The Foreign Investment Regulation Review

Eighth Edition

Editors
Calvin S Goldman QC and Michael Koch

The Law Reviews

The Foreign Investment Regulation Review

Eighth Edition

Editors
Calvin S Goldman QC and Michael Koch

The Law Reviews

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gracie Ford

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Sarah Andreoli

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-454-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALRUD

BOYANOV & CO

CLEARY GOTTLIEB STEEN & HAMILTON LLP

COVINGTON & BURLING (PTY) LTD

DARROIS VILLEY MAILLOT BROCHIER

FRESHFIELDS BRUCKHAUS DERINGER LLP

GOODMANS LLP

HOGAN LOVELLS

KING & WOOD MALLESONS

MATHESON

SZA SCHILLING ZUTT & ANSCHÜTZ
RECHTSANWALTSGESELLSCHAFT MBH

URÍA MENÉNDEZ

VILAF – VIETNAM INTERNATIONAL LAW FIRM

CONTENTS

PREFACE

This eighth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions.

Unprecedented challenges have arisen in 2020 not only to the health and well-being of persons around the globe, but also to globalisation itself and, with it, the flow of capital. Whereas foreign investment has for a number of years been attracting increased attention, in the past year this trend has accelerated. Prior to the covid-19 pandemic, the global economy was continuing on its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions were increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, as well as increased tensions over trade and related policies, as we have seen between the United States and China. These increased tensions have heightened concerns over national interest considerations such as the export of jobs and industrial policies, as well as heightened national security concerns over cybersecurity, new technologies, communications and other strategic areas. As previously pointed out, these developments have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations on the one hand and national and public-interest considerations on the other, the latter sometimes weighing heavily against the former. As a result, more large cross-border mergers have been scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Since the pandemic has taken hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have been both accelerating and increasing in scope. Concerns about the benefits of globalisation have been on the rise in an environment where nations find themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical to the pandemic response, such as public health and supply chains. As the impacts of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds triggering foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, the foreign investment review process has recently seen a significant expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018. This included a broadening of transactions under CFIUS's scrutiny, most notably in connection with transactions involving critical technology, critical infrastructure and sensitive personal data. The exceptional coverage and commentary recently on the CFIUS review pertaining to TikTok is a reflection of the heightened interest in this area in the United States. In turn, there is greater focus on foreign investment in Europe, where a regulation gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States, which have themselves strengthened their existing foreign investment laws (e.g., Germany). In the EU, there will now be greater focus on proposed acquisitions by foreign state-owned enterprises (SOEs) that may be acquiring European firms whose value has been reduced by the pandemic, in order to prevent the use of unfair subsidies. Recent additional regulatory steps directed towards broadening the scope of foreign investment reviews are being considered in the United Kingdom, as well as in other jurisdictions, and have also been taken in Australia where review thresholds have been dropped and national security reviews will be broadened. In addition, in Canada, timelines for national security reviews have been significantly extended and investments by SOEs, as well as investments in Canadian businesses related to public health or the supply of critical goods and services, will be subject to heightened scrutiny in response to the pandemic.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant 'chilling' effect on investment decisions and economic activity. Foreign investment regimes are increasingly challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there will be a sizeable number of distressed industries and failing firms in sectors that have been most significantly impacted by the pandemic. The number of failing firm cases is likely to increase the longer the pandemic continues to substantially affect economies in jurisdictions across the globe. The evolving view in various jurisdictions over the past couple of months or so is that the timeline for economic recovery from the effects of the pandemic is likely to be considerably longer than earlier forecasts suggested, and especially in sectors impacted the hardest; the *OECD Economic Outlook* issued by the Organisation for Economic Co-operation and Development (OECD) in June 2020 also reflects a longer timeline for economic recovery than the OECD originally estimated in March 2020.

In this exceptional environment there may be failing firm cases where the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the acquiree cannot be sustained during that period. That may lead to a competitively less preferable acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business, because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant impact on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews, including, in some cases, as they may relate to or interface with, normative competition reviews, the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019. In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 16 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition, or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism as well as geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage in order to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients or the editors or publisher.

Calvin S Goldman QC and Michael Koch
Goodmans LLP
Toronto
August 2020

Chapter 2

CANADA

David Rosner and Justine Johnston[1]

I INTRODUCTION

Canada began regulating foreign investment in 1973, when the Foreign Investment Review Act was introduced. While this Act was emblematic of Canada's protectionist stance towards foreign direct investment in the 1970s and early 1980s, its replacement by the Investment Canada Act (ICA) in 1985 made Canada a friendlier environment for foreign investment.[2]

Although the overwhelming majority of foreign investment reviews in Canada are still successful, the marked increase in contentious reviews over the past 10 years demonstrates that Canada is not entirely immune to the parallel rising tide of economic protectionism and concern for national security that is increasing in various jurisdictions across the globe. Although recent developments suggest that the Liberal government of Prime Minister Justin Trudeau continues to encourage foreign investment, changes in geopolitical tensions and the global covid-19 pandemic are affecting foreign investment in Canada. In particular, the Trudeau government has become less welcoming of foreign investment from China than it was in earlier years and has stated that it will increase the scrutiny of foreign investment in Canadian businesses related to public health or involved in the supply of critical goods and services to Canadians or the Canadian government, as well as increase the scrutiny of investments made by state-owned enterprises (SOEs).

II FOREIGN INVESTMENT REGIME

The stated purpose of the ICA is to review 'significant investments' by non-Canadians with a view to encouraging investment and economic growth, as well as to review investments by non-Canadians that 'could be injurious to national security'.[3] The ICA applies when non-Canadians acquire existing Canadian businesses or establish new Canadian businesses.

The Minister of Innovation, Science and Industry (the Minister) is responsible for administering the majority of investments subject to the ICA, except for acquisitions or investments concerning 'cultural' businesses, which fall under the responsibility of the Minister of Canadian Heritage, as discussed in Section IV.vi.[4]

1 David Rosner is a partner and Justine Johnston is a senior associate at Goodmans LLP.
2 Mathieu Frigon, 'The Foreign Investment Review Process in Canada', Library of Parliament (12 July 2011), online: www.parl.gc.ca [Frigon].
3 Investment Canada Act, RSC 1985, c 28, Section 2 [ICA].
4 id., Section 4.

There are two separate but interdependent regimes for review under the ICA – net benefit reviews, aimed at determining whether the proposed transaction is likely to be of net benefit to Canada, and national security reviews.

i Net benefit reviews

Proposed transactions subject to the net benefit review provisions of the ICA are either notifiable or reviewable, depending on whether the applicable statutory financial threshold is met. When investments are notifiable, the foreign investor need only file a short notice of the transaction with the Director of Investments within 30 days of closing.[5] In contrast, investments that are reviewable cannot be completed until the foreign investor has received, or has been deemed to receive, prior approval.[6]

When a transaction is reviewable, the non-Canadian investor files an application with the Investment Review Division (IRD) of the Department of Innovation, Science and Economic Development.[7] The IRD is led by the Director of Investments, who is appointed by the Minister. It is the Director's duty to assist the Minister and make a recommendation as to whether a proposed investment would be of net benefit to Canada.[8] The Minister is not bound by the Director's recommendation and can approve or deny any investment. The Director and his or her officials assess the net benefit of a transaction using a series of factors set out in the ICA, as discussed in Section IV.i. Consultations also occur with provincial governments affected by the proposed transaction, and with the Competition Bureau.

ii National security reviews

All foreign investments in Canada may also be subject to a national security review if the investment could be injurious to national security.[9] The national security review provisions in the ICA do not specify threshold requirements based on the size of the transaction or the extent of the interest being acquired by the foreign investor. Accordingly, any transaction involving a non-Canadian investor in a Canadian business may be subject to a national security review, even if the transaction is neither notifiable nor reviewable under the net benefit review provisions discussed above. The national security review framework is discussed further in Section IV.ii.

iii Special rules for state-owned enterprises and cultural businesses

Special guidelines under the ICA also apply to investments by foreign SOEs. These special guidelines are discussed in Section IV.vi. Similarly, transactions involving cultural businesses (e.g., those involved in the production or distribution of books, or film, audio and video products), for which the financial thresholds for review are substantially lower, are also subject to special rules, as discussed in Section IV.vi.

5 id., Section 12.
6 id., Sections 16 and 17.
7 Alternatively, in the context of a cultural business, the non-Canadian investor applies to the Cultural Sector Investment Review Division of the Department of Canadian Heritage.
8 ICA (see footnote 3), Section 6.
9 id., Section 25.3.

III TYPICAL TRANSACTIONAL STRUCTURES

Non-Canadian investors should take care when structuring their transactions because the ICA applies differently depending on the transaction structure. Direct acquisitions of Canadian businesses are subject to net benefit review under the ICA, whereas indirect acquisitions of Canadian businesses are subject only to notification. The only exception is for the indirect acquisition of a cultural business, which will be subject to review if the applicable financial threshold is exceeded (see Section IV.i).

When determining how to structure the acquisition of a Canadian business, the question is whether to acquire the assets or the shares of the target. Share purchase transactions are usually less complex than asset purchase transactions. Setting aside the simplicity of a share acquisition, an asset acquisition is generally preferable for buyers. In an asset purchase, the buyer can choose to assume only specific assets and specific liabilities, whereas in a share purchase, the buyer acquires all the target's assets and liabilities. An asset acquisition can also have tax benefits for purchasers, who are often able to allocate some of the purchase price to depreciable property, resulting in future tax deductions.

i Acquisitions of public companies

The acquisition of a public company in Canada by way of an asset purchase generally requires at least 66.66 per cent shareholder approval. The acquisition of shares in a public company is usually achieved through one of three structures: plan of arrangement, amalgamation or takeover bid.

a A plan of arrangement is a statutory procedure that facilitates the acquisition of all the outstanding shares of the target company in a single step.

b An amalgamation is the combination of one or more entities resulting in a single new entity that houses the combined assets and liabilities of both pre-amalgamation entities.

c A takeover bid is an offer to acquire outstanding voting or equity securities where the securities subject to the offer, together with the shares already owned by the potential acquirer, constitute 20 per cent or more of the shares of the class that is subject to the offer. A takeover bid is the only method available in Canada to acquire legal control of a public company without the consent of the board of directors.

While any of these three structures can be used for a 'friendly' transaction, most parties prefer a plan of arrangement for several reasons. First, plans of arrangement are subject to court approval while amalgamations and takeover bids are not. The board of directors will often take comfort from judicial approval, which effectively limits the potential liability of the directors in respect of the transaction. Second, plans of arrangement offer significant flexibility by accommodating transaction mechanics that may be difficult or impossible to implement through a takeover bid or amalgamation. It will also more easily accommodate the restructuring or acquisition of the target's options and other convertible securities.

IV REVIEW PROCEDURE

As set out in Section II, there are two separate interdependent regimes for review under the ICA – the net benefit review and the national security review.

i Net benefit reviews

When a non-Canadian acquires control of an existing Canadian business, the investment is subject to a net benefit review if it exceeds certain prescribed financial thresholds;[10] otherwise, a notification of the transaction must be filed with the Director of Investments within 30 days of closing.

Key terms: non-Canadian, acquires control and Canadian business

The ICA provides a framework for determining whether an investor is non-Canadian, whether an investment is an acquisition of control by the non-Canadian, and whether the investment relates to a Canadian business.

Non-Canadian

The ICA defines a non-Canadian as an individual, a government or an agency thereof, or an entity that is not Canadian.[11]

An individual is a Canadian under the ICA if she or he is a Canadian citizen or a permanent resident 'who has been ordinarily resident in Canada for not more than one year after the time at which she or he first became eligible to apply for Canadian citizenship'.[12]

An entity is Canadian if it is Canada-controlled. The determination of whether an entity is Canada-controlled is more complex and is determined by applying Part V of the ICA. Subject to additional rules applicable to SOEs, cultural businesses and investments that may be injurious to national security (discussed below), an entity is Canada-controlled if:

a one Canadian owns a majority of the voting interests of the entity;

b two or more members of a voting group who are Canadians own a majority of the voting interests of the entity; or

c a majority of the voting interests of an entity are owned by Canadians and it can be established that the entity is not controlled in fact through the ownership of its voting interests by non-Canadians.[13]

An entity is also Canada-controlled when less than a majority of the voting interests of the entity are owned by Canadians, but it can be established that:

a the entity is controlled in fact through the ownership of its voting interests by one Canadian or by a voting group in which the Canadian members own a majority of those voting interests of the entity owned by the voting group; or

b in the case of an entity that is a corporation or limited partnership, the entity is not controlled in fact through the ownership of its voting interests and two-thirds of the members of its board of directors (or, in the case of a limited partnership, two-thirds of its general partners) are Canadians.[14]

10 id., Section 14.

11 id., Section 3.

12 ibid.

13 id., Section 26(1)(a) to (c).

14 id., Section 26(1)(d).

Acquires control

The manner of acquiring control varies under the ICA depending on the target entity. Generally, an acquisition of control occurs upon the acquisition of a majority of the voting shares or voting interests of an entity, either directly or indirectly, carrying on a Canadian business, or upon the acquisition of all or substantially all the assets used to carry on a Canadian business.

In the case of a corporation specifically:

a where fewer than one-third of voting shares of the target corporation are acquired, control of the corporation is deemed not to be acquired;[15]

b where more than one-third but less than 50 per cent of voting shares of the target corporation are acquired, there is a rebuttable presumption that control has been acquired;[16] and

c where more than 50 per cent of the voting shares of the target corporation are acquired, control of the corporation is deemed to be acquired.[17]

In the case of a non-corporate entity, such as a trust, partnership or joint venture, the acquisition of less than 50 per cent of the voting interests of the entity is deemed not to be an acquisition of control.[18]

When the foreign investor is an SOE,[19] the acquisition is in respect of a cultural business[20] or where a transaction may be injurious to national security,[21] the Minister is given the flexibility to make a fact-specific determination as to whether an acquisition of control has occurred.

Canadian business

A Canadian business is defined as 'a business carried on in Canada that has (1) a place of business in Canada, (2) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (3) assets in Canada used in carrying on the business'.[22] The ICA also contains provisions relating to businesses that are only partially carried on in Canada.

Threshold requirements

Foreign investments are reviewable by the IRD (or the Cultural Sector Investment Review Division of the Department of Heritage Canada when the target engages in cultural business activities) if a foreign investor acquires control of a Canadian business and the value of the business exceeds certain financial thresholds.[23]

15 id., Section 28(3)(d).
16 id., Section 28(3)(b).
17 id., Section 28(3)(a).
18 id., Section 28(3)(b).
19 id., Section 28(6.1).
20 id., Section 28(4).
21 id., Section 28(4.1).
22 id., Section 3.
23 id., Section 14.

Threshold factors

The applicable statutory threshold depends on a number of factors:

a whether the investor, or investors, is a World Trade Organization (WTO) investor or trade agreement investor, or the target Canadian business is controlled by such an investor. A 'WTO investor' generally refers to an individual who is a national of a WTO Member State, the government of a WTO Member State and a WTO-controlled entity. A 'trade agreement investor' refers to the subset of WTO Member States with which Canada executes a trade agreement, such as the free trade agreement between the United States, the United Mexican States and Canada (USMCA) or the Comprehensive Economic and Trade Agreement (CETA);[24]

b whether the investor is an SOE;

c whether the target entity carries on a cultural business;

d whether the acquisition is direct or indirect. Pursuant to the ICA, an indirect acquisition is a transaction involving the acquisition of the shares of a company incorporated outside Canada, which owns subsidiaries in Canada; and

e whether the investment raises national security concerns.

Statutory financial thresholds

In determining whether an applicable financial threshold has been met, either the book value or the enterprise value of the transaction must be determined, depending on the type of transaction. The book value is determined by the value of the assets acquired as reflected in the business's most recent annual audited financial statements.[25] The calculation of enterprise value depends on the structure of the transaction:

a In the case of an acquisition of shares of a public entity, enterprise value is equal to the market capitalisation of the entity prior to the acquisition plus its liabilities (excluding operating liabilities), minus its cash and cash equivalents.[26]

b In the case of an acquisition of shares of an entity that is not publicly traded, enterprise value is equal to the acquisition value plus the entity's total liabilities (excluding operating liabilities), minus cash and cash equivalents.[27]

c In the case of an acquisition of assets, enterprise value is equal to acquisition value plus liabilities assumed by the investor (excluding operating liabilities), minus cash and cash equivalents.[28]

The 2020 reviewable threshold for direct private sector investments involving WTO investors either as purchaser or seller is C$1.075 billion in enterprise value. Since 1 January 2019, this reviewable threshold has been adjusted annually to reflect the change in Canada's nominal gross domestic product. The 2020 equivalent reviewable threshold for private sector investments involving trade agreement investors is C$1.613 billion in enterprise value, which is also adjusted annually.

The reviewable threshold for direct acquisitions by investors not belonging to a WTO Member State, or for direct acquisitions of Canadian cultural businesses (irrespective of

24 id., Section 14(6).
25 Investment Canada Regulations, SOR/85-611, Section 3.1.
26 id., Section 3.3.
27 id., Section 3.4.
28 id., Section 3.5.

investor nationality), is only C$5 million (book value of assets).[29] For direct acquisitions by SOEs from WTO Member States, the 2020 reviewable threshold is C$428 million (book value of assets).

Indirect acquisitions (in which a non-Canadian parent company that controls a Canadian subsidiary is being acquired) by investors from WTO Member States are not reviewable, unless the Canadian subsidiary of the target is a cultural business.[30] Indirect acquisitions of cultural businesses are reviewable if the book value of the assets involved exceeds C$50 million, but this threshold is reduced to C$5 million if the Canadian asset value of the target exceeds 50 per cent of the target's total international asset value.

Applicable time frames

When a transaction is reviewable, the investor must submit an application to the IRD to aid the Minister in determining whether the proposed transaction is likely to be of net benefit to Canada. The Minister has 45 days from the date of receiving a sufficient application to complete the net benefit review and issue an opinion.[31] The Minister can (and typically does) unilaterally extend the review period by an additional 30 days.[32] In practice, investors should therefore allow at least 75 days for the process. The review period may only be extended beyond 75 days with the consent of the investor.

As previously noted, when a transaction is notifiable (i.e., not reviewable), the investor must file a completed notification of the transaction with the Director of Investments within 30 days of closing.[33]

Net benefit test

In determining whether the proposed transaction is of net benefit to Canada, the Minister considers a set of factors enumerated in the ICA, none of which is individually determinative. These include:

a the effect of the investment on the level and nature of economic activity in Canada, including employment, resource processing, and the utilisation of parts, components and services;

b the degree and significance of participation by Canadians in the business;

c the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety;

d the effect of the investment on competition within any industry or between industries in Canada;

e the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

f the contribution of the investment to Canada's ability to compete in world markets.[34]

29 Government of Canada, 'Thresholds for Review' (2020), online: www.ic.gc.ca.

30 ibid.

31 ICA (see footnote 3), Section 21(1).

32 id., Section 21.

33 id., Section 20.

34 ibid.

The broad language of the net benefit factors listed in the ICA (such as 'compatibility with industrial policies') provides the Minister with wide discretion to approve or reject proposed transactions. Although ministerial decisions regarding approval of a proposed transaction are published, the Minister may, but has no statutory right to, publicise the reasons for approving or rejecting reviewable investments without the consent of the investor.[35] Commentators have suggested that the Minister make available information concerning the net benefit determination and 'create a "jurisprudence" of decisions that could inform future investors of the commitments that are likely to be required'.

In making an assessment under the net benefit test, the Minister will consider the investor's plans for the Canadian business and proposed undertakings (i.e., legally enforceable commitments from the investor to the Canadian government), and may also consider representations made by other federal departments and agencies, any provinces likely to be significantly affected by the investment, and the Competition Bureau.[36]

Although not mandatory under the ICA, in practice, the Minister requires undertakings from the investor regarding the acquired Canadian business in virtually all reviewable transactions. The undertakings usually have a term of three years and address matters such as employment levels in Canada, Canadian participation in management and the board of directors, production targets, research and development, future capital expenditures and charitable contributions.

In the 2018–2019 fiscal year, 962 investment filings (both applications for review and notifications) were submitted (also termed 'certified').[37] There were 953 notifications certified, which is significantly more than the 742 certified in 2017–2018. The total value associated with the approved applications for review and certified notifications was C$84.73 billion in enterprise value and C$41.24 billion in asset value. These filings were categorised into five broad sectors, with 353 transactions in the business and services sector; 194 transactions in the manufacturing sector; 249 transactions in other services; 126 transactions in the wholesale and retail sector; and 40 transactions in the resources sector. Nine applications for net benefit review were filed in the 2018–2019 fiscal year, all of which were approved (this is the same number as over the 2017–2018 fiscal year).[38]

ii National security reviews

The national security review process runs on a different timeline from the net benefit review process and can take up to 200 days, or longer with the consent of the investor. In response to the covid-19 pandemic, the Trudeau government temporarily amended the ICA until 31 December 2020 to extend the timelines for giving notice of a national security review (see section VII).[39] If the Minister believes that an investment could be injurious to national security, the Governor in Council may order a formal national security review within 45 days of receipt

35 The Minister must provide reasons for rejecting a proposed investment to the non-Canadian investor – ICA (see footnote 3), Section 23.1.

36 id., Section 19.

37 Ministry of Innovation, Science and Economic Development, 'Annual Report: Investment Canada Act 2018–19' (2019), online: www.ic.gc.ca.

38 Ministry of Innovation, Science and Economic Development, 'Annual Report: Investment Canada Act 2017–18' (1 March 2019), online: www.ic.gc.ca.

39 Order Respecting Time Limits and Other Periods Established By or Under Certain Acts and Regulations for Which the Minister of Industry is Responsible (COVID-19), Ministerial Order pursuant to subsection 7(1) of the Time Limits and Other Periods Act (COVID-19), SC 2020, C. 11 (31 July 2020).

of a notification or an application for review under the net benefit provisions. Alternatively, within the same 45-day period, the Minister may notify the investor of a potential national security review. Pursuant to the covid-19-related amendments to the ICA, these initial review periods have been temporarily extended from 45 days to 60 days. If the transaction is not notifiable or subject to the net benefit provisions of the ICA (for example, because there is no acquisition of control), the Minister has 45 days from the date the transaction closes to notify the investor of a potential review.[40] Pursuant to the covid-19-related amendments to the ICA, this initial review period has been temporarily extended from 45 days to 180 days. If the Minister provides notice to the investor of a potential national security review, the Governor in Council has a further 45 days from the date of the notice to order the review.[41] Pursuant to the covid-19-related amendments to the ICA, the further review period has been extended from 45 days to 90 days.

When a formal national security review is ordered by the Governor in Council, the initial review period is 45 days, which may be unilaterally extended by the Minister for a further 45 days. Following the review, unless the Minister sends a notice that no further action will be taken, she or he can refer the matter to the Governor in Council, who has 20 days in which to take any measures advisable to protect Canada's national security, including blocking the investment, allowing the transaction to close subject to undertakings by the investor or certain terms and conditions, or, in the case of a completed transaction, order a divestiture.[42] The investor may be required to make legally binding undertakings to the Canadian government to mitigate potential harm to national security. The investor may give structural or behavioural undertakings, or a combination of these, to (1) obtain government approval of proposed locations to avoid proximity to strategic assets; (2) service and support some or all business lines in Canada; (3) create approved corporate security protocols to protect information; (4) conduct third-party compliance audits; and (5) provide access to facilities for compliance inspection to mitigate such harm.[43]

As noted above, unlike a net benefit review, which is limited to acquisitions of control over certain thresholds, a national security review may be invoked in any transaction involving a non-Canadian investor, irrespective of both the size of the transaction and the extent of the interest being acquired by the foreign investor. This can be particularly problematic from a timing perspective in situations where no application for review or notification is required under the net benefit provisions of the ICA, but a transaction may, nonetheless, raise national security concerns; for example, because of the nature of the target. Formal pre-acquisition clearance cannot be obtained under the national security provisions of the ICA.

Commentators have expressed concern that the ICA does not provide sufficient guidance on what may constitute a threat to national security.[44] The ICA does not define

40 ICA (see footnote 3), Section 25.2(1); National Security Review of Investments Regulations, SOR/2009-271, Section 2.

41 ICA (see footnote 3), Section 25.4(1); National Security Review of Investments Regulations, note 41, Section 6.

42 ICA (see footnote 3), Section 25.4(1); National Security Review of Investments Regulations, note 41, Section 6.

43 'Annual Report: Investment Canada Act 2018–19' (see footnote 37).

44 Industry Canada, 'Regulatory Initiative: Amendments to the Investment Canada Regulations – Forward Regulatory Plan 2014–2016' (1 April 2014), online: www.ic.gc.ca.

national security, and so the Minister has broad discretion to review investments. To aid investors, the government published guidelines detailing the factors that it will consider in either ordering or considering a national security review.[45] The factors include:

a potential effects of the investment on Canada's defence capabilities and interests;
b potential effects of the investment on the transfer of sensitive technology or know-how outside Canada;
c potential effects of the investment on the security of Canada's critical infrastructure;
d potential effects of the investment on the supply of critical goods and services to Canadians or the Canadian government;
e potential for the investment to enable foreign surveillance or espionage, hinder current or future intelligence or law enforcement operations, or involve or facilitate the activities of terrorist organisations or organised crime; and
f potential effects of the investment on Canada's international interests, including foreign relationships.

Investors should engage with the IRD early in a review if any of the factors above are present, and work with counsel to identify any necessary mitigation strategies. In addition, investors should take note that the Canadian government has close working relationships with its Western allies, including the United States, United Kingdom, Australia and New Zealand, on matters of national security, which may affect Canadian foreign investment reviews.

iii Enforcement

If the Minister believes that a non-Canadian has breached the ICA (for example, by implementing an investment that required prior approval without first obtaining the approval, or failing to comply with a written undertaking), the Minister may send a demand to the non-Canadian, requiring the person or entity to cease the contravention, to remedy the default, to show cause why there is no contravention or to justify non-compliance with any undertakings provided.[46]

If a non-Canadian fails to comply with such a demand, the ICA provides for an application to be made to a superior court. The court may make any order that it determines is required in the circumstances, including an order imposing a penalty not exceeding C$10,000 for each day on which the person or entity is in contravention. The penalty is recoverable as a debt and any breach of a court order would constitute contempt of court. An appeal may be brought from any such order by the court.[47]

iv Exemptions from net benefit or national security reviews

Part II of the ICA provides a list of transactions that are exempt from the review and notification requirements contained in the ICA, and a list of transactions that are also exempt from the national security provisions of the ICA.

Transactions exempt from the review and notification requirements, but still subject to the national security review provisions, include:[48]

45 Minister of Innovation, Science and Economic Development, 'Guidelines on the National Security Review of Investments' (19 December 2016), online: www.ic.gc.ca.
46 ICA (see footnote 3), Section 39.
47 id., Section 40.
48 id., Section 10(1).

a an acquisition in the ordinary course of business by a trader or dealer in securities;
b an acquisition in the ordinary course of business by a venture capitalist;
c an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance;
d an acquisition of control for the purpose of facilitating financing so long as the acquirer divests itself of control within two years;
e an acquisition of control through an amalgamation, merger, consolidation or reorganisation where the ultimate control through the ownership of voting interests remains unchanged;
f an acquisition of control of a Crown corporation;
g an acquisition of control of a non-profit corporation;
h a transaction to which Part XII.01 of the Bank Act applies;
i an involuntary acquisition of control resulting from the devolution of an estate or by operation of law;
j certain acquisitions of control by non-Canadian insurance businesses or affiliates thereof; and
k an acquisition of control of a farming business where real property is acquired.

Transactions exempt from the review and notification requirements contained in the ICA, and from the national security review provisions, include:[49]
a an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance where the acquisition is subject to approval under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;[50]
b an acquisition of control through an amalgamation, merger, consolidation or reorganisation where the ultimate control through the ownership of voting interests remains unchanged and the acquisition is subject to approval under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;
c an acquisition of control of a Crown corporation;
d a transaction to which Part XII.01 of the Bank Act applies; and
e certain acquisitions of control by non-Canadian insurance businesses, or affiliates thereof, where the acquisition is subject to approval under the Bank Act, the Cooperative the Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act.

49 id., Section 10(2).
50 Note, an acquisition of control by a foreign lender in connection with the realisation of security granted for a loan or other financial assistance that is not subject to approval under the Bank Act, SC 1991, c 46, Cooperative Credit Associations Act, SC 1991, c 48, Insurance Companies Act, SC 1991, c 47 or Trust and Loan Companies Act, SC 1991, c 45, is still exempt from the review requirements of the ICA, but not the notification or national security provisions – ICA (see footnote 3), Section 10(1.1).

v Interplay with competition law

Investments that are subject to foreign investment review may also be subject to review under the Competition Act (CA),[51] whereby certain proposed acquisitions and business combinations trigger advance notification requirements. Specifically, Part IX of the CA establishes a review process whereby parties to a transaction must provide the Commissioner of Competition with pre-transaction notification filings if the proposed transaction exceeds specified monetary and shareholding thresholds.[52] These thresholds are different from those contained in the ICA. When a transaction is subject to review under Part IX of the CA, it cannot be closed until expiry of a 30-day statutory waiting period, which may be extended if the Commissioner requires more information about the proposed transaction.[53] Many reviews under the CA take approximately four to five months to complete; some cases certainly take longer.

Competition and foreign investment reviews in Canada cannot be 'siloed', as they require careful coordination, in terms of both timing and message. For example, it is of fundamental importance to ensure that information provided to each authority by the transacting parties is consistent. One of the factors considered in the net benefit test during a foreign investment review is the effect of the investment on competition within any industry or between industries in Canada. Given the Competition Bureau's expertise in this area, the Minister, through the Director of Investments, will consult the Bureau in respect of this criterion.[54]

Parallel reviews under the CA and the ICA can also have real-world timing implications for a proposed transaction. For example, the Minister might not issue a clearance under the ICA until the Bureau has completed its review, especially where there are significant competition issues. While not usual practice, there is also a possibility that the Competition Bureau may not complete its assessment until the ICA review process concludes, especially if there are significant foreign investment issues and sufficient competition issues to give rise to a supplementary information request.

The recently increased scrutiny of investments related to public health or involved in the supply of critical goods and services to Canadians or the Canadian government, and

51 RSC 1985, c C-34. Canada's competition law is governed by the CA, a federal statute that applies across Canada and contains both criminal and civil provisions aimed at preventing harmful anticompetitive practices in the marketplace. The CA empowers Canada's Commissioner of Competition to challenge transactions that are likely to prevent or lessen competition substantially in a relevant market. Subject to certain exceptions, the Commissioner may challenge a proposed transaction before the Competition Tribunal within one year of the transaction's substantial completion if it raises competition concerns. The Tribunal, an independent adjudicative body, is distinguished from the Competition Bureau (headed by the Commissioner), which investigates complaints and decides whether to proceed with the filing of an application to the Tribunal. The Bureau is part of the Department of Innovation, Science and Economic Development.

52 The size of the parties' threshold is met where the parties to the transaction (with their affiliates) have aggregate Canadian assets that exceed C$400 million or gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate (CA (see footnote 51), Section 109(1)). For the pre-merger notification requirement to be triggered, the size of the transaction must also exceed a threshold, which was C$96 million for 2020 (CA (see footnote 51), Section 110). This threshold value is determined annually according to an indexing mechanism set out in the CA, which is tied to Canada's gross domestic product.

53 CA (see footnote 51), Section 123(1).

54 Frigon (see footnote 2).

investments by SOEs, as well as the extended timelines and broadening scope of national security reviews may lead to fewer foreign entities proposing acquisitions of failing firms in Canada, even though they may be competitively preferable to a domestic entity. This may give rise to increased concentration of Canadian markets and related increases in market power going forward.

vi Special rules for SOEs and cultural businesses

Special considerations apply to investments by foreign SOEs and acquisitions of Canadian cultural businesses.

SOEs

As part of the Minister's net benefit assessment, investments by foreign SOEs must meet specific guidelines. These guidelines were significantly revised in 2012, following high-profile acquisitions of Canadian oil and gas producers by Asian SOEs.

Reflecting Canada's heightened sensitivity to SOE transactions, the 2012 amendments to the ICA significantly broadened the ICA definition of an SOE. Now, in addition to organisations that are directly owned by foreign governments, SOEs include entities 'controlled or influenced directly or indirectly' by a foreign government.[55] The ICA also allows the Minister to make 'control in fact' determinations about SOEs; in practice, this means the Minister can declare that a Canada-controlled investor is controlled in fact by an SOE, possibly subjecting the investment to review under the ICA. The Minister can also determine that an SOE has acquired control of a Canada-controlled entity, subjecting even minority investments by SOEs to ICA review.[56]

As detailed above, the financial thresholds for review are lower for SOEs, increasing the likelihood of review of SOE transactions. The 2020 financial threshold applicable to a WTO SOE is C$428 million (book value of assets).

Pursuant to the SOE guidelines, the Minister may consider the governance and commercial orientation of SOEs to determine whether an acquisition by an SOE is of net benefit to Canada. The Minister's aim is to ensure that foreign SOEs acquiring Canadian businesses will operate in a transparent and commercially oriented manner that mirrors private sector enterprises, and to prevent state owners from using Canadian acquisitions to effect their own undesirable objectives.[57] In practice, this means that SOEs seeking to complete investments subject to the ICA must satisfy the Minister that they are free from political influence and will adhere to Canadian laws, implement standards and practices that promote sound corporate governance and transparency, adopt free market principles and make positive contributions to the productivity and industrial efficiency of the Canadian business.[58]

To uphold these principles, the Minister may require that an SOE investor provide additional undertakings, such as the appointment of Canadians as independent directors on

55 ICA (see footnote 3), Section 3.

56 Industry Canada, 'Investment Canada Act – All Guidelines' (7 December 2012), online: www.ic.gc.ca.

57 Angela Avery, Peter Glossup and Paula Olexiuk, 'Foreign Investment in Canada's Oil and Gas Sector: New and Emerging Challenges' (2013) 51:2 *Alta L Rev* 343 at paragraph 69.

58 Industry Canada, 'Statement Regarding Investment by Foreign State-Owned Enterprises' (7 December 2012), online: www.ic.gc.ca.

the board of directors.[59] Unlike undertakings required by non-SOE investors, which typically have a three-year term, undertakings required of SOEs might continue indefinitely or for as long as the investor is an SOE.[60]

Cultural businesses

The Minister of Canadian Heritage is responsible for reviewing acquisitions of, or investments in, cultural businesses.[61] A cultural business is defined in the ICA and can include, for example, businesses involved in the publication or distribution of books, film, music and radio communications.[62] Even if only a small portion of a business's operations is cultural, the Canadian business is a cultural business for the purposes of foreign investment review.

As set out in Section IV.i, the monetary thresholds for review of cultural businesses are much lower than those for non-cultural businesses, ranging from C$5 million to C$50 million (book value of assets). Even when an investment would be otherwise notifiable, the Minister of Canadian Heritage has considerable discretion to review a transaction involving a cultural business when certain notification requirements are met.[63]

Transactions involving cultural businesses must also align with Canada's cultural policy objectives, where relevant, in addition to meeting the standard 'net benefit to Canada' test. Specifically, the Minister of Canadian Heritage will consider the consistency of the investment with Canada's cultural policies in such industries as periodical and book publishing, and film production and distribution.

V FOREIGN INVESTOR PROTECTION

There are a variety of trade and investment agreements pertinent to foreign investors in Canada; namely, free trade agreements, plurilateral agreements, WTO agreements and bilateral investment treaties.[64] In Canada, bilateral investment treaties are called foreign investment promotion and protection agreements (FIPAs), and they aim to promote and protect foreign investment through a mechanism of legally binding reciprocal rights and obligations.[65]

Although there are a number of exclusions concerning sensitive policy areas, such as environmental protection, FIPAs generally enable foreign investors to receive the same treatment as domestic or other third-party foreign investors,[66] referred to respectively as 'national treatment' and 'most-favoured-nation treatment'.[67] FIPAs include provisions

59 'Investment Canada Act – All Guidelines' (see footnote 56).
60 'Statement Regarding Investment by Foreign State-Owned Enterprises' (see footnote 58).
61 ICA (see footnote 3), Section 4.
62 id., Section 14.1(6).
63 id., Section 15.
64 Government of Canada, 'Agreement Types' (21 March 2017), online:www.international.gc.ca.
65 ibid.
66 ibid.
67 See, for example, Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Canada and the People's Republic of China, Articles 5 and 6 (entered into force 1 October 2014) (Canada–China foreign investment promotion and protection agreement (FIPA)).

allowing foreign investors to repatriate their capital and returns, and precluding the Canadian government from expropriating their investments without arranging sufficient and timely compensation.[68]

i Agreements in force and under way

Canada has 38 FIPAs in force. FIPAs often contain investor–state dispute settlement (ISDS) provisions, which allow investors to bring claims against the Canadian government for discriminatory practices, and to resolve those disputes through an arbitral tribunal.[69] For example, Chapter 8 of the CETA, a trade agreement concluded between Canada and the European Union, also provides an ISDS mechanism whereby foreign investors may submit a claim to an arbitral tribunal.[70] Similarly, Canada is a member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which includes an ISDS mechanism that allows foreign investors to submit claims to arbitration and be awarded monetary damages or restitution of property.[71]

Recent trade agreements have moved away from ISDS. In November 2018, Canada, the United States and Mexico signed a renegotiated North American Free Trade Agreement (NAFTA) and signed a new free trade agreement, USMCA, which came into force on 1 July 2020. Chapter 11 of the NAFTA included an ISDS provision that allowed investors from NAFTA states to submit arbitration claims, including claims for damages, against the Canadian government. Chapter 14 of the USMCA will remove Canada from the ISDS provision of NAFTA three years after NAFTA's termination.[72] Canada's exit from ISDS will greatly limit protection offered to both American and Mexican investors.

ii Enforcement issues

FIPAs involving Canada include exemptions for cultural industries engaged in the production and sale of books, film and music, and for environmental measures to protect human, animal or plant life or to conserve exhaustible natural resources.[73] Other exceptions include measures to ensure the integrity and stability of the financial system, and to protect financial market participants and investors.[74] Moreover, a decision by the Canadian government under the ICA regarding the approval of an investment after a review is generally exempt from the dispute settlement provisions.[75]

Furthermore, general concerns regarding the transparency of arbitration apply but are mitigated by the emergence of mechanisms such as the Rules on Transparency in Treaty-Based Investor–State Arbitration, established by the UN Commission on International Trade Law and which came into effect on 1 April 2014.

---

68 See, for example, id., Articles 10 to 12.

69 See, for example, id., Articles 19 to 32.

70 Comprehensive Economic and Trade Agreement, Canada and the European Union, 30 October 2016, Article 8.

71 Trans-Pacific Partnership Agreement, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States (withdrawn) and Vietnam, 4 February 2016, Article 9.

72 Free Trade Agreement between the United States of America, the United Mexican States, and Canada, 1 July 2020, Chapter 14.

73 See, for example, Canada–China FIPA (see footnote 67), Article 33.

74 ibid.

75 id., Annex D.34.

VI OTHER STRATEGIC CONSIDERATIONS

With the recent rise in the financial thresholds for review applicable to direct private sector investments, increasingly only the largest transactions are subject to a net benefit review pursuant to the ICA. Such investments tend to be of a very high-profile nature, and the Minister's discretion to address both national interest and national security considerations means that not only must legal process and substantive considerations be taken into account, but also the political and public relations aspects of a proposed acquisition. Indeed, since the 2012–2013 fiscal year, more than 70 per cent of the issued Section 25.3 Orders have been for Chinese and Russian investors. A recent high-profile example is the US$1.5 billion proposed acquisition by CCCI, a Chinese SOE, of Aecon Canada, a Canadian construction firm. The Canadian government issued a Section 25.4 Order blocking the proposed acquisition of Aecon Canada on the basis that it would be injurious to national security. CCCI's proposed investment was the third investment to be blocked under the national security regime and the first transaction blocked by the Trudeau government (other foreign investments have been approved with conditions or divestitures). These developments reflect Canada's fluctuating geopolitical relationships with other countries.[76]

Accordingly, in the planning phase of such a transaction, it is prudent to engage legal counsel and government relations and communications experts to understand how the particular transaction may be perceived against the political landscape and to develop key messages that will ensure a consistent, positive public perception regarding the transaction's benefits for Canada.

Investors proposing major transactions in sensitive economic sectors, such as Canada's oil and gas sector, or transactions of any size that might raise national security considerations, are also encouraged to arrange a meeting with the IRD at an early stage in their planning to identify any policy concerns that may be raised by a particular transaction.

VII CURRENT DEVELOPMENTS

Increased scrutiny in recent years of foreign investment has been driven by the rise of both national interest considerations and the number of jurisdictions raising national security concerns. In the 2018–2019 fiscal year, nine notices were issued to non-Canadian investors under Section 25.2 of the ICA on the grounds that the investment could be injurious to Canadian national security, and seven national security reviews were ordered under Section 25.3 of the ICA.[77] However, only four of the seven national security reviews resulted in further action (two transactions were withdrawn under Section 25.3 of the ICA and two transactions were subject to divestiture orders under Section 25.4 of the ICA). Notwithstanding this emerging trend, the Trudeau government has placed significant emphasis on attracting foreign direct investment in infrastructure projects, and has held seminars aimed at encouraging investors to deploy capital in Canada.

76 'Annual Report: Investment Canada Act 2018–19' (see footnote 37).

77 ibid.

In its initial years, the Trudeau government welcomed foreign investment from China, which put it on unique footing when compared to previous Canadian governments[78] and certain of Canada's Western allies. Following recent changes in geopolitical tensions between the West and China, the profile of Chinese foreign investment in Canada has risen. The Trudeau government's decision in 2018 to block the *CCCI/Aecon* Canada transaction on national security grounds marked a shift towards increased scrutiny of Chinese foreign investment, particularly investments by Chinese SOEs. This shift is consistent with the stance of Canada's Western allies, and a global environment that is increasingly inward facing.

In response to the covid-19 pandemic, Canada introduced new measures to increase the scrutiny of all investments in Canadian businesses related to public health or involved in the supply of critical goods and services to Canadians or to the Canadian government, as well as investments made by SOEs.[79] The Trudeau government also temporarily amended the ICA until 31 December 2020 to give the Minister the power to extend the timelines for giving notice of national security reviews.[80] In June 2020, opposition members of the Canadian government (not the government or its members) also initiated a study of whether Canadian businesses operating in strategic industries have been devalued during the pandemic; whether current ICA financial thresholds are adequate to trigger a net benefit review given the potential for devaluation of businesses operating in strategic Canadian industries; and whether Canada should place a temporary moratorium on acquisitions from SOEs of authoritarian countries. Although public hearings were held before the Industry Committee of the House of Commons, the study lapsed prior to issuing a report when the Trudeau government prorogued Parliament on 18 August 2020. It is anticipated that the study is likely to continue once the next session of Parliament opens on 23 September 2020.

78 For example, in 2015, the former Conservative government of Prime Minister Stephen Harper required O-Net Communications Group Ltd. (O-Net), a developer of optical networking components based in Hong Kong and a subsidiary of a Chinese SOE, to divest its investment in ITF Technologies Inc, a Montreal-based technology company, on national security grounds. O-Net made an application to the Federal Court of Canada for the judicial review of this decision, alleging the government breached its right to procedural fairness by, among other ways, failing to disclose its national security concerns regarding the transaction or to provide an opportunity to respond. In late 2016, the newly elected Trudeau government agreed to an order that it would undertake a new review of the ITF Technologies acquisition. In 2017, the Trudeau government announced that it would reverse the divestiture order, subject to certain conditions.

79 Government of Canada, Investment Canada Act Ministerial Statement Regarding Investment on Foreign Investment Review and COVID-19, online: www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html.

80 See footnote 39.

Appendix 1

ABOUT THE AUTHORS

DAVID ROSNER

Goodmans LLP

David Rosner is co-chair of the competition, antitrust and foreign investment group at Goodmans LLP. He provides strategic advice on all aspects of Canadian competition law, particularly with respect to complex mergers (including in regulated industries), mergers involving multi-jurisdictional review, alleged cartels and alleged abuses of dominance (including those involving technology and intellectual property). David also advises on mergers subject to the Investment Canada Act.

David was the only Canadian named in the *Global Competition Review* 40 Under 40 in 2020 and one of the 2019 *Lexpert* Rising Stars: Leading Lawyers Under 40. David is recognised as a leading competition lawyer by *Chambers Canada* and *Chambers Global*. He has also consistently been recognised since 2017 as one of the most highly regarded North American partners by *Who's Who Legal: Competition – Future Leaders*, which profiles the foremost practitioners in the competition community under 45. Clients describe David as 'a sharp thinker with great analytical capabilities', and praise his 'straightforward practical advice'.

David is an active member of the Canadian competition law community. He has been a professor at Osgoode Hall Law School and served as chair of several committees of the Canadian Bar Association's National Competition Law Section.

JUSTINE JOHNSTON

Goodmans LLP

Justine Johnston is a senior associate in the competition, antitrust and foreign investment group at Goodmans LLP. She advises on all aspects of Canadian competition law, including domestic and multinational mergers, alleged cartels and alleged abuses of dominance (including investigations), as well as compliance matters. Justine also provides advice on transactions subject to the Investment Canada Act.

Justine is actively involved in the competition community, serving as chair of the Young Lawyers Committee of the Canadian Bar Association Competition Law Section, as a young lawyer representative for the American Bar Association, and as an executive member of the Ontario Bar Association's Women Lawyers Forum.

Justine frequently writes and speaks on matters related to competition law and diversity and inclusion in the legal profession.

GOODMANS LLP

Bay Adelaide Centre – West Tower
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7
Canada
Tel: +1 416 979 2211
Fax: +1 416 979 1234
drosner@goodmans.ca
jjohnston@goodmans.ca
www.goodmans.ca

an LBR business

ISBN 978-1-83862-454-5