

## ***Investment Canada Act* Regulates Significant Foreign Investments in Canada**

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### **Purpose of the *Investment Canada Act***

The *Investment Canada Act* (the “Act”) regulates non-Canadian investments in Canadian businesses. The Act provides for “the review of significant investments in Canada by non-Canadians in order to ensure net benefit to Canada and to provide a mechanism for reviewing and blocking investments that may be injurious to national security.”<sup>1</sup> The Department of Innovation, Science and Economic Development administers the Act in relation to the approval of reviewable transactions. The Department of Canadian Heritage administers the Act with respect to investments concerning Canadian cultural businesses.<sup>2</sup>

### **Which Procedure Applies? Notification vs. Review**

Depending on the value of the assets of the Canadian business being acquired, acquisition of control by a non-Canadian of a Canadian business will be either notifiable or reviewable under the *Investment Canada Act*.<sup>3</sup> The definition of “acquiring control of a Canadian business” includes acquiring voting shares or assets or acquiring an entity that either carries on or controls an entity carrying on a Canadian business.<sup>4</sup> Notification involves the filing of basic information about the investor and the acquired business prior to closing or within 30 days after closing.<sup>5</sup> On the other hand, if an acquisition is reviewable, the transaction cannot be completed until the government is satisfied that the acquisition is likely to be of “net benefit to Canada”.

### **Special Considerations for Investment in Cultural Business**

For notifiable investment, if it is a “cultural business”, the government can decide to review it once the “cultural business” has given notice. The government will assess it for its net benefit to Canada. The government will not assess notifiable transactions in non-cultural businesses for their net benefit to Canada.<sup>6</sup> All transactions are assessed for their threat to national security.<sup>7</sup>

### **Enterprise Value Thresholds for Various Investment Categories**

Other than the size of the investment and the nature of the target business, the government also examines whether the acquisition is direct or indirect, whether the investor is controlled in one or more countries that are members of the World Trade Organization. (China is one of the WTO member countries.) For acquisitions by a WTO investor that is not a state-owned enterprise, they are reviewable if the enterprise value or asset value of the Canadian business exceeds \$1 billion. For acquisitions by WTO investors who are state-owned enterprises, the threshold is \$379 million. For acquisitions by non-WTO members and the acquisitions of a Canadian cultural business, the threshold is \$5 million. The threshold values will be adjusted annually based on inflation.<sup>8</sup>

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<sup>1</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 2.

<sup>2</sup> For more information, see <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home>

<sup>3</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 11-14.

<sup>4</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 28.

<sup>5</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 21-22.

<sup>6</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 14.

<sup>7</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 25.2(1).

<sup>8</sup> *Investment Canada Act*, R.S.C. 1985, c 28 (1<sup>st</sup> Supp), s 14.

## **Procedures involved in Investment Review**

If an acquisition is reviewable, the government will review the investor's plans for the business, including plans for employing Canadians in the business and capital investment. The review will usually be completed within 45 days. However, the government can unilaterally extend the deadline by 30 days. The deadline can be further extended when both parties agree. The applicant might be required to submit written undertakings in relation to employment levels and the locations of offices and facilities. Undertakings might be related to Canadian participation in management, Canadian capital expenditure levels, Canadian research and development commitments and the use of Canadian suppliers and businesses. The undertakings are legally enforceable. Undertakings can last for three years or longer. During this period, the government can ask for status reports.<sup>9</sup>

## **Considerations during Preparation of Review Application**

Investors often underestimate the amount of time required to prepare a review application. They should collect the information required for the business plan which forms part of their applications as early as possible. In addition, they should hire the appropriate advisors, e.g. securities lawyers, financial advisors, experts in public relations, depending on the circumstances. Furthermore, the business plan should include sufficient details to enable the government review officer a clear understanding of the applicant's intentions, e.g. detail employment and expenditure projections for the upcoming years. Applicants might be required to prepare written submissions that highlight the aspects of the transactions that will be beneficial to Canada. Depending on the circumstances, legal counsel and the parties involved might want to make a presentation describing the transaction's benefits to government officials. For non-Canadian state-owned enterprises ("SOEs"), the government will require more undertakings compared to private corporations. The government will evaluate whether they adhere to Canadian standards of corporate governance, disclosure requirements, independence of board directors etc.<sup>10</sup>

## **National Security Review**

For reviews triggered by a risk to national security, there is no minimum investment threshold. The government can reject the application if it has "reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security". The government can reject the application, allow the acquisition to proceed subject to certain conditions or order divestitures for transactions already completed. The national security review can take up to 130 days from the initial notice.<sup>11</sup>

## **Rectification after Rejection of Review Application**

If the review application is rejected, the investor will be given an additional thirty days to make further submissions or provide additional undertakings for the purpose of obtaining approval. Rejections of applications are quite rare. Upon approval, applicants and the government often work together on press releases. Co-operation between the two parties ensures that privileged information can stay confidential, even though the government has the right to disclose certain information.<sup>12</sup>

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<sup>9</sup> Borgers, O, Rix, E & Salzman, L. (2010) Foreign Investment Screening Under Canada's *Investment Canada Act*, Canada Bar Association, 2010 Annual Fall Conference on Competition Law, Session on Foreign Investment Review in Canada, Gatineau, Quebec. Retrieved from [http://www.cba.org/cba/cle/PDF/COMP10\\_Borgers\\_paper.pdf](http://www.cba.org/cba/cle/PDF/COMP10_Borgers_paper.pdf)

<sup>10</sup> Borgers, *supra*, footnote 9, para 47-57.

<sup>11</sup> Borgers, *supra*, footnote 9, para 62-72.

<sup>12</sup> Borgers, *supra*, footnote 9, para 54-57.



## **Common Challenges for Chinese Investors**

After acquisitions are completed, some challenges faced by Chinese investors include cultural differences and personnel management. Thorough preparation prior to market entries can prevent potential conflicts. In addition, Canadian characteristics, such as multiculturalism should be taken into account when Chinese investors identify and target different markets. Finally, Canadians who are trying to attract Chinese investment should present an accurate value of their projects, rather than inflating the value and risk damaging the relationship between them and the Chinese investors.<sup>13</sup>

**For more information, please call Barbara Hendrickson or Janny Cho at BAX Securities Law 416.601.1004.**

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<sup>13</sup> Asia Pacific Foundation of Canada. (2016, Sept 16). Chinese Investment in Canada: Development, Challenges and Recommendations. Asia Pacific Foundation of Canada. Retrieved from <https://www.asiapacific.ca/blog/chinese-investment-canada-development-challenges-and>