3. Investment Policy

Regulation of Foreign Investment – *Investment Canada Act*

(Current as of August 2021)

Canada's regime for foreign investment review is primarily governed by the Investment Canada Act (ICA). It provides for both net benefit and national security reviews of certain investments by "non-Canadians". In the case of a corporation, the term "non-Canadian" is defined in the ICA as a business that is controlled through the ownership of voting shares by persons who are not citizens or permanent residents of Canada.

Net Benefit Review Thresholds for 2021

The ICA employs a "net benefit to Canada" test for investments that are subject to review and approval by the federal Minister of Innovation, Science and Industry (Innovation Minister) and/or the federal Minister of Canadian Heritage (Heritage Minister). The Heritage Minister is responsible for reviewing transactions involving the acquisition of control of or the establishment of a business related to Canada's cultural heritage or national identity (cultural business). Examples of cultural businesses include those in the areas of publishing, film, video, and music. The Innovation Minister is responsible for evaluating all other transactions reviewable under the ICA.

Acquisitions of Control

Acquisitions of control of Canadian businesses by non-Canadians, whether direct or indirect, are subject to either notification or ministerial review under the ICA, with certain exceptions.

Generally, investments will not be subject to review (will only be subject to notification) where applicable thresholds are not exceeded or where an exemption applies. A notification can be filed either prior to or within 30 days following implementation of the investment.

The threshold for a ministerial review depends on whether the non-Canadian investor is (a) controlled by a person or an entity from a member of the World Trade Organization (WTO),

(b) a state-owned enterprise (SOE), or (c) from a country considered a trade agreement investor under the ICA. In certain cases, the status of the controller of the Canadian business being acquired may determine the applicable threshold. As noted above, a different threshold applies if the acquired Canadian business carries on a cultural business (including, for threshold purposes only, activities involving radio and/or television broadcasting).

Generally speaking, for a non-SOE WTO member, other than a trade agreement investor, directly acquiring control of a Canadian business that does not carry on a cultural business, the review threshold will be met if the Canadian business has an enterprise value equal to or greater than C$1.043 billion.

For a non-SOE trade agreement investor directly acquiring a Canadian business that does not carry on a cultural business, the review threshold will be met if the Canadian business has an enterprise value equal to or greater than C$1.565 billion.

"Enterprise value" is meant to reflect the actual value of the Canadian business as a going concern. The method to be used for determining the enterprise value of a transaction varies depending on whether the target entity is private or publicly listed and whether the transaction involves the acquisition of the assets or the voting interests in an entity.

An indirect acquisition of control by a WTO member, being an acquisition of control of a foreign corporation that controls a Canadian corporation carrying on the Canadian business, is generally not subject to the review requirement.

Where the Canadian business does not involve a cultural business and the acquirer is an SOE and a WTO investor (or the Canadian business is controlled by a WTO investor), a direct acquisition of control of a Canadian business requires review if the aggregate book value of the assets of the entity carrying on the Canadian business is equal to or greater than C$415 million.

Where the Canadian business involves a cultural business or the acquirer is not a WTO investor (and the Canadian business is not at such time controlled by a WTO investor), a direct acquisition of the Canadian business requires approval if the aggregate book value of the assets of the target entity carrying on the Canadian business is equal to or greater than C$5 million. Also, in such case, an indirect acquisition of control is subject to the approval requirement if the aggregate book value of the assets of the entity carrying on the Canadian business and all other entities in Canada (control of which is being directly or indirectly acquired in the transaction) is equal to or greater than C$50 million. However, if the aggregate book value of the assets exceeds C$5 million and represents 50% more of the book value of all assets of all entities being acquired in connection with the transaction, the transaction will require approval even if the asset value is less than C$50 million.

Establishments of New Canadian Businesses

A non-Canadian who establishes or proposes to establish a new Canadian business (as opposed to acquiring control of one) is required to file a notification under the ICA, but such investments are generally not subject to review under the ICA (except where the investment involves the establishment of a new cultural business and the Governor in Council (i.e., the federal Cabinet) elects to review such investment).

National Security Review

Where the Innovation Minister has reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security, the Governor in Council may review an investment implemented or proposed by a non-Canadian to, among other things, establish a new Canadian business, acquire control of a Canadian business or, subject to certain conditions, acquire, in whole or in part, or to establish an entity carrying on all or any part of its operations in Canada. A national security review may occur regardless of whether the investment is also subject to a net benefit review or notification under the ICA.

Provincial Investment Restrictions

All Canadian provinces welcome foreign investment, but some have implemented measures to protect sensitive sectors. For example, some impose special taxes on the acquisition of residential properties and have restrictions on the ownership of certain lands by foreigners.

Remittance of Funds

Canada does not restrict foreign investors from repatriating investments or profits. Canadian dollars are freely convertible into other currencies. Withholding tax applies to certain payments to non-residents. These include dividends, certain interest payments, royalties and management fees. The general rate of withholding tax is 25%, but this may be reduced or eliminated under an applicable bilateral tax treaty. Generally, only interest paid to non-arm's length creditors or "participating interest" is subject to withholding tax.

Fees payable to a non-resident for services rendered in Canada (including commissions) are subject to a 15% withholding, which can be applied as a credit against any income tax owing by the non-resident from carrying on business in Canada. The credit, which may result in a refund, is obtained by filing a Canadian income tax return for the applicable taxation year.

Sensitive Sectors

In addition, other federal legislation sets specific limits on foreign ownership in certain industry sectors including, for example, broadcasting, telecommunications, and transportation.

Broadcasting

A broadcasting licence will not be issued unless:

- The corporation is incorporated or continued in Canada
- The chief executive officer and not fewer than 80% of the directors of the corporation are Canadians
- Canadians own and control at least 80% of the voting shares of the corporation and 80% of its votes
- The Corporation is not otherwise controlled by a non-Canadian

Where the corporation is a subsidiary corporation, the parent corporation must be incorporated or continued in Canada and Canadians must own or control at least 66.66% of its voting shares and 66.66% of its votes. Where Canadians own fewer than 80% of the voting shares of the parent corporation or hold fewer than 80% of the votes, the chief executive officer is a non-Canadian, or fewer than 80% of the directors of the parent corporation are Canadian, neither the parent corporation nor its directors may exercise control or influence over any programming decisions of the subsidiary corporation.

Telecommunications

Subject to the exceptions discussed below, foreign ownership of a Canadian telecommunications common carrier is limited to 20% of the voting shares, and least 80% of the directors of a carrier must be Canadians. Non-Canadians may also own 33.33% of the voting shares of the carrier's parent corporation. In either case, non-Canadians may not exercise "control in fact" of the carrier. There are no Canadian foreign ownership restrictions on a person who (a) has annual revenues from telecommunications services that represent less than 10% of total annual revenues from the provision of telecommunications services in Canada or (b) does not own or operate transmission facilities but merely leases facilities or services in bulk from a carrier and resells the same (i.e., is a "reseller"). A carrier that is eligible under (a) to operate in Canada remains eligible to operate if its annual revenues exceed 10% of total annual revenues from the provision of telecommunications services in Canada provided the growth in revenues did not result from the acquisition of control of another Canadian carrier or of assets used by another Canadian carrier to provide telecommunications services.

Satellite and international submarine cable facilities are also exempt from these foreign ownership restrictions.

Transportation

Foreign ownership is generally limited to 49% of voting rights in domestic air transportation. However, a single foreign corporation or entity can only own up to 25% of the voting rights of a "Canadian" airline and any number of foreign airlines may together only own a total of 25% of the voting rights of a "Canadian" airline.

Maritime cabotage is generally restricted to Canadian registered duty-paid vessels. There is no foreign ownership restriction on companies incorporated in Canada that own such vessels, and companies incorporated outside Canada may own such vessels if a qualified company or individual is acting with respect to all matters relating to the vessel.

In addition, if a proposed transaction requires pre-merger notification under the *Competition Act* and "involves" a federal "transportation undertaking," a filing under the *Canada Transportation Act* (CTA) may be required. In that instance, the Minister of Transport (MOT) must assess whether or not the proposed transaction raises issues with respect to the public interest as it relates to national transportation. If the MOT is of the opinion that a proposed transaction does not raise such public interest issues, then further review under the CTA is not required. The MOT must inform the parties of this decision within 42 days of the filing.

On the other hand, where the MOT is of the opinion that a proposed transaction does raise public interest issues, he or she may direct the CTA or appoint and direct another person to examine those issues and report to him or her within 150 days (or such longer period as the MOT may allow). In addition, the Commissioner of Competition must, within 150 days of the pre-merger notification under the Competition Act (or such longer period as the MOT may allow), report to the MOT and the parties on any concerns regarding a potential prevention or lessening of competition that may result from the transaction. The CTA provides for a bifurcated process for the consideration of public interest issues and competition issues and the settlement of undertakings, where appropriate. Ultimately, it is the Governor in Council, on the recommendation of the MOT, who determines whether or not the proposed transaction is in the public's interest and may proceed.