

# Mergers & Acquisitions

In 59 jurisdictions worldwide

*Contributing editor*  
**Alan M Klein**



**2015**

GETTING THE  
DEAL THROUGH 

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# Mergers & Acquisitions 2015

*Contributing editor*

**Alan M Klein**

**Simpson Thacher & Bartlett LLP**

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Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@lbresearch.com

Adam Sargent  
adam.sargent@lbresearch.com

Dan White  
dan.white@lbresearch.com



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# Foreign Investment Review in Canada

Richard Annan, Calvin S Goldman QC, Michael Koch and Joel Schachter

Goodmans LLP

The federal government has reviewed foreign investment in Canada for over 40 years, during which period the level of scrutiny of foreign investment has waxed and waned. The current foreign investment review legislation, called the Investment Canada Act (ICA), was introduced in 1985 and was intended to provide a more light-handed approach to the review of foreign investment than its predecessor legislation, the Foreign Investment Review Act. For most of the ICA's history, that has proved to be the case. As described below, the current government has passed new regulations that are expected to reduce the number of transactions subject to review under the ICA.

However, recent developments in the past few years suggest that certain types of investors will face greater scrutiny or restrictions than in the past. The current government has made it clear that investments by state-owned enterprises (SOEs) will be carefully examined, and in the case of proposed investments by state-owned enterprises in the Canadian oil sands, prohibited altogether, except in 'exceptional circumstances'. In 2009, the government added a new type of review for national security reasons. In 2010, the government rejected the proposed takeover of Potash Corporation of Saskatchewan Inc by BHP Billiton, despite undertakings that were, as described by BHP Billiton, 'unparalleled in substance, scope and duration'. The *Potash* matter underscored the fact that the decision to accept or reject a reviewable transaction is ultimately a political decision and as such is subject to political considerations applied to the statutory factors in the ICA relating to determining whether an investment is likely to be of 'net benefit to Canada'.

## ICA framework

The ICA applies to any acquisition of control by a non-Canadian of a Canadian business or the establishment of a new Canadian business by a non-Canadian.

There are various rules in the ICA as to when there has been an acquisition of control. For example, 'control' includes the acquisition of a majority of the voting interests of a corporation, partnership, joint venture or trust that carries on or controls a Canadian business. An acquisition of one-third or more of the voting shares but less than a majority of the voting shares of a corporation is presumed to be an acquisition of control unless it can be established that the proposed acquisition will not amount to control in fact of the Canadian business. For cultural businesses, the Minister of Canadian Heritage has discretion to determine whether control in fact would occur and that an acquisition of control would take place as a result, notwithstanding the other rules in the ICA.

Transactions subject to the ICA generally fall into three types: reviewable transactions (non-cultural and cultural businesses), notifiable transactions and transactions subject to a national security review.

## Reviewable transactions

Reviewable transactions undergo a review process conducted by the Investment Review Division of Industry Canada (IRD) for non-cultural Canadian businesses, by the Cultural Sector Investment Review Division (CSIRD) of the Department of Heritage Canada for cultural Canadian businesses,<sup>1</sup> or by both if the business has both cultural and non-cultural business activities. In all cases, the Minister of Industry or the Minister of Canadian Heritage, as the case may be, makes the decision to approve or reject the proposed investment.

The purpose of the review is to determine whether the proposed transaction is of net benefit to Canada. In making this determination,

the Minister must take into account a number of factors listed in the ICA, including the effect of the investment on:

- the level and nature of economic activity in Canada (such as the effect on employment, resource processing, utilisation of Canadian suppliers and exports);
- the degree of participation of Canadians in the Canadian business (such as the number of Canadians as employees, managers, directors and owners);
- productivity, industrial efficiency and technological development and competitiveness of the Canadian business (such as the level of capital expenditures and R&D funding);
- competition in Canada (this factor is generally assessed by the Competition Bureau, which provides its views to the IRD or CSIRD); and
- compatibility with national, industrial, economic and cultural policies.

In order to provide information to assess these factors, investors are required in their application for review to provide detailed plans for the Canadian business which will address how each of these factors, where relevant, will be affected by the proposed investment, typically over a three- to five-year period. Since the test for approval is net benefit to Canada, the investor must demonstrate that the proposed investment is an improvement on the status quo.

In order to secure approval by the Minister, the investor will be required in virtually all reviewable transactions to provide legally binding undertakings that set out what the investor is going to do with respect to these factors, such as increasing the level of employment in Canada, increasing the level of capital and R&D expenditures and maintaining the level of Canadian participation in management and the board of directors. The undertakings are typically in force for three to five years, but in some cases may extend for longer periods. The IRD or CSIRD will ask the investor to provide periodic reports on its compliance with the undertakings, typically at 18-month intervals.

With very few exceptions, a proposed transaction subject to a net benefit review cannot legally close until it is approved by either the Minister of Industry for non-cultural businesses or the Minister of Canadian Heritage for cultural businesses. The statutory time frame for review is an initial period of 45 days after the application for review is filed and certified complete. This period can be extended unilaterally by the Minister for a further 30 days (and usually is). The Minister must also allow the investor at least another 30 days to make further representations if the Minister is unable to make a favourable decision in the first 75 days. Further extensions in the periods of review can be made with consent of the parties to the transaction and the Minister.

The threshold for review varies depending on whether the buyer or the seller is a World Trade Organization (WTO) investor and if the business is a cultural business. An investor is a WTO investor if it is ultimately controlled by an individual or individuals, other than Canadians, who are nationals or permanent residents of a WTO member country or by a government of a WTO member.

The thresholds for a net benefit review in place as of 24 April 2015 are based on either the enterprise value or the book value of assets of the Canadian business and are as follows:

Investor type	Non-cultural	Cultural
WTO non-SOE buyer or seller Direct acquisition	C\$600 million enterprise value	C\$5 million book value
WTO SOE buyer Direct acquisition	C\$369 million book value	C\$5 million book value
WTO buyer or seller Indirect acquisition of Canadian business through acquisition of a non-Canadian corporation	Not reviewable	C\$50 million or C\$5 million book value if the Canadian assets being acquired represent more than 50% of all assets being acquired
Non-WTO Direct acquisition	C\$5 million book value	C\$5 million book value
Non-WTO Indirect acquisition	C\$50 million or C\$5 million book value if the Canadian assets being acquired represent more than 50% of all assets being acquired	C\$50 million or C\$5 million book value if the Canadian assets being acquired represent more than 50% of all assets being acquired

With respect to cultural businesses, even if the financial thresholds noted above are not met, the Governor in Council (the Federal Cabinet) has the power to order a review when it decides it is in the public interest to do so.

These thresholds for review were recently replaced by a new set of substantially higher thresholds based on the enterprise value of the Canadian business, not the book value of assets. Commencing 24 April 2015, the new threshold for direct acquisitions of a Canadian business by a non-SOE WTO investor or by a non-WTO investor from a WTO investor will be C\$600 million for two years, C\$800 for the next two years, C\$1 billion for the fifth year, and thereafter be indexed to changes in Canada's GDP. As noted above, the current asset-based thresholds will continue to apply to investments in cultural businesses, investments by non-WTO investors and to investments by SOEs.

#### Notifiable transactions

Notifiable transactions are not subject to any waiting period before closing. Notifiable transactions are essentially any proposed transaction for the acquisition of control of a Canadian business by a non-Canadian, or the establishment of a new Canadian business by a non-Canadian, that is not subject to a net benefit review. In the case of notifiable transactions, all that is required is to provide Industry Canada, Heritage Canada, or both with the prescribed information in the notification form at any time up to 30 days after closing.

#### National security review

An acquisition by a non-Canadian of any part of a business in Canada that has a place of operations in Canada or employees in Canada or assets in Canada, regardless of the size of the business, can potentially undergo a review to determine whether the investment could be injurious to national security. The review process must be initiated either up to 45 days after certification of a notification or of a review application, as the case may be, or in all other cases up to 45 days after closing. Consequently, in cases that may raise national security concerns, it is advisable to provide a notification or application for review well in advance of closing to see whether a national security review will be triggered by the proposed transaction.

There is no definition of national security in the ICA nor is there likely to be any definition provided by the government in the future in order to maintain maximum flexibility in applying this provision. The possibility of a national security review should be considered, for example, where the Canadian business is providing goods or services to the military, law enforcement or to other sensitive government agencies, or concerns advanced technology, uranium production, important infrastructure or transportation links or export-controlled products.

The national security review process is initiated by the Minister of Industry providing a notice to the investor. Following an initial consideration, the Governor in Council (the Federal Cabinet), on the recommendation of the Minister of Industry (after consultation with the Minister of Public Safety and Emergency Preparedness) will determine whether a full national security review is warranted. A full national security review can

take up to 200 days to complete from the day that investor files a notification or application for review. In certain cases, the review period may be extended with the investor's consent.

At the conclusion of the full national security review, the Governor in Council can:

- prohibit the non-Canadian investor from closing the proposed transaction;
- allow closing of the proposed transaction subject to undertakings by the investor;
- allow closing of the proposed transaction subject to terms and conditions; or
- in the case of a completed transaction, order the non-Canadian investor to divest themselves of control of the Canadian business or of their investment in the entity.

It is likely that national security has played a role in certain net benefit to Canada decisions under the ICA even before the national security provisions were in place. For example, in May 2008 the government blocked the proposed acquisition of the information systems and geospatial services business of MacDonald, Dettwiler and Associates Ltd (MDA) by US-based Alliant Techsystems Inc. MDA built and operated an important remote sensing satellite. The national security review provisions were introduced shortly after this case. Since then, there appears to have been two cases where the national security provisions were used.

In 2009 the government notified George Forrest International Afrique SPRL that its proposed acquisition of Forsys Metals Corp could be injurious to national security and that an order for a full national security review could be made. Forsys Metals Corp's operations included a uranium project in Namibia. The review was never completed as the purchaser abandoned the proposed transaction.

In 2013 the government rejected the proposed acquisition of the Allstream division of Manitoba Telecom Services Inc by Accelero Capital Holdings (Accelero). MTS Allstream operates a national fibre optic network that is important to telecommunication services in Canada. Although the reasons for the rejection were never outlined by the government, it has been reported that the government consulted with the intelligence and police services and that the review considered that one of the principals behind Accelero had investments in North Korea.

#### State-owned enterprises (SOEs) subject to additional scrutiny

In considering whether an acquisition of control of a Canadian business by a SOE is of net benefit to Canada, the government has set out in its administrative guidance additional factors to be considered in such cases. The SOE policy guidance is intended to ensure that the governance and commercial orientation of SOEs form a part of the net benefit assessment.

This examination will include whether the non-Canadian adheres to Canadian standards of corporate governance (such as commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders) and to Canadian laws and practices, including adherence to free market principles and business operations conducted on a commercial basis. It will also consider how and the extent to which a non-Canadian is owned or controlled by a state or its conduct and operations are influenced by a state.

In addition to the set of undertakings that are typically expected from non-Canadian investors, SOEs may be required to make additional undertakings such as the incorporation of the business in Canada, appointment of Canadians as independent directors on the board of directors, and where applicable the listing of shares of the acquiring company or the Canadian business on a Canadian stock exchange.

In 2012 the government approved two controversial and high-profile acquisitions by SOEs of Canadian companies that had ownership interests and operations in the oil sands region of western Canada.<sup>2</sup> The Prime Minister then announced that foreign state control of oil sands development had reached the point at which further foreign state control would not be of net benefit to Canada and that in the future, proposed acquisitions of control of Canadian oil sands businesses would only satisfy the net benefit test in 'exceptional circumstances'.<sup>3</sup> The government has also stated that where acquisitions of control by SOEs could undermine the private sector orientation of an industry by subjecting that industry to an inordinate amount of foreign state influence, the government would act to protect Canadian interests.<sup>4</sup>



SOEs have been singled out for special treatment in other respects. First, unlike investments by non-Canadians in non-cultural businesses, the threshold for review for investments by SOEs will continue to be an asset-based threshold as set out above and the new much higher thresholds based on enterprise value will not apply to investments by SOEs. Second, the Minister has the power to make control in fact determinations in respect of SOEs without regard to the bright line rules noted above for other foreign investors. For example, it is possible that the Minister may determine control in fact would occur for an investment by an SOE that comprises less than one-third of the voting shares of the Canadian business to be acquired. Third, the definition of what constitutes an SOE has been broadened to include not only entities owned or controlled by states, but also any entity that is controlled or influenced, directly or indirectly, by a foreign government.

#### **The cautionary tale of BHP Billiton's (BHP) failed takeover of Potash Corporation of Saskatchewan Inc (PCA)**

In August 2010, BHP, an Australian company and the largest mining company in the world, launched a hostile takeover bid for PCA valued at approximately US\$40 billion on a fully diluted basis. PCA is one of the world leaders in potash production. The majority of PCA's operations, including its headquarters, are located in the province of Saskatchewan. BHP had established a reputation as a first-class corporate citizen in Canada.

This proposal quickly became a major political issue with the Premier of Saskatchewan voicing his government's strong opposition to the deal, citing concerns about the loss of jobs, investment, provincial tax revenues and control of an important Canadian resource.<sup>3</sup> BHP attempted to address these concerns by offering a package of extensive undertakings. According to BHP its proposed undertakings included, among other commitments, increased employment, maintaining the company's global potash headquarters in Saskatchewan, forgoing tax benefits it could legally claim, and commitments of US\$450 million on exploration and development and of an additional US\$370 million on infrastructure funds in Saskatchewan and New Brunswick.<sup>6</sup>

Despite these undertakings, the Minister sent a notice to BHP that he was not satisfied that the proposed transaction was likely to be of net benefit to Canada and BHP subsequently withdrew its bid for PCA. At that time the federal government ruled with only a minority position in Parliament and 13 of the government's members of parliament represented ridings in Saskatchewan.

This case highlights the fact that review under the ICA is ultimately a political decision and that political considerations, such as the opposition

of provincial governments or local members of Parliament, can be decisive to the final outcome. As a result, when considering high-profile acquisitions that may affect political interests, a plan to deal with the political implications of such a proposal should be developed. This suggests consulting with experienced legal and government relations experts at the earliest stages of the transaction planning process.

#### **Conclusion**

For most transactions subject to the ICA, even those subject to net benefit review, the process under the ICA will likely not materially affect the transaction, although in the case of reviewable transactions it can be expected that the purchaser will need to agree to undertakings that will carry some financial cost to them. However, for those transactions where the purchaser or purchasers involved are state-owned enterprises, or which may raise potential national security concerns, the path through the ICA approval process can be more challenging. Careful and early planning and risk assessment with advisers are key to avoid surprises and ultimately to successfully complete the proposed transaction.

#### **Notes**

- 1 *A cultural business means a Canadian business that carries on any activities related to the publication, distribution or sale of: books, magazines, periodicals, newspapers, film or video recordings, audio or video music recordings, or music; the exhibition of films; radio communication; radio, television and cable television broadcast undertakings; satellite programming; and broadcast network services.*
- 2 *These acquisitions were the purchase of Nexen, Inc by China's Chinese National Offshore Oil Corp and the takeover of Progress Energy Resources Corp by Malaysia's Petroliam Nasional Berhard.*
- 3 *Statement by the Prime Minister of Canada on foreign investment, 7 December 2012; [www.pm.gc.ca/eng/media.asp?id=5195](http://www.pm.gc.ca/eng/media.asp?id=5195).*
- 4 *Industry Canada, Statement Regarding Investment by Foreign State-Owned Enterprises, 7 December 2012; [www.ic.gc.ca/ecic/site/ica-lic.nsf/eng/lk81147.html](http://www.ic.gc.ca/ecic/site/ica-lic.nsf/eng/lk81147.html).*
- 5 *'Premier Wall says Province cannot support Potash Takeover Bid' news release of the Government of Saskatchewan, 21 October 2010; [www.gov.sk.ca/news](http://www.gov.sk.ca/news).*
- 6 *'BHP Billiton Withdraws Its Offer to Acquire Potash Corp and Reactivates Its Buy-Back Program', News Release dated 15 November 2010; [www.bhpbilliton.com](http://www.bhpbilliton.com).*

# Goodmans<sup>LLP</sup>

Richard Annan  
Calvin S Goldman QC  
Michael Koch  
Joel Schachter

[rannan@goodmans.ca](mailto:rannan@goodmans.ca)  
[cgoldman@goodmans.ca](mailto:cgoldman@goodmans.ca)  
[mkoch@goodmans.ca](mailto:mkoch@goodmans.ca)  
[jschachter@goodmans.ca](mailto:jschachter@goodmans.ca)

Bay Adelaide Centre  
333 Bay Street, Suite 3400  
Toronto  
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Tel: +1 416 979 2211  
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