Stikeman Elliott

Foreign Direct Investment Regimes 2023: Canada

By Mike Laskey, Peter Flynn and Kirsten Cirella

Published and reproduced with kind permission by Global Legal Group Ltd, London.
This article was first published in November 2022.

ICLG.com

International
Comparative
Legal Guides

Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

2023

Fourth Edition

Contributing Editors:
Bernadine Adkins and Samuel Beighton
Gowling WLG

ICLG.com

Canada


Mike Laskey


Peter Flynn


Kirsten Cirella

Stikeman Elliott LLP

1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

The review of foreign investments in Canada is governed primarily under the Investment Canada Act ("**ICA**"), which sets out the processes for three types of review of foreign investments: economic; cultural; and national security.

Economic: Subject to certain limited exemptions, under the economic provisions of the ICA, every acquisition of control by a non-Canadian of a Canadian business, even where the target business is already controlled by a non-Canadian, requires either an administrative notification (which can be filed up to 30 days post-closing) or a detailed pre-closing review (during which time closing of the investment is prohibited). Whether a transaction is subject to notification or review depends on whether certain financial and ownership thresholds are met. The applicable financial threshold to a given transaction depends on several factors, including the structure of the transaction, the value of the transaction or business and the investor or vendor (including the nationality and the investor's potential status as a state-owned or state-influenced entity). See question 3.1, below, for the applicable rules and thresholds. If an investment requires review, it must be approved by the federal government on the basis that it is likely to be of "net benefit" to Canada. Such a "net benefit" determination typically requires that the investor provide legally binding undertakings regarding the future conduct of the acquired business.

Cultural: For an investment in a Canadian business that has activities related to Canada's cultural heritage or national identity (these activities are defined exhaustively in the ICA), the Minister of Canadian Heritage has jurisdiction to review the investment on a pre-closing (and, in some cases, post-closing) basis if certain financial thresholds are exceeded. The cultural business review thresholds are much lower than the economic review thresholds, and are set out in question 3.1. Cultural review is separate from economic review; where it is required, the Minister must approve the transaction on the basis that it is likely to be of "net benefit" to Canada. Such approval typically requires that the investor provide binding undertakings relating to cultural matters.

National Security: There is no separate mandatory process requiring pre-clearance or separate filings for transactions that raise or may raise national security concerns. When either a review or notification under the ICA is filed with the federal government (under the economic and/or cultural provisions of the ICA, described above), the investment will also be screened for possible national security concerns. In addition, transactions that do not trigger a notification or review requirement (including where they do not result in a change of control of a Canadian business, such as minority investments) can also be subject to a review for national security concerns if the transaction comes to the attention of the Government, or if the investor chooses to notify the Government pursuant to the recently enacted voluntary filing mechanism under the ICA, which came into force in August 2022 (see the response to question 1.3 below for further details). In both cases, a national security review of an investment may be ordered if the Minister of Innovation, Science and Industry believes the investment could be "injurious to Canada's national security" (which is not defined in the ICA).

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

For transactions subject to economic and/or cultural business review, the approval process can be lengthy (*i.e.*, 60 to 90 days) and typically requires the investor to commit to binding undertakings to obtain approval. Foreign investors should consider the potential ICA implications of their transactions very early in the planning process and should ensure that potential undertakings are consistent with commercial objectives. In some cases, advance consultation with the Canadian Government is advisable, and public relations or government relations support may be helpful for high-profile acquisitions.

With respect to national security reviews, timing is an important strategic consideration for the investor. As noted in question 1.1 above, there is no separate filing or pre-clearance process required for the national security review process. As a result, in many cases, an investment which may be expected to raise national security concerns requires only the filing of a notification within 30 days after closing, or, such as in the case of a minority investment, may not require any notification at

all. However, for regulatory certainty, there may be a benefit to filing a notification early, well in advance of closing a transaction, or advising the Canadian Government of an upcoming investment that does not require notification. Such proactive steps can ensure that any national security issues arise (and are resolved) prior to closing, rather than after.

In assessing when national security concerns may be a relevant consideration to the Canadian Government, as noted above, the term "injurious to Canada's national security" is not defined in the ICA. However, the Minister has released Guidelines on the National Security Review of Investments, which set out a non-exhaustive list of factors that will be considered by the Minister in making the decision of whether to order a national security review. These factors are discussed further in the response to question 4.3 below.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

In July 2020, in response to the COVID-19 pandemic, the Canadian Government announced that it would be increasing its scrutiny of inbound foreign investments, particularly those in Canadian businesses related to public health or involved in the supply of critical goods and services, given the potential for opportunistic investment behaviour that could harm Canada's national security and economy. Its announcement also indicated that investments by state-owned enterprises (or private investors closely tied to or subject to direction from foreign governments) will be subject to enhanced scrutiny under the ICA.

Following this announcement, the Canadian Government released revised Guidelines on the National Security Review of Investments in March 2021 in order to provide greater transparency about the factors that are considered in the national security review process. The revised Guidelines provide further clarity about the types of investments that will be subject to closer scrutiny on national security grounds, which include those involving critical minerals and their supply chains (*e.g.*, nickel, lithium, cobalt, copper, *etc.*), specified "sensitive" technologies with military or intelligence applications (*e.g.*, robotics, energy, aerospace, artificial intelligence, medical technology, navigation, *etc.*) and those that potentially enable access to sensitive personal data of Canadians. The revised Guidelines also re-confirmed the Canadian Government's focus on closer scrutiny of investments involving state-owned enterprises under the national security provisions.

The COVID-19 pandemic also impacted the Canadian Government's approach to foreign acquisitions of Canadian cultural businesses, particularly those involving Canada's video game sector. The video game industry, which has traditionally been an important contributor to the Canadian economy, experienced a surge in growth during the pandemic. A Canadian Government briefing note from March 2021 indicates that the Canadian Government is more closely scrutinizing foreign purchases of Canadian video game companies, including, in some cases, requiring foreign investors to submit undertakings in order to ensure such investments will likely be of net benefit to Canada.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

The ICA applies to the review of foreign investments in Canadian businesses across all sectors and includes both national security and public interest ("net benefit") reviews. The ICA applies exclusively to transactions involving the acquisition of all or part of a "Canadian business" by a "non-Canadian-controlled" investor and does not apply to domestic-to-domestic transactions where the acquiring entity is ultimately Canadian-controlled. Definitions of a "Canadian business" and "non-Canadian investor" are described in the response to question 2.2 below.

In addition, some regulated sectors have sector-specific legislation regulating investments (including foreign investments) into undertakings in these sectors, including for telecommunications companies (*Telecommunications Act*), broadcasting companies (*Broadcasting Act*), financial institutions (*Bank Act*) and transportation undertakings (*Canada Transportation Act*).

As discussed above, one notable change occurring since the onset of the COVID-19 pandemic has been the Canadian Government's enhanced scrutiny of foreign investments to ensure they do not introduce new risks to Canada's economy or national security. Since this announcement, there has been an increase in the use of the national security review process on transactions that might not historically have invited scrutiny. Transactions that would appear to have little nexus to national security (*i.e.*, ones that do not relate to the Canadian Government's stated interest in sectors such as health, food, or infrastructure in Canada) and transactions involving reputable purchasers and target businesses (*e.g.*, U.S. private equity investors) have received notices of potential national security review.

On August 2, 2022, amendments to the *National Security Review of Investments Regulations* came into force, which created a voluntary filing mechanism under the ICA, pursuant to which foreign investors could notify the Canadian Government of certain classes of transactions which were not subject to a mandatory filing requirement (most notably, acquisitions of minority/non-controlling interests in Canadian businesses), however, nonetheless remained vulnerable to a potential post-closing national security review. Under the new national security regime, investors are now able to voluntarily notify such investments and obtain certainty in respect of national security concerns on a pre-closing basis. However, the new regime also provides the Government five years after the date of closing to raise concerns about an investment that does not give rise to a mandatory notification requirement, if no voluntary filing is made.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

The national security provisions of the ICA apply to all direct or indirect investments by non-Canadians in entities that have one or more of: (a) a place of operations in Canada; (b) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations; or (c) assets in Canada used in carrying on the entity's operations. As noted above, the national security provisions apply to investments that do not constitute an acquisition of control under the ICA, including acquisitions of a minority interest in a Canadian business.

The economic and cultural review and notification provisions of the ICA apply to acquisitions of direct or indirect control of the assets or shares of a Canadian business by a non-Canadian investor.

Control: Whether control is acquired will depend on the structure of the target entity:

- **Corporate target:** the acquisition of less than a majority but one-third or more of the voting shares of a corporation is presumed to be an acquisition of control, however this presumption can be rebutted if it can be demonstrated

that the purchaser has not acquired control in fact of the target. The acquisition of a majority of the voting shares of a corporation is deemed to be an acquisition of control.

- **Non-corporate targets:** for non-corporate entities, such as limited partnerships and trusts, the acquisition of a majority of the economic interests of the entity is deemed to be an acquisition of control (however there is no presumption of control for the acquisition of less than a majority of the voting interests).

Canadian business: A Canadian business is defined as a business carried on in Canada that has: (a) a place of business in Canada; (b) an individual or individuals in Canada who are employed or self-employed in connection with the business; and (c) assets in Canada used in carrying on the business.

Non-Canadian investor: The assessment of whether a foreign investor is considered a "non-Canadian investor" is described further in the response to question 2.4 below. In short, the assessment of whether an investor is Canadian or non-Canadian depends on *ultimate* control, rather than the jurisdiction of incorporation of the investing entity.

With respect to the national security and cultural business provisions of the ICA, the Minister also has jurisdiction to determine (including retroactively) that any investor is a non-Canadian (even where the investor would otherwise qualify as a Canadian within the meaning of the ICA) and/or that an acquisition of control has or has not occurred. Further, with respect to any of the provisions of the ICA, the Minister may determine that an entity which would otherwise qualify as a Canadian-controlled entity is controlled in fact by one or more state-owned enterprises (and is thus considered a foreign investor).

Internal re-organisations within a corporate group where the ultimate control of the entity remains unchanged are exempt from economic reviews under the ICA. However, internal re-organisations within a corporate group where the ultimate control of the entity remains unchanged are only exempt from national security review under the ICA if the re-organisation is otherwise subject to approval by the Canadian Government under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

As noted above, investments in cultural businesses are subject to lower economic thresholds requiring pre-closing review under the ICA. A cultural business is defined as one that carries on any activities relating to the publication, distribution, production, exhibition or sale of books, magazines, periodicals, newspapers, film or video recordings, audio of video music recordings, music, radio communications to the general public, or any radio, television and cable television broadcasting undertakings or satellite programming and broadcast network services (even to a *de minimis* extent).

With respect to national security, the Canadian Government's Guidelines on the National Security Review of Investments set out certain non-exhaustive factors that the Government will take into account when assessing whether an investment is likely to be "injurious to national security". These factors generally suggest categories of activities (rather than specific sectors) that can raise national security concerns, including: (i) the Canadian business's involvement in the research, manufacture or sale of goods and technology that is sensitive, for defence or military purposes or in activities relating to Canada's defence capabilities and interests; (ii) the Canadian business's involvement in critical infrastructure; and (iii) the Canadian business's involvement in sensitive technology or know-how. As noted in response to question 2.2 above, the Government released an updated version of the Guidelines in March 2021, which listed several new factors that may potentially trigger national security concerns, including investments involving certain sensitive technology areas (such as: advanced ocean technologies; advanced weapons; aerospace; artificial technology; energy generation; quantum science; robotics; and space technology), critical minerals or sensitive personal data (such as: personally identifiable health or genetic information; biometric information; financial information; private communications; and geolocation).

Finally, as described in question 2.1 above, certain industry sectors have sector-specific ownership restrictions (separate from and in addition to the ICA).

2.4 How are terms such as 'foreign investor' and 'foreign investment' defined in the law?

A foreign investor is defined under the ICA as an individual, a government or agency thereof or an entity that is not a Canadian. As a result, any investor that would not qualify as a Canadian within the meaning of the ICA is a foreign investor.

For individuals, a Canadian is defined as either a (i) Canadian citizen, or (ii) a permanent resident ordinarily resident in Canada for not more than one year after the time at which he or she first became eligible to apply for Canadian citizenship.

Entities will be considered Canadian where they are Canadian-controlled, which is typically the case where: (i) one Canadian or two or more Canadians considered a voting group own a majority of the voting interests in the entity; (ii) a majority of its voting interests are owned by Canadians, provided it can be established that the entity is not controlled in fact through the ownership of its voting interest by a non-Canadian or a voting group in which at least one member is non-Canadian; or (iii) if the entity is widely-held, two-thirds or more of the members of its Board of Directors are Canadians. In most other cases, an entity will not qualify as Canadian-controlled.

Finally, as noted in response to question 2.2, in some cases, the Minister can also determine that an investor is a non-Canadian, even where the investor would otherwise be considered a Canadian within the meaning of the ICA.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

Yes. Foreign investors considered to be SOEs are subject to different (and, generally, lower) thresholds for pre-closing economic review, such that investments by SOEs may be subject to mandatory pre-closing review despite the fact that the same investment by a non-SOE investor would not be subject to review (or *vice versa*).

Further, as noted in response to question 1.3 above, the Government has re-emphasized in recent policy statements that investments by SOEs will be subject to enhanced scrutiny under the ICA, including under the national security provisions specifically.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

Notification or review of an investment is only required where a non-Canadian investor is acquiring control of a "Canadian business". A Canadian business is defined as a business carried on in Canada that has: (a) a place of business in Canada; (b) an individual

or individuals in Canada who are employed or self-employed in connection with the business; and (c) assets in Canada used in carrying on the business.

The scope of the national security provisions is broader and applies to investments in entities carrying on any part of their operations in Canada, provided that the entity has at least one of the following: (a) a place of operations in Canada; (b) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations; or (c) assets in Canada used in carrying on the entity's operations.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Yes. Indirect investments are subject to the ICA. Indirect investments generally require only a notification (and not a pre-closing review) except in cases involving either a cultural target business, or an indirect investment involving both a non-WTO investor and vendor, in which case the indirect investment will be subject to "net benefit" review where a much lower applicable threshold is met. Applications for review of indirect acquisitions can, however, be filed by the investor within 30 days after closing.

The national security review provisions apply equally to indirect acquisitions.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

As noted above, the economic provisions of the ICA apply to all acquisitions of control of Canadian businesses by non-Canadians, regardless of value. However, some investments are subject only to a notification, while others require a pre-closing review. The monetary threshold at which an acquisition requires a mandatory pre-closing review as opposed to a post-closing notification depends on several factors. As a general matter, the monetary thresholds for review in 2022 can be summarised as follows:

Acquisition of Canadian Business	Target Type	Seller or Buyer is a WTO Investor	Threshold
Direct	Cultural Business	Yes	Book value of assets exceeds C$5 million.
		No	
	Non-Cultural Business	Yes	For non-SOE investors, enterprise value exceeds C$1.141 billion (or C$1.711 billion under certain circumstances). For SOE investors, book value of assets exceeds C$454 million.
		No	Book value of assets exceeds C$5 million.
Indirect	Cultural Business	Yes	Book value of assets exceeds C$50 million.
		No	
	Non-Cultural Business	Yes	Exempt from review.
		No	Book value of assets exceeds C$50 million.

There are no monetary thresholds for the national security provisions of the ICA; an investment can be subject to national security review regardless of its size.

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

There are no monetary thresholds for the national security provisions of the ICA; an investment can be subject to review under the national security provisions regardless of its size.

3.3 Is there a mandatory notification requirement and is there a specific notification form? Are there any filing fees?

Where an investment meets the conditions requiring a notification or an application for review, the applicable filing is mandatory. No separate filing is required under the national security provisions of the ICA.

There is no filing fee.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

As a general matter, if an investment is subject to a "net benefit" review under the cultural or economic provisions of the ICA, the transaction is prohibited from closing until completion of the review.

As an exception, where an indirect acquisition of a Canadian cultural business is subject to mandatory review (see question 3.1), the review may be completed on a post-closing basis. In addition, the Government has the discretion to permit closing prior to completion of the review where a delay in closing would result in undue hardship to the investor or would jeopardise the operations of the target.

If a notice of possible national security review (or full national security review) is received prior to the implementation of a transaction, closing is similarly barred until completion of the review.

If an investor closes a transaction that requires pre-closing review before approval is obtained, the Government can apply to the superior court for an order imposing severe sanctions, such as requiring the investor to divest of its investment or imposing a monetary fine not exceeding C$10,000 for each day the non-Canadian is in contravention of the ICA. However, it bears noting that these sanctions have very rarely been used.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

The investor is responsible for obtaining the necessary approval in cases where the investment requires a pre-closing "net benefit" review, and in other cases, for filing the notification. The target company (and vendor) generally has no legal responsibility to make any filings or obtain any approvals under the ICA.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance as to whether the authorities would object to the transaction?

Yes. The Canadian Government encourages early engagement

to obtain informal guidance in advance of filing. The ICA also includes a provision permitting an investor to apply for a formal ministerial opinion on the applicability to them of any provision of the ICA; however, informal guidance is more typical.

Note that the Canadian Government's Guidelines on the National Security Review of Investments specifically encourage investors to engage with the relevant authorities early on in their investment planning, particularly in circumstances where the investment either involves an SOE or where the factors set out in the updated Guidelines are present (described in response to question 2.3 above).

3.7 What type of information do parties to a transaction have to provide as part of their filing?

The information required for a notification includes items such as the names and biographical details of the investor's board of directors and the five highest-paid officers, an indication of any foreign state interest in the investor, the sources of funding, a copy of the purchase agreement, the name of the "ultimate controller" of the investor, and certain financial information to assess the value of the investment.

Where pre-closing review is required, information in an ICA application for review includes not only that required in a notification, but also a description of future plans of the investor for the Canadian business (which typically form the basis for binding undertakings in the course of the review process).

3.8 Are there any sanctions for not filing (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

If an investor fails to comply with any requirement of the ICA, the Minister can send the investor a demand letter requiring the investor to remedy the contravention or default or explain why there was no contravention of the ICA. If the investor fails to comply with the Minister's demand letter, the Minister can apply to a superior court for an order. The court may make any order that the circumstances require, including directing the investor to divest of its investment, directing it to comply with a written undertaking or imposing a penalty not exceeding C$10,000 for each day the non-Canadian is in contravention of the ICA.

3.9 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

The applicable time frame for a "net benefit" review runs from the date a filing is made and certified as complete. The responsible Minister(s) has(ve) a 45-day period within which to make a "net benefit" determination, which may be unilaterally extended once by the responsible Minister(s) by up to 30 days, and thereafter extended with the consent of the investor.

The applicable time periods for national security reviews are set out below:

- **Notice of possible review:** At the first stage, the Minister has an initial 45 days following receipt of a certified notification or application for review to initially screen an investment, and, in the case of national security concerns, to send the investor a notice of a possible national security review or a notice of review.
- **Notice of review:** Following a notice of a possible review, the Minister has a further 45 days, following which the Minister can either take no action, or issue an order for a formal national security review.
- **National security review:** Following a notice of a review, the Government has 45 days to engage in its in-depth national security review and refer the matter to Cabinet, which can be extended by the Government a further 45 days (or more with consent of the investor).
- **Cabinet referral:** If the Minister wishes to seek to block the transaction or impose remedies, the federal Cabinet has 20 days to consider the Minister's recommendation and make any order it considers advisable to protect national security.

As a result, the total time associated with a national security review can extend to 200 days, or more with the consent of the investor.

For non-notifiable transactions, the same periods apply, but with the "notice of possible review" period beginning upon closing and lasting for five years thereafter, or lasting for 45 days after notification if a voluntary notification filing is made.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

There are no provisions for expediting the review timeline, though early engagement and timely cooperation from the parties can permit the Government to advance its process more quickly and be less likely to avail itself of its possible extensions.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

Third parties cannot be directly involved in the review process. Third parties may make submissions to the Government concerning an ongoing review. In such circumstances, the Government will typically notify the investor of the substance of the comment, and provide the investor an opportunity to respond, however the third party does not have any participation rights nor any entitlement to confidential information.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

No public disclosure of information related to a transaction (including the fact of the transaction) is made to third parties during an ongoing review. The Government publishes a monthly registry of completed reviews and notifications on its website, which includes the name of the Canadian business, the name of the purchase vehicle, and a brief description of the business activities of the Canadian business. If a cultural business and/or national security review is commenced, certain limited public disclosure is permitted.

In addition, the Government publishes an annual report, which provides aggregated statistics on notifications and reviews, including national security reviews.

Other than as disclosed in the monthly registry, and some limited exceptions, all information submitted to the Government under the ICA is privileged. As a result, the Government is not permitted to disclose any such information to any third parties without the consent of the investor. Note that, for high-profile transactions and reviews, the Government typically requests the

investor's consent to acknowledge – if asked – that a review is ongoing; and the Government typically requests that the investor consider requests to disclose information about undertakings provided to secure approval (though such disclosure is very rare).

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

There are no sector-specific requirements under the ICA. However, certain sectors are subject to reviews or approvals under other statutes, either in addition to or instead of review under the ICA, as noted in the response to question 2.1.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The responsible authorities depend on the type of review:

- **Economic net benefit:** The Minister of Innovation, Science and Industry is the decision-maker. The Investment Review Division ("**IRD**"), a federal bureaucracy, is responsible for working with investors, reviewing investments and providing guidance to the Minister, and is the principal point of contact for investors.
- **Cultural net benefit:** The Minister of Canadian Heritage is responsible for the net benefit review of cultural businesses. Cultural Sector Investment Review, a federal bureaucracy, is responsible for working with investors, reviewing investments and providing guidance to the Minister of Heritage, and is the principal point of contact for investors.
- **National security review:** Again, the IRD is the primary interface between the investor and the other public bodies involved in a national security review. The IRD coordinates its review in consultation with a large number of other governmental bodies, including the departments of Heritage, Public Safety and Emergency Preparedness, National Defence and Public Health, and authorities such as the Canadian Security Intelligence Service, Royal Canadian Mounted Police and Canada Border Services Agency. The Ministers of Innovation, Science and Industry and Public Safety and Emergency Preparedness are the primary decision-makers for the assessment of whether an investment would be injurious to national security; in the event that the Ministers determine that an investment would be injurious to national security, the matter is referred to the federal Cabinet for the ultimate decision.

4.2 What is the applicable test and what is the burden of proof and who bears it?

Economic "net benefit" review: An economic review requires that the Minister be satisfied that the investment is likely to be of "net benefit to Canada".

Cultural "net benefit" review: The same test used in the economic net benefit assessment is also applicable to the Minister of Heritage's weighing of the net benefit assessment of a cultural business.

National security review: In order to refer an investment to Cabinet, the Minister must either be satisfied that the investment would be injurious to national security, or not able to determine whether the investment would be injurious to national security on the basis of the information available.

The factors relevant to each assessment are further detailed in question 4.3 below.

The ICA provides the responsible minister with both the decision-making power and jurisdiction over the investigation and review. As a result, the process is not judicial in nature, with no formal burden of proof, but instead it is a discretionary decision by the Government in the public interest. Therefore, as a practical matter, the burden of proof lies with the investor.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

Economic "net benefit" review: The factors relevant to the "net benefit" assessment include:

- the economic impact on Canada (employment, exports, *etc.*);
- participation by Canadians in the Canadian business;
- productivity, technological development, and product variety in Canada;
- competition in Canada;
- compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution to Canada's ability to compete in world markets.

The Minister's assessment will consider any legally binding undertakings the investor is willing to make. Undertakings regarding factors such as employment levels, capital expenditures, levels of Canadian representation on boards and in executive positions, charitable contributions, and research and development activities are typical. The Government has several guidelines to assist with the review process, including its "suggested supplementary information" guidelines, which set out the types of supplementary information that are useful to assist the IRD in its assessment.

Cultural "net benefit" review: The same test and factors outlined above are also applicable to the net benefit assessment of a cultural business. For cultural businesses, undertakings may also include culturally focused undertakings such as commitments to promote certain cultural products, to create or support cultural programmes or institutions or offer training programmes or internships to Canadians. The Government has published guidelines on "net benefit undertakings and Canadian cultural policy" to help guide investors.

National security review: In assessing whether an investment would be injurious to national security, the Minister can consider any factor he or she deems relevant to the assessment. The Government's Guidelines on the National Security Review of Investments set out certain non-exhaustive factors that the Government will consider when assessing whether an investment would be "injurious to national security". These include:

- the potential effects of the investment on Canada's defence capabilities and interests;
- the potential effects of the investment on the transfer of "sensitive technology" or know-how outside of Canada;
- involvement in the research, manufacture or sale of goods/technology relating to certain controlled goods noted in the *Defence Production Act* (*i.e.*, sensitive military products);
- the potential impact of the investment on "critical minerals" and critical mineral supply chains;
- the potential impact of the investment on the security of Canada's critical infrastructure;
- the potential impact of the investment on the supply of critical goods and services to Canadians, or the supply of goods and services to the Government of Canada;
- the potential of the investment to enable foreign surveillance or espionage or to hinder intelligence or law enforcement operations;

- the potential impact of the investment on Canada's international interests;
- the potential of the investment to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and
- the potential of the investment to enable access to sensitive personal data such as: (a) personally identifiable health or genetic information; (b) biometric information; (c) financial information; (d) communications information; (e) geolocation information; and (f) personal data concerning government officials, including members of the military or intelligence community.

For reviews, the Government is permitted to make its approval decision public (*e.g.*, via a news release), however typically only does so for highly politically sensitive transactions.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Economic and cultural "net benefit" reviews generally only relate to the operations of the target business in Canada.

The scope of national security reviews is broader, and would extend to an entity carrying on any part of its operations in Canada, provided it has either: a place of operations in Canada; individuals in Canada who are employed (including self-employed) in connection with the operations; or assets in Canada used in carrying on its operations. As a result, if a foreign entity satisfied any of these conditions, its activities in Canada would be captured in the scope of a national security review.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

For both economic and cultural "net benefit" reviews, the responsible Minister is charged with determining whether he or she is satisfied that an investment will be of net benefit to Canada, based on the prescribed factors described above. If the responsible Minister is not satisfied this test is met, taking into account these factors and any representations and legally binding undertakings put forth by the investor, the Minister will send a notice to the investor to that effect and the investor will be required either to not complete the transaction, or, if it is already completed, to divest itself of the business (following a remedial period). If the Minister is satisfied that the transaction is of net benefit to Canada, he or she can approve the transaction. As a result, the Minister has significant discretion to make an approval or rejection decision.

The national security review involves two decision-makers. At first instance, the Minister of Innovation, Science and Industry has discretion as to whether to refer the matter to Cabinet for further action (provided the test for a referral is met, in his or her view), or whether to allow the transaction to close. If the matter is referred to the federal Cabinet, it then has discretion to order any measures it considers advisable, including a divestiture, an order not to implement a transaction or authorising the investment on certain terms and conditions.

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

Yes. In "net benefit" reviews, investors are typically expected to propose undertakings and the Government will negotiate the parameters of these undertakings with the investor.

In national security reviews, investors may also propose undertakings. In considering a matter referred to it by the Minister, the Cabinet can take into account these undertakings in reaching its decision on the transaction. However, for transactions raising significant perceived national security concerns and/or investors that cannot be trusted to comply with undertakings, the Cabinet may determine that no undertakings could resolve the applicable concerns.

For transactions subject to "net benefit" reviews, while the Government is permitted to publish high-level information about the review and any undertakings offered, it typically does not do so. Similarly, in national security reviews, the Government is permitted to publish information about its concerns and any undertakings provided, although again, it typically does not do so.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

A net benefit or national security decision can be challenged through an application for judicial review to the Federal Court of Canada, which is a standard judicial procedure for review of administrative decisions by federal decision-makers in Canada.

A court order issued by a superior court has the same rights of appeal as in the case of other decisions or orders made by that court.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

As described above, the Government has increased scrutiny of foreign investments in response to the COVID-19 pandemic, which has resulted in the Government's increased use of the national security provisions of the ICA. In the last fiscal period for which data is available (April 1, 2020–March 31, 2021), 24 investments were subject to some form of national security review, which is almost equal to the number of investments scrutinized under the national security provisions of the ICA in the past four years combined.

One recent example of a transaction that was blocked by the Canadian Government on national security grounds was Shandong Gold Mining Col. Ltd's proposed acquisition of TMAC Resources, a Toronto-based mining company and owner of a mine in Hope Bay, Nunavut, in 2020. The proposed investment was reviewed in the early days of the COVID-19 pandemic and only several weeks after the Government released its policy statement warning that certain foreign investments, including those linked to foreign governments, would be subject to enhanced scrutiny under the ICA.

Additionally, in contrast to the rise in national security reviews, in the last fiscal year, there was a sustained decrease in the number of foreign investments reviewed under the "net benefit" process.

Mike Laskey is a partner in the Competition & Foreign Investment Group at Stikeman Elliott. His practice focuses on the review of transactions under the *Competition Act* and the *Investment Canada Act*.

Under the *Competition Act*, Mike regularly advises clients on the competition law risks of complex and high-profile transactions. Mike leads competition law reviews of some of the most involved transactions in Canada. Mike works with the Competition Bureau to resolve difficult and novel competition issues and negotiate complex remedial agreements. In addition to the review of transactions, Mike also advises clients on compliance matters (including compliance training and internal investigations) and provides guidance on misleading advertising issues.

Under the *Investment Canada Act*, Mike advises on precedent-setting economic, cultural and national security matters for clients across a broad range of industries. Mike also works with government relations and public relations advisors to secure approval for high-profile and complex transactions.

Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9
Canada

Tel: +1 416 869 5541
Email: mlaskey@stikeman.com
URL: www.stikeman.com

Peter Flynn is an associate in the Competition & Foreign Investment Group at Stikeman Elliott. His practice focuses on the review of transactions under the *Competition Act* and the *Investment Canada Act*.

Under the *Competition Act*, Peter advises on all aspects of competition law, including complex merger review, joint ventures and strategic alliances, criminal and civil investigations, regulatory compliance matters and misleading advertising.

Under the *Investment Canada Act*, Peter advises clients on economic, cultural and national security matters. He has worked with clients in a number of Canada's key industries, including telecommunications, media, technology and fintech, consumer goods, life sciences, mining, and oil and gas. Peter has significant experience working with government relations and public relations advisors to secure approval for high-profile transactions.

Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9
Canada

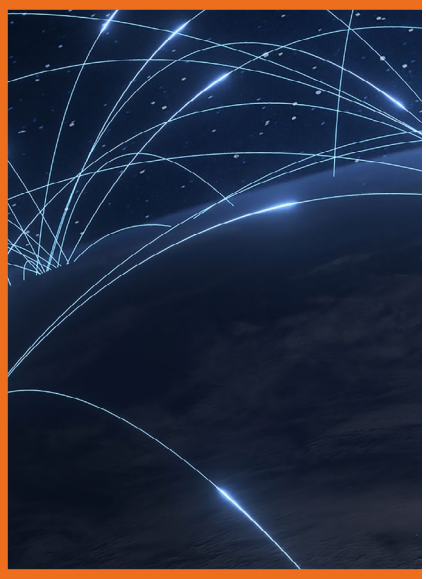
Tel: +1 416 869 5569
Email: pflynn@stikeman.com
URL: www.stikeman.com

Kirsten Cirella is an associate in the Competition & Foreign Investment Group at Stikeman Elliott. Her practice focuses on the review of transactions under the *Competition Act* and the *Investment Canada Act*. Kirsten also advises clients on a broad range of regulatory issues, including federal and provincial marketing and advertising laws and regulations.

Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9
Canada

Tel: +1 416 869 6876
Email: kcirella@stikeman.com
URL: www.stikeman.com

ICLG.com



Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: glg global legal group

About Stikeman Elliott

Stikeman Elliott is a global leader in Canadian business law and the first call for businesses working in and with Canada. Our offices are located in Montréal, Toronto, Ottawa, Calgary, Vancouver, New York, London and Sydney. We provide clients with the highest quality counsel, strategic advice, and workable solutions. The firm has an exceptional track record in major U.S. and international locations on multijurisdictional matters and ranks as a top firm in our primary practice areas including mergers and acquisitions, securities, business litigation, banking and finance, competition and foreign investment, tax, restructuring, energy, mining, real estate, project development, employment and labour, and pensions.

For more information about Stikeman Elliott, please visit our website at www.stikeman.com.

Contact us

Mike Laskey
mlaskey@stikeman.com

Peter Flynn
pflynn@stikeman.com

Kirsten Cirella
kcirella@stikeman.com

Follow us

SE

Subscribe to updates on a variety of legal topics from Stikeman Elliott's Knowledge Hub at stikeman.com/kh

Stikeman Elliott LLP

Montréal Toronto Ottawa Calgary Vancouver New York London Sydney

Stikeman Elliott