FOREIGN INVESTMENT LAWS

The Investment Canada Act (ICA) is the only federal foreign-investment law of general application. Certain statutory provisions restrict foreign investment and ownership in specific areas, including the financial services, air transportation, and broadcasting and telecommunications sectors. There are also foreign-investment disincentives for media and publishing. The ICA was amended in a number of significant respects, with effect from March 2009. These amendments are discussed below. Transactions involving “national security,” including minority investments, are now also reviewable.

One of the ICA’s stated purposes is to encourage investment in Canada by non-Canadians, as this contributes to economic growth and employment opportunities. Two federal ministers are responsible for administering the ICA: the Minister of Industry and the Minister of Canadian Heritage and Official Languages. The Minister of Industry has appointed a Director of Investments to advise and assist the Minister in administering the ICA for non-cultural matters.

If an investment by a non-Canadian relates to a cultural business, the Minister of Canadian Heritage and Official Languages is responsible. Consequently, any required review process for cultural businesses as defined under the ICA will be done through Canadian Heritage instead of Industry Canada. The Minister of Canadian Heritage and Official Languages has appointed a Director of Investments to advise and assist the Minister in administering the ICA for cultural matters.

Whether a foreign investor establishes a Canadian operation through an acquisition or by starting up a new Canadian business, the investment may be subject to the foreign investment review requirements of the ICA. Investments to establish a new Canadian business, and acquisitions of control of existing businesses that do not exceed applicable thresholds, are subject to “notification,” which requires only the filing of a short
Foreign Investment Laws

information form either before or shortly after completion of the transaction. However, investments to acquire control of Canadian businesses that exceed applicable thresholds are subject to “review,” which requires the filing of more detailed information concerning the target business and the investor’s plans for it. The review process generally takes at least 45 days and focuses on whether the proposed transaction “is likely to be of net benefit to Canada.”

Review Thresholds

Generally, when a non-Canadian is acquiring control of a Canadian business, review by the Minister-appointed Director and approval by the Minister are required in the following cases:

- Where there is a direct acquisition of control of a Canadian business through the acquisition of voting shares of a corporation incorporated in Canada or through the acquisition of voting interests of a non-share capital corporation, partnership, trust or joint venture carrying on that business, or by the acquisition of substantially all of the assets used to carry on that business, the book value of the assets of the Canadian business is $5 million or more.

- Where there is an indirect acquisition of control of a Canadian business through, for example, the acquisition of the foreign parent of a corporation incorporated in Canada if either a) the Canadian business has assets of $50 million or more in value, or b) the Canadian business represents more than 50% of the assets of the acquired group of entities and the Canadian business has assets of $5 million or more in value. The value of the assets is usually calculated by using book values based on the most recent audited financial statements for the relevant entity.

As a result of the North American Free Trade Agreement (NAFTA), the Agreement Establishing the World Trade Organization (WTO), amendments made pursuant to the renegotiation of the General Agreement on Tariffs and Trade (GATT) and the policy of the Director,
the thresholds for review referred to above are modified in some instances with respect to the acquisition of control of a Canadian business, by what the ICA defines as a “WTO Investor” (a person or entity from countries that are members of the WTO), or by another non-Canadian where the Canadian business is controlled by a WTO Investor. These modifications are made in the following cases:

- For the direct acquisitions referred to above, the threshold value of assets of the Canadian business that will trigger the review requirement for an acquisition by or from a WTO Investor is increased from $5 million to $330 million (for 2012; this threshold is adjusted at the beginning of each calendar year in accordance with an inflation index), subject to annual adjustment for inflation and economic growth. However, the March 2009 amendments affect the review thresholds as described below.

- For indirect acquisitions by or from a WTO Investor, there will be no review, regardless of the value of Canadian assets.

Review may be required if the investment involves either the acquisition of control of a Canadian business (regardless of the value of the assets) or the establishment of a new Canadian business in an area concerning Canada’s “cultural heritage or national identity.” Areas of “cultural heritage and national identity” include book publishing, magazine publishing, film production and distribution, television and radio, and music production and distribution.

With certain exceptions, a non-Canadian may not implement a reviewable investment until the investment has been reviewed and the Minister is satisfied, or deemed to be satisfied, that the investment “is likely to be of net benefit to Canada.” If the Minister initially decides that the investment will not be of such benefit, the non-Canadian will be given an opportunity to make representations and submit undertakings with respect to the investment with a view to satisfying these requirements.
In determining “net benefit to Canada,” the Minister is required to give consideration to:

- the effect of the investment on the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians in the Canadian business and the industry of which it forms a part;
- the effect of the investment on productivity, industrial efficiency, technological development and product innovation and variety in Canada;
- the effect of the investment on competition within an industry in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution of the investment to Canada’s ability to compete in world markets.

In December 2007, the Minister of Industry issued guidelines that apply to reviewable transactions for the acquisition of control of a Canadian business, where the proposed acquiror is an enterprise controlled directly or indirectly by a foreign government (“state owned enterprise”). The guidelines reflect the potential concerns the Minister may have regarding the “governance and commercial orientation” of some state-owned enterprises. The guidelines specify that the Minister will examine the corporate governance and reporting structure of the state owned enterprise, and that part of this examination will include whether the state owned enterprise adheres to Canadian standards of corporate governance — including, for example, commitments to transparency and disclosure, independent members of the boards of directors, independent audit committees, equitable treatment of shareholders and adherence to Canadian laws and practices.
In making the net benefit determination, the guidelines state that the Minister will assess whether the Canadian business to be acquired by the state owned enterprise will continue to have the ability to operate on a commercial basis and specify a number of important indications. These include where exports go, where processing takes place, the participation of Canadians in the operations and the level of capital expenditures to maintain the Canadian business. A state owned enterprise can therefore anticipate that it may be required to provide undertakings beyond those normally expected of a privately owned company, in order to secure approval by the Minister.

In December 2012, the Prime Minister of Canada announced that two state owned enterprises would be permitted to acquire control of Canadian businesses. One was CNOOC’s acquisition of Nexen Inc., the other was Petronas’ acquisition of Progress Energy Resources Corp. At the same time, the Prime Minister announced important changes to Canada’s policy for reviewing investments in Canada by state owned enterprises. These new guidelines indicate that the rules will be changing. The Prime Minister stated that in the future, while each case will be examined on its own merits, the Minister of Industry will find the acquisition of control of a Canadian oil sands business by a foreign state owned enterprise to be of net benefit (and therefore allowed) only in exceptional circumstances. It remains to be seen what the rules will be in other economic sectors besides energy.

**General**

Presently, not all investments in Canadian businesses by non-Canadians are subject to review or notification under the ICA. For example, the ICA contains a number of exempt transactions, such as the acquisition of shares by a person whose business is dealing in securities. An investment to acquire an interest in an existing Canadian business that does not result in an acquisition of control under the ICA will also generally not be subject to notification or review.
Foreign Investment Laws

Information submitted under the ICA is treated as confidential and, subject to certain exceptions, will not be disclosed to the public. It is also subject to the Minister’s new powers, described below.

Compliance with provisions of the ICA does not bar review or action by the Competition Bureau under the merger provisions of the Competition Act. See Competition Law.

As indicated, care must be taken to ensure that the ICA’s requirements are met and that compliance is achieved with any legislation relating to foreign investment restrictions applicable to specific industries or activities.

Some of the significant changes included in the March 2009 amendments to the ICA (the first, third and fifth of which noted below are not yet in force) were:

- **Increase of WTO thresholds.** The thresholds for review of WTO investments in a Canadian business will be increased to $600 million, $800 million and $1 billion, respectively, over the next several years. After that, the applicable threshold will be determined on an annual basis using a prescribed formula. This may decrease the number of investments that are subject to pre-closing review. Investments by non-Canadians will still be subject to an obligation to submit a post-closing notification.

- **Removal of most sector-specific thresholds.** The $5-million threshold for investments in transportation businesses, financial services businesses and uranium businesses has been removed, but will be maintained for investments in cultural businesses and certain direct investments by non-WTO investors. Pre-closing review for transportation and uranium investments may still be subject to pre-closing government scrutiny. The Minister of Transport conducts pre-closing reviews of proposed transactions involving a transportation undertaking that raise public interest issues and that exceed the pre-notification thresholds under the Competition Act. Further, although the lower threshold for certain businesses has been
repealed in the ICA, the new national security review criteria described above could still provide a mechanism for the Minister to review investments in a uranium business at the Minister’s option.

- Thresholds based on “enterprise value.” Currently, the threshold for review is based on the aggregate value of all assets being acquired as shown in the financial statements for the Canadian business for the prior year. The calculation will be changed from one based on the value of assets to one based on “enterprise value,” to be defined in regulations that are still pending and a Regulatory Impact Analysis Statement, a draft of which have been Gazetted.

- Vague criteria and potentially broad review. The government has the authority to review proposed investments (including minority investments) where the responsible Minister has “reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security.” No financial threshold will apply to a national security review and there is no definition of “national security.” The government may deny the investment, ask for undertakings, provide terms or conditions for the investment, or, where the investment has already been made, require divestment. Review can occur before or after closing and may apply to corporate reorganizations where there is no change in ultimate control. Regulations are still pending on this topic.

- Information produced can be shared with other investigating agencies. The Minister will be able to compel a party to provide information within the context of a review application that the Minister “considers necessary.” In addition, for information produced with respect to a national security review, the Minister may communicate this information to prescribed investigative bodies, which may also disclose the information to others for the purposes of that agency’s investigation.
Generally, information provided to the Minister in the context of investment review is protected from disclosure to other government agencies unless necessary for the purposes of the administration and enforcement of the ICA.