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FOREIGN INVESTMENT REVIEW IN CANADA

Most foreign investments in Canada are regulated by the *Investment Canada Act* (**ICA**). The stated purposes of the ICA are: (a) to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada; and, (b) to provide for the review of investments in Canada by non-Canadians that could be injurious to national security. In most cases, non-Canadian investors are only required to file a notification of their investment. However, some cases may require a more in-depth review and approval of the investment based on a "net benefit to Canada" test.

Investments involving companies operating in certain sensitive sectors, such as financial services, telecommunications, broadcasting, and transportation may also be subject to sector-specific legislation.

When does the ICA apply?

The ICA applies to the establishment of a new Canadian business or the acquisition of control of an existing Canadian business by a non-Canadian. The definition of “non-Canadian” includes an individual who is not a Canadian citizen and an entity that is not Canadian-controlled. The ICA contains specific rules for determining whether an entity is in fact Canadian-controlled.

A “Canadian business” is broadly defined as a business carried on in Canada that has: (a) a place of business in Canada; (b) an individual or individuals in Canada who are employed or self-employed in connection with the business; and, (c) assets in Canada used in carrying on the business.

A “new Canadian business” generally means a business that is not already carried on in Canada by the non-Canadian or related to any other business carried on in Canada by that non-Canadian.

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Is the investment notifiable or reviewable?

Whether an investment is notifiable or reviewable depends on a number of factors, including the residence of the purchaser or vendor, whether the business is a cultural business, and whether the transaction is a direct or an indirect investment. However, all investments are subject to review and approval if they are considered to be potentially injurious to Canada's national security.

An investment in a new Canadian business by a non-Canadian will generally be only notifiable, unless the business is a cultural business.

A direct or indirect acquisition of control of a Canadian business will be reviewable and will require approval based on a "net benefit to Canada test" if the investment exceeds specified monetary thresholds or if the business acquired is a cultural business.

The ICA distinguishes between direct and indirect investments made by non-residents based in countries that are members of the World Trade Organization (WTO) and by non-residents based in countries that are not WTO members. A "direct" acquisition is the acquisition of a Canadian business by the purchase of either (a) all or substantially all of its assets, or (b) a majority (or, in some cases, one-third or more) of the shares or voting interests of the entity that controls or carries on the business in Canada. An "indirect" acquisition is the acquisition of a foreign corporation that controls a Canadian corporation carrying on the Canadian business.

WTO Investments – A direct acquisition by a WTO investor (other than one involving a cultural business - see below) is reviewable if the book value of the acquired Canadian assets exceeds C$330 million (in 2012). This threshold is reviewed annually. An indirect acquisition by a WTO investor (other than one involving a cultural business) is not reviewable.

Non-WTO Investments - A direct acquisition by a non-WTO investor is reviewable if the value of the acquired Canadian assets is C$5 million or more. An indirect acquisition by a non-WTO investor is reviewable where the value of the Canadian assets is C$50 million or more. If the asset value of the Canadian business being acquired exceeds 50% of the asset value of the global transaction, then the lower $5 million threshold will apply.

Cultural Businesses

Investments by non-Canadians in businesses related to Canada's cultural heritage or national identity will be subject to review, if the investment is equal to or exceeds the review thresholds of C$5 million for a direct acquisition and C$50 million for an indirect acquisition. Such investments must be found to be of "net benefit" to Canada in order to be allowed. The following business activities fall within the category of cultural business:

- publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form;

- production, distribution, sale or exhibition of (a) film or video products, (b) audio or video music recordings, or (c) music in print or machine readable form.

Notification and Review Process

If an investment is notifiable, the investor must file a notification with Investment Canada prior to or within 30 days following completion of the investment. Notifications require basic information about the investor, the Canadian business being acquired, and whether the investment relates to a cultural business.

Subject to limited exceptions, investments that are reviewable may not be implemented before the investor has received a decision from the Minister that the investment is of net benefit to Canada. An application for review requires much more in-depth information concerning the investor and the Canadian business. In assessing whether a reviewable investment will be of net benefit to Canada, the minister responsible will consider a number of factors, including: the effect of the investment on economic activity in Canada; the degree and significance of participation by Canadians in the Canadian business or new Canadian business; the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect of the investment on competition within any 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. The investor is expected to address each of these factors and provide supporting documentation and data in its application for review.

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