable latitude in setting their own procedure. Consequently, the “analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are

appropriate in the circumstances.”⁴⁸ However, the procedure adopted by a tribunal must ensure that those who come before it are treated fairly. Therefore, while “important weight must be given to the choice of procedures made by the agency itself,” it is not determinative.⁴⁹

In *Baker*, Mavis Baker was ordered deported to Jamaica, despite having Canadian-born, dependent children in Canada. As a result, she made a written application on humanitarian and compassionate grounds for an exemption to the requirement under subsection 114(2) of the *Immigration Act* that her application for immigration be made from abroad. In a letter received from a senior immigration officer, her application was denied without a hearing and without reasons being provided. Upon requesting reasons, Ms. Baker was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. She sought judicial review of the officer’s determination, and pursued the matter to an appeal before the Supreme Court of Canada.

The Supreme Court of Canada held that the nature of the decision (which involved considerable discretion), and the statutory scheme (categorizing compassionate relief as an exception to the general principles of Canadian immigration law) both militated in favour of a more relaxed duty of fairness. However, the lack of appeal procedure and the exceptional importance of this decision both weighed in favour of more extensive procedural protections. Balancing these factors, the Supreme Court of Canada held that the resulting duty of fairness was more than minimal.

Nevertheless, even in light of a ‘more than minimal’ duty of fairness, the Supreme Court of Canada recognized that reasons ought to have been provided. The Court held that, “in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.”⁵⁰ Moreover, it would be unfair, the Supreme Court of Canada held, for a person subject to a decision such as this one which is so critical to their future not to be told why the result had been reached.⁵¹

(b) The Duty to Provide Reasons and the Case to be Met

This general duty of fairness informs the particular procedural remedies required in given circumstances. *Baker* is therefore doubly relevant in that it also established that even minimal procedural fairness can require administrative decision-makers to provide written reasons for a decision.⁵²

In addition, procedural fairness also entitles those appearing before a decision-maker to know the case to be met. As Lord Denning stated:

The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.⁵³

Where decisions are ‘serialized’ as they are under the *ICA*’s national security regime, one can think of a document like the Summary of Concerns in two ways. One way to think of it is as a form of reasons (for example, for the Minister’s Further Review), the other, as a document which sets out the case to be met. In either case, procedural fairness demands more than investors receive under the current regime.

4. Investors are Owed Greater Procedural Protections

While this paper does not attempt to pinpoint the precise legal bounds of the requirements of procedural protections that must be afforded to investors subject to national security review under the *ICA*, in the authors’ view, the vague and high level “Summary of Concerns” issued thus far is insufficient. At the very least, the Minister’s reasons should provide investors with a clear understanding of the nature and extent of the national security concerns that have been identified, including which business segments, products/services, locations, personnel or practices are causing the concern. Where interim measures are concurrently imposed, the Minister should also provide reasons why these measures are required to mitigate national security concerns. These key pieces of information will allow the investor to make meaningful and robust representations to the Minister, and will provide an informed basis on which the investor can develop a package of undertakings that could potentially address national security concerns.

This section details three principal arguments for why these more detailed reasons ought to be provided during the national security review of an investment. Further detail is required because: (a) procedural fairness demands it, (b) the current, sparse reasons risk undercutting the substantive result following the Supreme Court of Canada’s clarification of substantive judicial review principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (described further below) and (c) conditional approval of investments, which we argue is a desirable outcome in many national security cases, requires a meaningful dialogue to craft workable remedies.

(a) Greater Justification is Required as a Matter of Procedural Fairness

We understand from FIRES' September 3, 2024 *Administrative Note on Interim Conditions* that, in a post-Amendments world, the Minister anticipates continuing to provide a high-level Summary of Concerns only at the Further Review stage. In our view, this is insufficient to satisfy the requirements of procedural fairness.

The *ICA* process contemplates multiple decision-points, and the duty of procedural fairness attaches to each decision.⁵⁴ For example, the 25.2(1) Extension is suspensory and therefore in a pre-closing context is the first point at which a foreign investor's rights are impacted; it is unclear why this decision ought not to be justified with reasons. Nevertheless, for the sake of brevity, we focus on two important inflection points where reasons are already provided: the order for Further Review and the Final Referral (or Ministerial Conditional Approval).⁵⁵ At both points, investors deserve better information than that which is currently provided.

(i) Investors are Owed a Significant Degree of Procedural Fairness

The five factors set out in *Baker* militate toward a significant degree of procedural fairness to investors caught in an *ICA* national security process. On the one hand, the importance of the decisions to investors, investors' legitimate expectations, and the nature of the statutory scheme entail that Canada owes foreign investors a high degree of procedural fairness. On the other hand, deference is owed to the decision-maker with respect to its choice of procedure, and one may argue that the national security review process is merely an "investigatory" administrative regime and not a quasi-judicial one, militating in favor of fewer procedural protections. Ultimately, we conclude that even affording the latter two factors due consideration, the government's common law duty of procedural fairness at least requires investors be furnished with greater information under the *ICA*'s national security regime than they presently receive.

Three *Baker* factors weigh in favour of a strengthened duty of fairness in national security reviews.

First, the nature of the statutory scheme demands greater procedural fairness.⁵⁶ The absence of any appeal under the regime significantly strengthens the duty of procedural fairness owed to investors. The *ICA* makes abundantly clear that there is no right of appeal for decisions relating to national

security. Section 25.6 provides that “[d]ecisions and orders of the Governor in Council, and decisions of the Minister, under this Part [IV.1] are final and binding and, except for judicial review under the *Federal Courts Act*, are not subject to appeal or to review by any court.”⁵⁷ Applying *Baker*, there is “no appeal procedure provided within the statute”, which entails that “greater procedural protections” are needed.⁵⁸ Moreover, the express provision for the possibility of judicial review makes it obvious that a duty of fairness is owed. If meaningful reasons are not provided, how can judicial review itself be meaningful?

Second, investors legitimately expect reasons at these key inflection points. The *ICA* is silent as to whether reasons are specifically required, but the *ICA* does provide the investor with a right to make representations to the government during the Further Review, and to offer mitigation undertakings to resolve national security concerns. This procedural protection is empty if the investor does not understand the specific nature of the government’s concerns and what specific steps may be needed to address them. The fact that the government provides *some* reasons in the form of the Summary of Concerns and as a part of the Final Order also reinforces the expectation and the requirement for the government to provide justification for action taken under the national security regime; but these reasons cannot inform meaningful representations if they are vague and non-specific. It is, in our view, hollow to say that FIRES will propose interim undertakings. An investor cannot reasonably assess the propriety of such a proposal without knowing the case against it.

Third, the potential for significant consequences weighs heavily in favor of greater procedural protections. The sole prior decision contemplating procedural fairness under the *ICA*, *Canada (Attorney General) v United States Steel Corporation*, dealt with an entirely different regime.⁵⁹ *United States Steel Corporation* considered enforcement action under section 40 of the *ICA* relating to undertakings given by US Steel under the *ICA*’s “net benefit” (economic) review regime.⁶⁰ Under section 40 of the *ICA*, the government may seek a court order requiring investors to comply with an earlier demand. US Steel argued that procedural fairness required the company to be furnished with the same level of disclosure as in a criminal trial.⁶¹ In *United States Steel Corporation*, the Federal Court recognized that “the possibility of forced divestiture appears to be ominous and a serious intrusion on the right to the enjoyment of property.”⁶² However, because the remedies under that section of the *ICA* were purely pecuniary, they did not “rise to the level of those decisions in which the life, liberty and security of the person are at stake” (as in criminal decisions), and the duty of procedural fairness

did not require disclosure above and beyond that which was provided for in the *Federal Courts Rules*.⁶³ Though not as high as in a criminal proceeding, the *Federal Courts Rules* set out procedural protections that are significantly more robust than those afforded to investors subject to the ICA's national security provisions.

In contrast with the economic review regime, national security decisions go beyond merely pecuniary impacts. The gravity of such decisions is greater in severity and broader in scope. National security attention invites stigma akin to criminal proceedings. Indeed, the Minister's statutory standard for the 25.2(1) Extension explicitly borrows a criminal law standard (e.g., "reasonable grounds to believe").⁶⁴ The impact of an adverse finding will also reverberate beyond Canada when they are reported to agencies in other jurisdictions (especially the "Five Eyes" countries)⁶⁵, or when they may need to be reported in securities disclosure in respect of a public transaction, or in future diligence or other commercial contexts. Finally, national security scrutiny impacts real people. Surveillance or intelligence gathering with respect to a company is naturally effected *via* its employees. The consequences of being branded a national security concern stretch far-beyond the pecuniary impacts. The potential consequences of a national security order are weighty.

The Amendments expose investors subject to national security review to additional risks. For example, once in force (as of writing, expected to be during mid-2025), a mandatory pre-closing notification regime will apply to certain classes of investments, and the commencement of a national security review will enjoin such transactions pending completion. Further, the Amendments already in force empower the Minister to make interim orders relating to an investment, impacting investments that have already closed prior to any national security order being made. FIRES' administrative guidance on interim conditions details the intrusiveness of these measures, which can include "temporarily suspending the investor's voting rights", "prohibiting or suspending contracts with the investor", as well as stringent restrictions on integration of the investment within the investor's business (including with respect to communications systems, workforce, and physical access).⁶⁶ All of these significant consequences speak in favor of greater procedural protections.

Conversely, two other *Baker* factors may appear to militate in favor of a reduced duty of procedural fairness.

First, concerning the nature of the decision, while the Minister's and Cabinet's decision-making under the *ICA*'s national security regime is not "quasi-judicial", neither is it entirely discretionary or investigative. Accordingly, this *Baker* factor speaks in favor of a moderate duty of procedural fairness.

Baker explains that the closer the nature of the determination and the processes used to reach it parallel the judicial model of decision-making, the greater the need for procedural protections.⁶⁷ Here, there are important differences to be acknowledged between the determinations made under the *ICA*'s national security framework and the judicial model. Most importantly, while there is a right to make submissions, there is no adversarial hearing.⁶⁸ However, these are also not fundamentally mere "investigative" or "discretionary" processes.⁶⁹ The Minister's decisions are each driven by explicit statutory standards, and the Minister must adjudicate, at each stage, if that standard is met.⁷⁰ As such, the nature of the decision is a factor that may somewhat diminish the duty of procedural fairness owed to investors, though not one which outweighs the importance of the decision to investors or the nature of the statutory scheme.

Second, deference to the administrative decision-maker's choice of procedure only has a limited impact on the government's duty in this case, as there are statutory guarantees with respect to the procedure to be followed. This factor, as the Supreme Court of Canada reaffirmed in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, requires courts to "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances."⁷¹ The *ICA*'s national security regime leaves a great deal of procedure up to its multiple decision-makers, but not everything. In particular, investors are guaranteed the right to make representations.⁷² But the current reasons (or, equivalently, disclosure) that accompany the Further Review and Final Referral (or Ministerial Conditional Approval) are so sparse as to undercut this right. As described above, a vague and high-level Summary of Concerns does not offer investors any ability to make *effective* representations under the *ICA* national security regime, nor to offer a meaningful undertakings package to resolve such concerns. Where the decisionmaker's choice of procedure undermines the procedural rights expressly afforded by Parliament, *Baker* does not afford that procedure any deference.⁷³

Considering all of the *Baker* factors together, while the duty of procedural fairness may not approach the exacting level required of a criminal trial, the government still owes investors substantial procedural safeguards.

(ii) National Security Privilege and Cabinet Privilege do not Abrogate Procedural Fairness

Perhaps the most substantial limit on the provision of additional information by the government is legal privilege. For example, in *Suresh v Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada explained that, while disclosure of the case to be met and reasons are each required where a refugee is deported as posing a threat to the security of Canada, both requirements are “subject to privilege or valid legal reasons for not disclosing detailed information.”⁷⁴

At least two forms of privilege⁷⁵ could apply to information considered over the course of a national security review under the *ICA*. Sections 38 through 38.17 of the *Canada Evidence Act (CEA)* set out a comprehensive scheme for the assertion of privilege over information that, if disclosed, could injure international relations, national defence, or national security.⁷⁶ Section 39 of the *CEA* sets out the regime for the assertion of Cabinet privilege.⁷⁷

National security privilege only applies to information whose release would be injurious to international relations, national defence, or national security. It is common sense that a meaningful amount of the information in the government’s hands in the course of the national security review of an investment may be subject to such privilege. However, it is much less credible to suggest that the information currently provided to investors is *all* the non-privileged information that the government can provide.

Further, even if the information itself is privileged, section 38 provides for a mechanism by which a non-privileged summary can be provided. Specifically, the judge designated to oversee the application by which national security privileged is claimed is entitled to make an order to release the information subject to conditions (e.g., a non-privileged summary, or a redacted summary) on the basis that the public interest requires it.⁷⁸

In fact, the Amendments suggest that Parliament believes greater disclosure is in the public interest. The Amendments provide what is, in essence, an accelerated route to claim national security privilege where judicial review is sought of an order under the *ICA*. They include a slightly altered regime than the mechanism contemplated in section 38 of the *CEA*. Specifically,

the new section 25.7(1)(c) mandates that a non-privileged summary be made where the Minister makes *ex parte* submissions to the judge hearing the judicial review that involve information that is potentially injurious to national security:

throughout the proceeding, the judge shall ensure that the applicant is provided with a summary of the evidence and other information available to the judge that enables the applicant to be reasonably informed of the Government of Canada's case but that does not include anything that, in the judge's opinion, would be injurious to international relations, national defence or national security or would endanger the safety of any person if disclosed.⁷⁹ [Emphasis added]

As a result, national security privilege scarcely provides a justification for the limited disclosure under the *status quo*. It does not credibly apply to all information that is not presently disclosed. Even if it did, the statutory schemes that would be used to assert national security privilege in the event of a judicial review both contemplate providing non-privileged summaries of the information where the public interest demands it. These summaries ought to be provided to the investor during the course of a national security review—not for the first time during judicial review of the administrative procedure below.

Cabinet privilege does not have similar statutory exceptions. If successfully asserted, the *CEA* acts as an absolute bar to the disclosure of broad categories of information.⁸⁰ As a result, it may arguably apply to the entirety of the information before Cabinet when it makes a Final Order.⁸¹

Yet while Cabinet privilege appears to present a greater obstacle, the problem of what to do with information protected by Cabinet privilege has already been considered, and neatly addressed, in the immigration context. In *Al Yamani v Canada (Solicitor General)*, the Federal Court considered what reasons are required where Cabinet relies on a report by a prior decision maker.⁸² There, the Court explained:

Where a decision is specifically based on the grounds set out in the Minister's report, and there is no evidence otherwise, the reasons for the determination of the Governor General in Council are those of the Minister.⁸³

In like fashion, non-Cabinet privileged reasons for which the Minister reaches their decision to refer could be substituted for the reasons of Cabinet in similar fashion.⁸⁴

To be clear, the above simply sets out one of *many* avenues to resolve a procedural fairness deficit arising as a result of Cabinet privilege. The Federal Court of Appeal has noted that courts are only limited by their own creativity in this regard. For example, in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, the Federal Court of Appeal noted it was “alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making.”⁸⁵ In response, the Court of Appeal highlighted a number of solutions to resolve potential unfairness flowing from national security and Cabinet privilege, including ordering special advocates (counsel with security clearance able to represent a party’s interest in confidential hearings without disclosing privileged information to that party) or fashioning a highly-bespoke order for the conditional disclosure of particular documents.⁸⁶

Such proposals are consistent with practice in other jurisdictions. Analogous results have flowed from the Committee on Foreign Investment in the United States (“CFIUS”) national security review process. In *Ralls Corp v Committee on Foreign Investment in the US*, Ralls Corp. challenged a CFIUS review and Presidential executive order in part on the grounds that they were reached without regard to due process, with the courts finding that the non-classified evidence upon which both decision-makers relied in reaching their determination ought to have been provided to the company.⁸⁷ Courts can and should ensure fair process, even in matters relating to national security. So should the Minister.

(c) Greater Procedural Protections are Required to Avoid Imperiling the Substantive Result

Yet another rationale for providing more and better reasons from the Minister is that they serve to buttress the decisions to which they relate in the event of a substantive review.

Following *Canada (Minister of Citizenship and Immigration) v Vavilov*,⁸⁸ reasons have emerged as all the more important to substantive review, with knock-on implications for their sufficiency. As the Federal Court detailed in *Okojie v Canada (Citizenship and Immigration)*:

In my view, the Supreme Court’s decision in *Vavilov* raised the bar for what passes as sufficient reasons to justify some kinds of decisions. The majority of the Court emphasized the creation of a “culture of justification” in administrative decision-making: at paras 2 and 14. The Court held that on

a judicial review application, the reviewing judge must consider both the reasons provided by decision-maker and the overall outcome: at paras 83 and 87. The reviewing court should start with the reasons, as they are the “primary mechanism by which administrative decision-makers show that their decisions are reasonable”: at para 81. “[C]lose attention” must be paid to those reasons: at para 97. In addition, a decision must not only be justifiable; where reasons are required, the decision must actually be justified, by way of reasons, by the decision-maker: at para 86. The Court outlined in detail how to approach and analyze a decision-maker’s reasons, providing guidance about what will, and will not, be sufficient as justification for judicial review purposes: esp. at paras 84-86, 96 and following.⁸⁹

Of course, *Vavilov* also recognizes that judicial review as to the reasonableness of an administrative decision can take place in the absence of reasons entirely, though that analysis will inevitably focus “on the outcome, rather than on the decision maker’s reasoning process.”⁹⁰ The problem with such an approach is that, in matters of national security, outcomes can often make little sense without explanation. Consider an investor from a non-allied country who wishes to set up an innocuous business in a particular location. Unbeknownst to them (or anyone apart from military personnel), a key military installation sits nearby. It would be difficult for a reviewing court to make sense of an order blocking that transaction (and the Minister’s decisions below), without some indication that the location is sensitive. This is just one illustration of how asking a decision to “speak for itself” may render the decision vulnerable to substantive review.⁹¹

The Amendments explicitly contemplate the potential for more contested judicial review proceedings going forward. Section 25.7(1)(c) of the *ICA*, discussed above, provides a special mechanism akin to national security privilege for the information provided by the Minister to a court seized with an application for judicial review relating to a national security order.⁹² Further, section 25.3(1.1) enables the Minister to impose interim conditions “necessary for the purpose of preventing injury to national security that could arise during” the review process.⁹³ Both provisions signal that the government is contemplating a greater number of contentious, and more highly contested, national security reviews. If reviews are to see more litigation, it would only serve the government’s own interests to ensure decisions are supported with robust reasons.

(d) First Principles Militate Toward Greater Procedural Protections

Finally, separate and apart from the purely legal reasons for equipping investors with greater information over the course of a national security review of an investment, there are at least two other principled arguments in favor of greater disclosure. First, reasons are the bedrock of transparency in public decision-making, a value that extends beyond the interests of parties involved in a particular dispute. Second, both the original and amended *ICA* contemplate a regime by which investments that pose national security risk may be approved subject to conditions that mitigate this risk—a procedure which would be improved by greater transparency.

(i) Reasons and Accountability

The first principled argument in favor of greater reasons is simple: transparency provides the light required for public justification and accountability. In the context of weighty government decisions relating to national security, it is not just good for the parties to have greater information, but also good for public confidence that the administration of a significant executive power has been carried out appropriately.

Academic commentators have credited greater transparency in administrative decision-making with the Supreme Court of Canada's fresh demand for public justification post-*Vavilov*. Professor Paul Daly argues that the Vavlovian "culture of justification", a substantive review principle, has been fueled first and foremost by the provision of reasons, a procedural instrument. Professor Daly compellingly describes how, as a window into administrative decision-making, more expansive reasons and administrative records naturally lead to greater scrutiny of public administration "warts and all," informing the approach taken by the Supreme Court in reviewing administrative decision-making.⁹⁴ In turn, this culture of justification, fueled by reasons, both reinforces and is reinforced by unwritten constitutional commitments to democracy and the rule of law.⁹⁵

Adopting such a posture in the national security context aligns with the Canadian government's own recognition of the importance of transparency in such matters. The Minister's November 2, 2022 announcement committed to publishing the outcomes of Final Orders going forward was an important acknowledgement of the importance of transparency (although as a practical matter few such orders have been disclosed since the announcement).⁹⁶ The Amendments, too, were advanced by the Minister's office as a means of achieving greater transparency, and the authors

recognize as a positive step that the Amendments include a mandate to report on the use of the Minister's national security authorities in the annual report.⁹⁷ This is consistent with established national security mandates such as the National Security Transparency Advisory Group, which, since 2019 has been tasked with advising Public Safety Canada on how to, among other things, "infuse transparency into Canada's national security policies, programs, best practices, and activities in a way that will increase democratic accountability" and "promote transparency while ensuring the safety and security of Canadians."⁹⁸

The Minister's commitment to sharing the results of national security orders, the final form of which remains uncertain, is clearly a step in the right direction. But the public interest requires more. Canadians should not only see national security authorities working on their behalf, they should also know that those actions have been justified to the parties involved.

(ii) Reasons and the Conditional Approval of Investments

Increased transparency is needed to facilitate the *ICA*'s own stated objectives. Both the prior *ICA* and the newly amended *ICA* contemplate the approval of investments that may present national security concerns provided they are subject to mitigation. An absence of meaningful dialogue between investors and government, however, impairs this goal. Given the importance of encouraging foreign investment in Canada to a number of policy issues—including closing the productivity gap and stimulating Canada's "green economy", among others—and the potential chilling effect that a poorly-administered national security process could have on investment in critical sectors, striking the right balance on conditional approvals is critical.

The *ICA*'s purpose clause recognizes that there is a necessary tradeoff between national security risk on the one hand and the benefits of foreign investment on the other. It states:

Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.⁹⁹

As a consequence, the *ICA* provides for compromises. Previously, Cabinet could approve investments subject to conditions required to

mitigate national security risk; following the Amendments, so too can the Minister.¹⁰⁰ That said, conditional approval by Cabinet has been limited. The last conditional approval from Cabinet was ordered with respect to two investments in the Investment Review Division's 2016-2017 fiscal year.¹⁰¹ By contrast, the CFIUS review process in the United States involves substantial mitigation, and minimal blocking. To illustrate, CFIUS pursued mitigation in 18% of notices in 2022, while roughly 4% of notices were effectively blocked (withdrawn either after CFIUS informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns or where CFIUS requested mitigation which the parties were unable to accept).¹⁰²

The Canadian system evidently aspires to emulate the American regime. Likely as a result of the cumbersome process involved in seeking conditional approval from Cabinet, the Amendments now provide authority for the Minister to accept binding undertakings and, on the basis of same, to conditionally approve investments in lieu of a Final Referral.¹⁰³ In this regard, the Amendments codify the Minister's recent practice of accepting investors' representations as to the "commitments" they will undertake in order to assuage national security concerns.¹⁰⁴

Yet conditional approval in Canada is stymied by inadequate information. First, prior to the Amendments, there was no public disclosure as to the nature and frequency of soft commitments obtained by the Minister in national security reviews (which reviews would be reported in the annual report as cases in which "no further action" was taken following a 25.3(1) Review Order). Second, the lack of reasons provided by the Minister for his decisions—especially given the dynamic in which Investors negotiate undertakings with FIRES officials rather than with the Minister (who is the ultimate decision maker), which in the writers' experience can lead to a misalignment that results in material last-minute requests after extensive negotiation—mean that in certain cases investors and the government simply are unable to have a meaningful conversation about national security risk and proposed mitigation. If the new undertakings process in the Amendments is to be applied effectively, in our view, it will need to be paired with greater public transparency and more effective communication with investors. We recommend that the government continue its customary practice of providing a Summary of Concerns and written reasons along with a final decision (whether in the form of a final order or conditional approval); work to ensure that this disclosure is as robust as possible; provide greater transparency as to the Minister's feedback in negotiation of undertakings; and consider providing reasons at interim stages of the

process (for example at the 25.2(1) Extension stage). While further amendment to the *ICA* may be unlikely in the near future, we also recommend that Parliament consider codifying these customary practices by amending Part IV.1 of the *ICA* to require the Minister to provide reasons at least justifying each of the decisions to order a national security review, impose interim measures, and accept undertakings.

5. Conclusion

The Canadian government owes greater procedural protections to foreign investors. As a matter of procedural fairness, the government should at least provide a more robust Summary of Concerns to inform investors' representations and more fulsome reasons for Cabinet's Final Order or the Minister's conditional order. Further, greater justification should only serve to benefit the government in the event of judicial review. Finally, as a practical matter, providing more information to investors about the government's concerns would improve the mitigation investors may offer and facilitate the conditional approval of investments, a clear objective of the Amendments.

ENDNOTES

- ¹ This piece would not be possible without the hard work of Samantha Steeves (Associate, Competition/Antitrust & Foreign Investment—McCarthy Tétrault LLP), Sophie D'Souza (Summer Student, 2023), and Foti Vito (Summer Student, 2023). Sincere thanks to all for their invaluable assistance.
- ² Counsel, Competition and Foreign Investment—Goodmans LLP
- ³ Associate, Competition/Antitrust & Foreign Investment—McCarthy Tétrault LLP
- ⁴ Innovation, Science and Economic Development Canada, “Government of Canada orders the divestiture of investments by foreign companies in Canadian critical minerals companies” (November 2, 2022), online: Government of Canada <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/10/government-of-canada-orders-the-divestiture-of-investments-by-foreign-companies-in-canadian-critical-mineral-companies.html>>.
- ⁵ Innovation, Science and Economic Development Canada, “An Act to amend the *Investment Canada Act*” (December 7, 2022), online: *Government of Canada* <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/12/an-act-to-amend-the-investment-canada-act.html>>. The final version of the Bill, which received Royal Assent and is referred to within as the “Amendments” is “Bill C-34, An Act to amend the Investment Canada Act”, Royal Assent, *House of Commons Debates*, 44-1, No 143 (22 March 2024).
- ⁶ The ICA was initially enacted as a regime for the economic review of foreign investment into Canada. Part III of the ICA requires mandatory technical notification of acquisitions of control of Canadian businesses, and establishments of new Canadian businesses, by non-Canadians; Part IV of the ICA requires mandatory pre-closing review, and approval by the relevant Minister on the basis that the investment would likely be of “net benefit” to Canada, of acquisitions of control of Canadian businesses by non-Canadians that exceed (significant) prescribed financial thresholds. Certain of the Amendments will introduce mandatory pre-closing notification for investments meeting certain prescribed criteria; this portion of the Amendments is not yet in force and timing will be dependent on the issuance of relevant regulation. The national security review regime set out in Part IV.1 of the ICA was implemented in 2009, and applies to all investments covered by the mandatory filing regime set out in Parts III and IV, as well as other investments with more limited nexus to Canada.
- ⁷ *Investment Canada Act*, RSC 1985, c 28 (1st Supp), s 25.1 as it appeared on September 2, 2024 [“**Prior ICA**”]. Certain Amendments not yet in force expand the ICA’s scope to apply to acquisitions of any assets of a Canadian business by a state-owned enterprise, and note that acquisitions of assets under s. 25.1(1)(c) include “investment to acquire, in whole or in part, the assets of an entity”. “Bill C-34, An Act to amend the Investment Canada Act”, Royal Assent, *House of Commons Debates*, 44-1, No 143 (22 March 2024).
- ⁸ Where an investment is subject to a mandatory application for review under Part IV of the ICA, the national security timelines run from the date a complete

application for review is submitted, with the initial 45-day period running in parallel with the initial period for “net benefit” review under the *ICA*; where an investment is subject only to a notification obligation under the *ICA*, the national security timelines run from the date a complete notification is submitted. Where an investment is not subject to a mandatory filing obligation under the *ICA*, the foreign investor may choose to submit a voluntary notification, after which the process proceeds as described here from the date the complete voluntary notification is submitted (*National Security Review of Investment Regulations*, SOR/2009-271, s 2). The Minister may also “call in” an investment that is not subject to a mandatory filing requirement but is covered by the residual jurisdiction of section 25.1(c). However, in practice, the vast majority of national security reviews begin by the filing of a mandatory application for review or a mandatory or voluntary notification. For brevity, through the rest of this paper we treat national security reviews as being triggered by an initial filing and have referred to each of these initial filings (i.e. application for review, mandatory notification or voluntary notification) as the “notification”.

⁹ Prior *ICA*, s 25.2(3); *Investment Canada Act*, RSC 1985, c 28 (1st Supp), s 25.12 as it appeared on September 3, 2024 [“**New ICA**”].

¹⁰ For completeness, we note that where a foreign investor does not submit a voluntary notification, the national security timelines run from the date the investment is “implemented” (i.e. the closing date, for an acquisition, or the date a new entity is established, for the establishment of a new Canadian entity), and the initial period within which the Minister must decide to take action is 5 years (*National Security Review of Investment Regulations*, SOR/2009-271, s 2). If the Minister decides to take action under the *ICA* within this initial period, the subsequent timelines proceed as described below.

¹¹ Prior *ICA*, s 25.2(1); *National Security Review of Investment Regulations*, SOR/2009-271, s 2.

¹² Prior *ICA*, s 25.2(2).

¹³ Prior *ICA*, s 25.3(1); *National Security Review of Investment Regulations*, SOR/2009-271, s 4.

¹⁴ Prior *ICA*, s 25.3(1).

¹⁵ Prior *ICA*, s 25.3(2).

¹⁶ Prior *ICA*, s 25.3(3).

¹⁷ New *ICA*, s 25.3(1).

¹⁸ “Review” is deemed by s. 25.11 to begin “on the day on which [the investment] first comes to the attention of the Minister”. New *ICA*, s 25.11. For the power to impose interim conditions, see New *ICA*, s 25.3(1.1).

¹⁹ See Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>> (noting that a “ministerial order imposing interim conditions, if any, would be delivered to the investor and any other relevant party(ies) along with the notice [that an order for Further Review had been made] referred to under subsection 25.3(2).”)

²⁰ Prior ICA, s 25.3(7).

²¹ Prior ICA, s 25.3(4).

²² New ICA, s 25.3(1); National Security Review of Investment Regulations, SOR/2009-271, s 2.

²³ New ICA, s 25.3(7).

²⁴ New ICA, s 25.3(4).

²⁵ Prior ICA, s 25.3(4); New ICA, s 25.3(4)

²⁶ Prior ICA, s 25.3(6); New ICA, s 25.3(6).

²⁷ New ICA, s 25.3(6).

²⁸ Prior ICA, s 25.4(1); New ICA, s 25.4(1); *National Security Review of Investment Regulations*, SOR/2009-271, s 2.

²⁹ Prior ICA, s 25.4(1); New ICA, s 25.4(1).

³⁰ Foreign Investment Review and Economic Security Branch, Guidelines on the National Security Review of Investments (March 24, 2021), online: <<https://ised-isde.canada.ca/site/investment-canada-act/en/investment-canada-act/guidelines/guidelines-national-security-review-investments>>.

³¹ “Dual-use” goods—those with both civilian and military applications—provide one good example. Providers of products like these, especially where their product is just one component of a broader defence system, may underestimate the significance of their products to certain end-users. Defence end-users may make up a *de minimis* portion of overall sales, but those sales may be critical from a national security perspective.

³² What exactly constitutes reasons is, of course, understood flexibly, recognizing the “day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured”. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 848.

³³ Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>>.

³⁴ Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>>; Foreign Investment Review and Economic Security Branch, Administrative Note on National Security Undertakings, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-national-security-undertakings>>.

³⁵ Foreign Investment Review and Economic Security Branch, Administrative Note on National Security Undertakings, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-national-security-undertakings>>.

³⁶ Public Stay Motion Record of the Applicants (November 19, 2021), Court docket: T-1377-21 at 156.

³⁷ Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, September 3, 2024, accessible at: <<https://>

ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>; Foreign Investment Review and Economic Security Branch, Administrative Note on National Security Undertakings, September 3, 2024, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-national-security-undertakings>>.

³⁸ Public Stay Motion Record of the Applicants (November 19, 2021), Court docket: T-1377-21 at 258.

³⁹ Public Stay Motion Record of the Applicants (November 19, 2021), Court docket: T-1377-21 at 259-60.

⁴⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 836-37; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 840-41.

⁴¹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838.

⁴² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838-39.

⁴³ *Sexsmith v Canada (Attorney General)*, [2021 FCA 111](#).

⁴⁴ *Black v Advisory Council for the Order of Canada*, [2012 FC 1234](#), aff'd [2013 FCA 267](#).

⁴⁵ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838.

⁴⁶ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 838.

⁴⁷ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 839-40.

⁴⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 840.

⁴⁹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 840.

⁵⁰ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 848.

⁵¹ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 848.

⁵² *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] [2 SCR 817](#) at 848.

⁵³ *R v Race Relations Board, Ex parte Selvarajan*, [1975] 1 WLR 1686 at 1694 (CA), cited with approval by the Supreme Court of Canada in *Syndicat des employés de production du Québec & de l'Acadie v Canada (Human Rights Commission)*, [1989] [2 SCR 879](#) at 899.

⁵⁴ All of the inflection points detailed above are decisions for the purposes of the *Baker* framework. In *China Mobile*, the Federal Court of Appeal, in considering a challenge to a national security order under the ICA, explained that the “ICA is clear that orders from the Governor in Council are reviewable separately from decisions of the Minister, as shown by the distinct and separate reference to each category of decision in the section of the ICA dealing with the availability

of judicial review” [Emphasis added]. The fact that the ICA also incorporates an explicit statutory standard upon which the Minister’s decisions are based (for example, “reasonable probable grounds to believe”), and that the Minister may dispose of matters before a Cabinet decision is contemplated by the statute, only support this conclusion. See further: *China Mobile Communications Group Co., Ltd. v. Canada (Attorney General)*, [2023 FCA 202](#), para 48.

⁵⁵ Note that each of these referrals are final decisions even though, if the decision is made to refer, Cabinet is provided with subsequent decision-making authority. This is because they are final decisions *vis-à-vis* the particular decision-maker. For an example of a regime where two successive decisions were both recognized as final in this manner, see *Al Yamani v Canada (Solicitor General) (TD)*, [\[1996\] 1 FC 174](#).

⁵⁶ A discussion of the impact of Cabinet and national security privilege follows in the next section, but, in the interim, note that the rules of evidence under the Canada Evidence Act (“CEA”) are not a component of this statutory scheme, and are not properly considered under the Baker inquiry.

⁵⁷ Prior ICA, s 25.6; New ICA, s 25.6.

⁵⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 838. Note that *Baker* also emphasizes the significance of the fact that “the decision is determinative of the issue and further requests cannot be submitted”. This is also certainly true of the Final Referral and Final Order.

⁵⁹ *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#).

⁶⁰ *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at paras 1-3.

⁶¹ *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at para 83.

⁶² *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at para 84.

⁶³ *Canada (Attorney General) v United States Steel Corporation*, [2010 FC 642](#) at para 84.

⁶⁴ Prior ICA, s 25.2(1); New ICA, s. 25.2(1).

⁶⁵ The Five Eyes comprise: Australia, Canada, New Zealand, the United Kingdom, and the United States of America.

⁶⁶ Foreign Investment Review and Economic Security Branch, Administrative Note on Interim Conditions, accessible at: <<https://ised-isde.canada.ca/site/investment-canada-act/en/administrative-note-interim-conditions>>.

⁶⁷ *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at 838.

⁶⁸ Prior ICA, s 25.3(4); New ICA, s 25.3(4).

⁶⁹ Note that even purely investigative decisions—which this is not—still attract a duty of fairness, albeit a diminished one. See for instance: *Masters v Ontario* (1994), [115 D.L.R. \(4th\) 319](#).

⁷⁰ Prior ICA, s 25.2(1), 25.3(1), 25.3(6); New ICA, s 25.2(1), 25.3(1), 25.3(6)

⁷¹ *Council of Canadians with Disabilities v VIA Rail Canada Inc et al*, [2007 SCC](#)

15 at para 231 citing *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at 840.

⁷² Prior ICA, s 25.3(4); New ICA, s 25.3(4).

⁷³ The Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)*, for example, took a dim view of the potential for uninformed representations to act as a bulwark against unfairness, reasoning: “Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her.” *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 122.

⁷⁴ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paras 122, 126.

⁷⁵ Arguably public interest privilege may also apply, though section 38 is the government’s default where both national security and public interest privilege may apply as per the Public Prosecution Service’s Deskbook. “4.2 Protecting Confidential Information under Section 38 of the *Canada Evidence Act*” (March 1, 2014), *Public Prosecution Services of Canada*, accessible at: <https://www.ppsc-ppsc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p4/ch02.html#section_5>.

⁷⁶ *Canada Evidence Act*, RSC 1985, c. C-5, ss 38-38.17.

⁷⁷ *Canada Evidence Act*, RSC 1985, c. C-5, s 39.

⁷⁸ *Canada Evidence Act*, RSC 1985, c. C-5, s 38.06.

⁷⁹ New ICA, s 25.7(1).

⁸⁰ The particular categories that are especially relevant are set out in subsections 39(2)(a) (a memorandum the purpose of which is to present proposals or recommendations to Council), 39(2)(d) (a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy), and 39(2)(e) (a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d)). *Canada Evidence Act*, RSC 1985, c. C-5, s 39(2)(a), (d), (e).

⁸¹ Theoretically, subsection 39(2)(d) (a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy), could apply to any document used in furtherance of the Minister’s decision-making under the ICA, as the Minister consults with the Minister of Public Safety throughout the process. Note, however, that the application of this broad interpretation by the government previously resulted in a withering concurrence from the Federal Court of Appeal, calling its use in that manner a “gross abuse of executive power”, and, in our view, would be highly suspect. See: *Canadian Assn of Regulated Importers v Canada (Attorney-General)*, 1991 CanLII 13564 at 140 (FCA).

⁸² *Al Yamani v Canada (Solicitor General) (TD)*, [1996] 1 FC 174.

⁸³ *Al Yamani v Canada (Solicitor General) (TD)*, [1996] 1 FC 174.

⁸⁴ One limited possible exception is, in cases where the Minister makes a Final Referral because they were unable to determine whether the investment poses a national security risk, and where Cabinet imposes conditions, it may be possible to question the alignment between the distinct decisions of each decision-maker (i.e., could the reasons to refer be the same as the reasons to make an order).

⁸⁵ *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, [2021 FCA 72](#) at paras 106.

⁸⁶ *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, [2021 FCA 72](#) at paras 117-120.

⁸⁷ 758 F (3d) 296 at 319 (DC Cir 2014): “We conclude that the Presidential Order deprived Ralls of its constitutionally protected property interests without due process of law. As the preceding discussion makes plain, due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.”

⁸⁸ [2019 SCC 65](#).

⁸⁹ *Okojie v Canada (Citizenship and Immigration)*, [2020 FC 948](#) at para 23.

⁹⁰ *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) at para 138.

⁹¹ This example also illustrates the opportunity for reasons earlier in the process (detailing the case to be met) to remedy procedural problems before they escalate. For example, a special advocate (counsel with security clearance—an approach which is commonly leveraged in immigration matters) could be deployed to negotiate mitigation to resolve proximity concerns in a manner that does not alert the investor to the precise rationale.

⁹² “Bill C-34, An Act to amend the Investment Canada Act”, Royal Assent, *House of Commons Debates*, 44-1, No 143 (22 March 2024).

⁹³ New ICA, s 25.3(1.1).

⁹⁴ Paul Daly “Vavilov and the Culture of Justification in Contemporary Administrative Law” (2021) 100:13 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 279 at 299.

⁹⁵ Paul Daly “Vavilov and the Culture of Justification in Contemporary Administrative Law” (2021) 100:13 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 279 at 305-306.

⁹⁶ Innovation, Science and Economic Development Canada, “Government of Canada orders the divestiture of investments by foreign companies in Canadian critical minerals companies” (November 2, 2022), online: *Government of Canada* <<https://www.canada.ca/en/innovation-science-economic-development/news/2022/10/government-of-canada-orders-the-divestiture-of-investments-by-foreign-companies-in-canadian-critical-mineral-companies.html>>. On May 24, 2024, the Minister announced dissolution of two Canadian businesses after a national security review under the ICA. See “Government of Canada orders the dissolution of Canadian businesses following a national security review under the Investment Canada Act” (May 24, 2024), online: <<https://www.canada.ca/en/innovation-science-economic-development/news/2024/05/>

[government-of-canada-orders-the-dissolution-of-canadian-businesses-following-a-national-security-review-under-the-investment-canada-act.html](https://www.government.ca/en/innovation-science-economic-development/news/2024/11/government-of-canada-orders-the-dissolution-of-canadian-businesses-following-a-national-security-review-under-the-investment-canada-act.html)>. On November 6, 2024, the Minister disclosed that he had ordered the wind-up of TikTok Technology Canada, Inc. after a review under the national security provisions of the ICA. See “Government of Canada orders the wind up of TikTok Technology Canada, Inc. following a national security review under the Investment Canada Act” (November 6, 2024), *online*: <<https://www.canada.ca/en/innovation-science-economic-development/news/2024/11/government-of-canada-orders-the-wind-up-of-tiktok-technology-canada-inc-following-a-national-security-review-under-the-investment-canada-act.html>>.

⁹⁷ New ICA, s. 38.1(2).

⁹⁸ “The National Security Transparency Advisory Group (NS-TAG)” (last modified May 23, 2023), *online*: *Government of Canada* <<https://www.canada.ca/en/services/defence/nationalsecurity/national-security-transparency-commitment/national-security-transparency-advisory-group.html>>.

⁹⁹ Prior ICA, s 2; New ICA, s 2.

¹⁰⁰ Prior ICA, s 25.4(1); New ICA, s 25.3(6).

¹⁰¹ Innovation, Science and Economic Development Canada, “Annual report on the administration of the *Investment Canada Act* 2016-17” (2017), *online*: *Government of Canada* <<https://ised-isde.canada.ca/site/investment-canada-act/en/node/855#p3>>.

¹⁰² Committee on Foreign Investment in the United States, “Annual Report to Congress” (2022) at 19, 44, *online* (pdf): *treasury.gov* <https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf>.

¹⁰³ New ICA, s 25.3(6).

¹⁰⁴ By way of example, in testimony before Parliament, Innovation, Science and Economic Development Canada officials confirmed that the acquisition of Resolute Forest Products by Domtar was subject to national security review, but not an economic “net benefit” review under the ICA. CBC, “Pulp giant’s purchase didn’t go through a net benefit review, federal officials say,” (Jun. 2, 2023), available at: <<https://www.cbc.ca/news/politics/paper-excellence-government-review-1.6864399>>. In separate testimony before Parliament regarding the Proposed Amendments, Minister Champagne indicated in respect of the same transaction “I would nevertheless tell you that in the analysis of national security, we were able to do a number of things to protect the country’s economic interests. One example is the Paper Excellence Group, in which you are keenly interested, where we were able to obtain undertakings to protect the economic interests of Quebec and Canada.” <<https://www.ourcommons.ca/DocumentViewer/en/44-1/INDU/meeting-69/evidence>>. Such cases are typically classified in government statistics as having resulted in “no further action under the ICA” following a 25.3 order.

