

CHAPTER 34

Competition and Foreign Investment Reviews of Asian Investments into Canada

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In late 2012, the Minister of Industry approved two high-profile acquisitions by foreign state-owned enterprises (“SOEs”) in the Canadian oil and gas sector—*China*

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National Offshore Oil Company (“CNOOC”) / Nexen Inc. and Petrolia Nasional Berhad (“Petronas”) / Progress Energy Ltd. Both transactions required approval under Canada’s *Competition Act*¹ and *Investment Canada Act*.² The merger provisions in the *CA* are enforced with a focus on whether market power can be exercised; the investor’s nationality is not a decision-making criterion. The media coverage surrounding the two transactions mainly concerned whether they would meet the somewhat open-textured “net benefit to Canada” test applicable to large foreign investment transactions reviewed under the *ICA*.³ The decisions confirmed that Canada continues to welcome inbound investment from Asia and elsewhere.

Recently, the Canadian government tabled amendments to implement previously promised increases to the *ICA* financial review thresholds for investments by private investors from World Trade Organization (“WTO”) countries.⁴ Canada also remains receptive to investments by SOEs, although such investors may have to take a more proactive approach to demonstrating that a transaction is of net benefit to Canada. In parallel with the *CNOOC/Nexen* and *Petronas/Progress* approvals, the *Investment by State Owned Enterprises Guidelines (“SOE Guidelines”)*⁵ were updated (“*Revised SOE Guidelines*”) and the Canadian government indicated that further investments by SOEs in the Canadian oil sands would likely be limited to joint ventures and minority interests.⁶ This has been followed with amendments that expand the definition of “SOE” and provide the Minister of Industry with greater ability to examine SOE transactions through a new “control in fact” test.⁷

The rules governing SOEs are mainly concerned with whether such entities are likely to operate an acquired Canadian business in accordance with ordinary

¹ *Competition Act*, R.S.C., 1985, c. C-34, as amended [*CA*].

² *Investment Canada Act*, R.S.C., 1985, c. 28 (1st Supp.) [*ICA*].

³ *Ibid.*, s. 20.

⁴ Canada, *An Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures*, Bill C-60, First Reading, April 29, 2013 (41st Parliament, 1st Sess) [Bill C-60], s. 137(1).

⁵ Industry Canada, *Guidelines—Investment by State-owned Enterprises—Net benefit Assessment* (7 December 2012), online: Industry Canada <<http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk00064.html#p2>> [*Revised SOE Guidelines*].

⁶ Notably after the *CNOOC/Nexen* and *Petronas/Progress* approvals, a C\$2.2 billion oil and gas joint venture between Encana Corp. and PetroChina Company Limited, a Chinese SOE, was not reviewed under the *ICA* because PetroChina was obtaining 49.9% interest in the joint venture and not control, while Encana retained the remaining 50.1% and would operate the joint venture: see Rebecca Penty, “Encana-PetroChina deal not subject to review, Industry Canada rules”, *Bloomberg* (19 December 2012), online: *The Toronto Star* <http://www.thestar.com/business/2012/12/19/encanapetrochina_deal_not_subject_to_review_industry_canada_rules.html>.

⁷ Bill C-60, *supra* note 4, ss. 136(2), 142(2), 143(4) and 144(1). For a further discussion, see Neil Campbell and Jun Chao Meng, “Canada proceeds with promised changes to foreign investment review” (May 2013), online: *McMillan* <<http://www.mcmillan.ca/Canada-proceeds-with-promised-changes-to-foreign-investment-review>> [Campbell and Meng, “Changes to Foreign Investment Review”].

commercial principles.⁸ They have not been applied in a protectionist manner and the recent revisions do not suggest that this will change.

The approach in these areas is consistent with the Canadian government's ongoing efforts to build stronger trade and investment ties between Canada and the growing economies of Asia, including China (which became Canada's second largest trading partner after the United States ("US") in 2011), Japan, Korea and India. The overall message for foreign investors is that Canada is very much "open for business".

§ 34.02 Acquisitions of Canadian Businesses by Foreign Investors

The acquisition of a Canadian business by a foreign entity may be subject to review and approval under either, or both, the *CA* and the *ICA*. Each of these economic framework laws serves a distinctive purpose, albeit with a limited degree of overlap.⁹

When the *CA* was restructured in 1986, a modern merger control regime was added. It is similar to the antitrust/competition law review framework that is commonplace in developed jurisdictions and increasingly common in developing jurisdictions.¹⁰ The focus is on maintaining price and non-price competition which benefits Canadian customers. Competition from foreign firms is therefore viewed positively.¹¹

Unlike many countries, Canada has an additional review process for significant foreign investment transactions. As originally enacted in 1973, the *Foreign Investment Review Act*¹² had a protectionist orientation. However, it was refashioned as the *ICA* in 1985 by a conservative government as part of a "Canada is open for business" strategy and as a precursor to the negotiation of a comprehensive free trade agreement with the US.¹³ The objective is to encourage investment that is beneficial for the

⁸ Stephen Harper, "Statement by the Prime Minister of Canada on foreign investment" (Remarks delivered 7 December 2012), online: *Prime Minister of Canada* <<http://www.pm.gc.ca/eng/media.asp?id=5195>> [Harper, "Foreign Investment Remarks"]; *Revised SOE Guidelines*, *supra* note 5.

⁹ Canada also has sector-specific foreign investment rules in a few sensitive areas such as financial services, uranium, transportation, broadcasting and telecommunications.

¹⁰ For the most part, the *CA* merger provisions are consistent with the International Competition Network, *Recommended Practices for Merger Notification and Review*, online: *International Competition Network* <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> [*ICN Recommended Practices*].

¹¹ See, e.g., *CA*, *supra* note 1, s. 93(a), which explicitly lists foreign competition as a relevant factor in merger reviews, as well as s. 93(d), which requires consideration of any tariff or non-tariff barriers to entry by foreign suppliers.

¹² *Foreign Investment Review Act*, S.C. 1973–74, c. 46.

¹³ The free trade agreement between Canada and the U.S. included some basic investment provisions: see *Canada-United States Free Trade Agreement*, 2 January 1988, online: *Foreign Affairs and International Trade Canada* <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf>> (entered into force 1 January 1989), c. 10. It was later renegotiated to include Mexico and broadened into the *North American Free Trade Agreement* ("NAFTA") with more extensive investment rules: see *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No. 2, 32 OLM 289 (entered into force 1 January 2004), c. 11.

Canadian economy, with competition listed as one of many potentially relevant considerations in such assessments.¹⁴

Below we examine how each of these regimes is applied to acquisitions of Canadian businesses by foreign companies, with particular emphasis on the experience to date relating to investments from Asia.

§ 34.03 Merger Review Under the Competition Act¹⁵

[1] Pre-Notification Thresholds

The CA is enforced by the Commissioner of Competition (“Commissioner”) who heads the Canadian Competition Bureau (“CCB”). The Commissioner has jurisdiction to investigate a wide range of activities with potentially anti-competitive effects, including cartels and abuses of dominant position, as well as completed or proposed mergers. While the CCB resides administratively in the Industry Canada department, the Commissioner has an independent law enforcement mandate. The Minister of Industry can direct the Commissioner to conduct an inquiry in relation to a merger or other matter, and can also instruct the Commissioner to re-open and undertake further inquiry when a file has been closed.¹⁶ However, he does not direct the Commissioner’s decisions on whether to challenge mergers or negotiate remedies to address competition concerns.

The CA requires advance notification where a party acquires an interest in an operating business in Canada in certain specific ways (*e.g.* by purchasing shares or assets) and two financial thresholds are exceeded:¹⁷

- The “size-of-the-parties” threshold is met when the parties to the transaction, along with their affiliates, have either combined assets in, or combined gross annual revenues from sales in/from/into, Canada exceeding C\$400 million.¹⁸
- For 2013, the “size-of-the-target” (or “transaction size”) threshold is triggered when the Canadian assets of the acquiree, or the gross revenues from sales in or from (but not into) Canada generated from such assets, exceed C\$80 million.¹⁹

¹⁴ ICA, *supra* note 2, ss. 2 and 20(d).

¹⁵ This section contains a general overview. For a more detailed description of the CA merger review process in Canada, see Neil Campbell *et al.*, *Getting the Deal Through: Merger Control—Canada* (London, England: Law Business Research, 2013) [*Merger Control—Canada*].

¹⁶ CA, *supra* note 1, ss. 10 and 22.

¹⁷ *Ibid.*, ss. 108–110. Limited exceptions apply for certain types of transactions which are unlikely to affect competition: *ibid.*, s. 111.

¹⁸ The Canadian regime is not fully compliant with the ICN *Recommended Practices*, *supra* note 10, in that the size-of-parties test includes the financial data of the vendor and its affiliates.

¹⁹ Government Notices (Department of Industry), (12 January 2013) C. Gaz., I, vol. 147, no. 2 (*Competition Act*), available online at: <<http://www.gazette.gc.ca/rp-pr/p1/2013/2013-01-12/html/notice-avis-eng.html>>. The CA provides for an indexing mechanism under which the “size-of-the-target” test can be reviewed annually to reflect changes in Canada’s gross domestic product: see CA, *supra* note 1, s. 110(8).

For share acquisitions, pre-notification is only required when the acquiror will obtain a voting interest exceeding 35% in a private corporation (or more than 50% if the acquiror already owns 35% or more of the shares) or 20% in a public corporation (or more than 50% if the acquiror already owns 20% or more of the shares).²⁰ Equity interests in unincorporated combinations are subject to similar thresholds.²¹ Canada's shareholding thresholds are lower than those of many other regimes and can trigger reviews of transactions which may not be subject to review in jurisdictions such as the European Union ("EU").

While notification is mandatory when these thresholds are exceeded, the CCB can also review a non-notifiable merger transaction of any size. The definition of "merger" includes the acquisition of control or a significant interest in any business.²² In 2012, the Commissioner highlighted this power by successfully challenging a consummated, and non-notifiable, acquisition in the waste disposal industry.²³ However, reviews of transactions which fall below the notification thresholds are relatively infrequent and challenges of such transactions by the CCB are rare.

[2] Competitive Effects

The substantive test under the *CA* is whether the merger "would, or would be likely to, prevent or lessen competition substantially" in a relevant market.²⁴ When making such an assessment, the CCB (or the Competition Tribunal, if a merger is challenged) will consider market shares and industry concentration,²⁵ as well as any other factors that are relevant to competition, including barriers to entry and the effectiveness of remaining competition in the market.²⁶ Potential anti-competitive effects will be

²⁰ *CA*, *supra* note 1, s. 110(3).

²¹ *Ibid.*, s. 110(4).

²² *Ibid.*, s. 91. The CCB takes the view that this can, in theory, occur at levels where there is material influence arising from very small equity investments—or even through contractual arrangements in the absence of any equity shareholding. See Competition Bureau, *Merger Enforcement Guidelines* (6 October 2011), online: *Competition Bureau* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s4_3_1> [MEGs] at paras. 1.6, 1.8, 1.11 and 1.18–1.19. Joint ventures may also be caught by the *CA*'s definition of a "merger" (and/or as a "competitor agreement" under the new s. 90.1 added in 2009).

²³ The Competition Tribunal granted, and the Federal Court of Appeal recently upheld, an order for the divestiture of a landfill site in connection with that merger: *see Tervita Corporation v. Commission of Competition*, 2013 FCA 28, *aff'g Commission of Competition v. CCS Corp.*, 2012 Comp. Trib. 14, leave to appeal to the Supreme Court of Canada, *granted*, 2013 CarsellNat 2359 (WL)

²⁴ *CA*, *supra* note 1, s. 92(1).

²⁵ High market shares and/or concentration in a properly defined relevant market are a necessary but not sufficient basis for finding that market power may be exercised: *ibid.*, s. 92(2). The CCB applies a "safe harbour" in respect of "unilateral effects" concerns if the parties' combined post-merger market share is below 35% (subject to possible "closest competitor" concerns arising in respect of differentiated products): *MEGs*, *supra* note 22 at para. 5.9. Similarly, the CCB applies a "safe harbour" in respect of "coordinated effects" concerns if the post-merger combined market shares of the four largest firms (the "CR4 Ratio") is below 65% (or if the merging parties' combined post-merger share is below 10%): *MEGs*, *supra* note 22 at para. 5.9.

²⁶ *CA*, *supra* note 1, s. 93.

assessed in the downstream market(s) where the parties sell and/or the upstream market(s) in which they purchase.²⁷ In practice, the focus is on anti-competitive effects that can result from a merged entity being able to exercise market power (*i.e.* profitably sustaining a material price increase) either unilaterally²⁸ or in coordination with other firms in the market.²⁹

While the *CA* potentially applies to all mergers, the CCB is primarily concerned with horizontal mergers (*i.e.*, mergers between firms supplying competing products), as “[n]on-horizontal mergers are generally less likely to prevent or lessen competition substantially than are horizontal mergers.”³⁰ Vertical mergers usually are not expected to confer market power, but may be reviewed and challenged based on theories of harm related to raising rivals’ costs, facilitating coordination or increasing barriers to entry.³¹ Conglomerate mergers rarely raise issues.³²

Many acquisitions by foreign investors are non-overlapping in either product terms (*i.e.*, a conglomerate merger) and/or geographic scope (*e.g.*, an expansion from Asia into Canada via acquisition of a local firm). Such transactions typically receive quick and straightforward clearances from the CCB.

The nationality of the acquiror is not a relevant factor in a merger review under the *CA*. In general, acquisitions of Canadian businesses by foreign investors will only raise concerns if the acquiror has an existing competitive (horizontal), or occasionally an upstream or downstream (vertical), presence in Canada. There is also a possibility of a “prevention of competition” theory of harm being examined (*i.e.*, that potential future competition which likely would have emerged in the absence of the merger will no longer materialize).³³ However, the Commissioner would have difficulty challeng-

²⁷ *MEGs*, *supra* note 22, at paras. 2.4 and 4.3–4.5. For a discussion of the way in which mergers between buyers are treated, see Neil Campbell, Jun Chao Meng and Francois Tougas, “*The Application of Monopsony Theory to Mergers and Agreements Between Buyers—the Canadian Experience*”, paper prepared for the ABA Section of Antitrust Law Spring Meeting, Washington, DC, April 2013, revised version forthcoming in *CANADIAN COMPETITION LAW REVIEW*, Vol. 26, No. 2 (Fall 2013).

²⁸ *MEGs*, *supra* note 22 at paras. 6.10–6.12.

²⁹ *Ibid.* at paras. 6.23–6.27.

³⁰ *Ibid.* at para. 11.2.

³¹ *Ibid.* at paras. 11.4–11.7. A recent example is the CCB’s negotiated remedy in respect of Bell Canada’s acquisition of competing television programming from Astral Media, which would have allowed Bell to raise costs for rival distributors: see *Commissioner of Competition v. BCE Inc.* (4 March 2013), CT-2013-002 (Consent Agreement), online: *Competition Tribunal* <http://www.ct-tc.gc.ca/CMFiles/CT-2013-002_Consent%20Agreement_2_45_3-4-2013_2073.pdf>.

³² *MEGs*, *supra* note 22 at paras. 11.8–11.9. The potential concerns with conglomerate mergers are that they may facilitate coordination, or give the merged firm the ability and incentive to leverage a strong market position from one market to another.

³³ *Ibid.* at paras. 2.10–2.1, 4.2 and part 7. BHP Billiton’s proposed acquisition of Potash Corporation of Saskatchewan raised such issues in respect of the parties’ potential future mining projects in Saskatchewan. This potential prevention of competition was one (but by no means the only) concern of the federal and Saskatchewan provincial governments. BHP offered a number of undertakings, but was ultimately unsuccessful and abandoned the acquisition: see BHP Billiton, News Release, “BHP Billiton

ing such a transaction unless there was clear evidence that the investor was likely going to enter/expand in Canada in the absence of the acquisition (and that the existing acquiree possessed market power, and that it was unlikely that other firms would enter/expand to erode such market power).

[3] Review Process and Timing

Consistent with the *ICN Recommended Practices*, there is no required filing deadline for pre-notifiable transactions under the *CA*. The merging parties must simply organize their affairs to allow the *CA* no-close waiting period to expire and (if desired) allow the CCB time to complete its review.

In 2009, the *CA* was amended to make the pre-notification regime similar to the US *Hart Scott Rodino Act* process. Pre-notifiable transactions are subject to an initial 30-day no-close waiting period that runs from the date when both parties' completed filings are submitted.³⁴ During the initial waiting period, the CCB can issue a "Supplementary Information Request" ("SIR") which, like a US "second request," may require the production of extensive additional documents, data and other information.³⁵ A SIR has the effect of extending the no-close waiting period until 30 days after the complete SIR response is submitted.³⁶ However, the CCB has made significant efforts to make SIRs relatively focused, including through pre-filing consultations, and has used SIRs quite sparingly.³⁷ The nationality of the acquiror is not a factor in determining whether a SIR will be issued and has little effect on the scope of a SIR (other than potentially to reduce requirements related to issues or custodians that clearly do not have any relevance to issues of interest to the CCB).

Proposed mergers under the *CA* can be designated by the CCB as "non-complex" or "complex." Non-complex mergers are characterized by an obvious absence of competition concerns, and usually involve transactions with no or minimal overlap between the parties.³⁸ Many acquisitions by foreign investors fall within this stream.

Withdraws Its Offer To Acquire PotashCorp And Reactivates Its Buy-back Program" (15 November 2010), online: *BHP Billiton* <<http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP%20Billiton%20Withdraws%20Its%20Offer%20To%20Acquire%20PotashCorp%20And%20Reactivates%20Its%20Buy-back%20Program.aspx>>; see also BHP Billiton, News Release, "BHP Billiton statement regarding comments by the Government of Saskatchewan" (20 October 2010), online: *BHP Billiton* <<http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP%20Billiton%20statement%20regarding%20comments%20by%20the%20Government%20of%20Saskatchewan.aspx>>.

³⁴ *CA*, *supra* note 1, s. 123(1)(a). For unsolicited or "hostile" takeover bid transactions, the waiting period starts on the date of the acquiror's filing and the Commissioner requisitions the counterpart filing from the acquiree (which is due within 10 days): ss. 114(3) and 123(3).

³⁵ *Ibid.*, s. 114(2). See also Competition Bureau, *Merger Review Process Enforcement Guidelines* (11 January 2012), online: *Competition Bureau* <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html>> [*Merger Review Process Guidelines*] at part 3.

³⁶ *CA*, *supra* note 1, s. 123(1)(b).

³⁷ See *Merger Review Process Guidelines*, *supra* note 35 at 3.2.

³⁸ Competition Bureau, *Competition Bureau Fees and Services Standard Handbook for Mergers and Merger-Related Matters* (1 November 2010), online: *Competition Bureau* <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03423.html>>.

All other mergers are treated as complex in recognition of the possibility that the transaction may create, maintain, or enhance market power.³⁹ Generally, where the combined post-merger market share of the parties is 35% or more, the merger is designated complex. Mergers between 10%–35% may be either complex or non-complex and post-merger shares less than 10% are regarded as non-complex.⁴⁰ If the market definitions and market shares are not clear at the outset, this will typically result in a complex classification.

The vast majority of mergers are, in fact, classified by the CCB as non-complex, and a very substantial portion are cleared in the applicable (non-binding) “service standard” period of 14 days.⁴¹ For complex cases, the service standard is the later of 45 days or, if an SIR is issued, 30 days after it has been complied with.⁴² In practice, cases involving significant issues may take 3 to 5 months (or, occasionally, longer) to resolve. This is not inconsistent with the typical timeframes for second-phase investigations in other major jurisdictions such as the US and the EU.

Parties wishing to have assurance that a proposed transaction will not be challenged can request an Advance Ruling Certificate (“ARC”), regardless of whether or not the transaction is subject to pre-notification. The Commissioner has the discretion to issue an ARC when he believes that there are insufficient grounds to challenge a proposed merger under the CA.⁴³ Where the Commissioner chooses not to issue a binding ARC, he will often issue a non-binding “no-action letter,” indicating that there is no intention to challenge the transaction at the time but that the one-year limitation for doing so⁴⁴ remains applicable.⁴⁵

In international mergers, the CCB normally will focus on the direct or indirect impacts on Canadian customers (or, where relevant in an upstream market context, Canadian suppliers). If the market dynamics are supra-national in scope, the CCB is open to defining geographic markets that extend beyond Canada and analyzing competitive effects in that context (*e.g.*, various freely tradable source commodities have been viewed as international markets). However, it will also be attentive to the possibility that multinational companies may be operating in a series of national (or even more localized/regional) markets (*e.g.*, in the pharmaceutical sector or in various distribution/retail businesses). In either scenario, the CCB regularly communicates with other agencies reviewing the transaction, particularly in the US and the EU. This

competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03375.html#s3_0 at 3.3.2.

³⁹ *Ibid.* at 3.2.3.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 5.1.

⁴² *Ibid.* at 5.1 (Table 1).

⁴³ CA, *supra* note 1, ss. 102–103.

⁴⁴ *Ibid.*, s. 97.

⁴⁵ Competition Bureau, *Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act* (1 November 2010), online: *Competition Bureau* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html#s3_0> at 3.1.

often leads to consistent clearance or remedy decisions,⁴⁶ although the CCB has obtained customized remedies in various cases (usually involving national or local markets).⁴⁷ Alternatively, in some cases the CCB will be prepared to forego a parallel Canadian remedy where it is satisfied that the remedy in another jurisdiction (*e.g.*, divestiture of a plant that supplies products into Canada) will adequately address the competition concerns related to Canada.⁴⁸

In summary, the merger provisions in the *CA* are a modern, well-functioning and largely ICN-compliant regime. The decision-making framework is based on well-established economic theory relating to market power rather than broader public interest considerations, and foreign parties are on a level playing field.

§ 34.04 Review of Foreign Investments Under the Investment Canada Act⁴⁹

[1] Investment Canada Act

The *ICA* is administered by the Minister of Industry, with the exception of certain prescribed cultural business sectors,⁵⁰ which are the responsibility of the Minister of Canadian Heritage. Each department maintains a small division which handles the relatively modest flow of reviewable transactions.⁵¹

The *ICA* applies when a “non-Canadian” proposes to acquire control of an existing Canadian business, or establish a new business in Canada.⁵² Virtually all such investments are subject to basic post-closing notification requirements.⁵³ Larger acquisitions exceeding certain financial thresholds will be reviewed to determine if

⁴⁶ See, *e.g.*, *Commissioner of Competition v. The Coca-Cola Company* (27 September 2010), CT-2010-009 (Consent Agreement), online: *Competition Tribunal* <http://www.ct-tc.gc.ca/CMFiles/CT-2010-009_Registered%20Consent%20Agreement_2_45_9-27-2010_5925.pdf>.

⁴⁷ See, *e.g.*, *Commissioner of Competition v. Novartis AG* (6 August 2010), CT-2010-008 (Consent Agreement), online: *Competition Tribunal* <http://www.ct-tc.gc.ca/CMFiles/CT-2010-008_Registered%20Consent%20Agreement_1_38_8-9-2010_1437.pdf>.

⁴⁸ See, *e.g.*, Competition Bureau, “Competition Bureau Statement Regarding United Technology Corporation’s Acquisition of Goodrich Corporation” (26 July 2012), online: *Competition Bureau* <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>>.

⁴⁹ This section contains a general overview. For further discussion of the *ICA* regime, see *Merger Control—Canada*, *supra* note 15.

⁵⁰ *Investment Canada Regulations*, SOR/85-611, Schedule IV.

⁵¹ The Investment Review Division within Industry Canada and the Cultural Sector Investment Review branch within the Department of Canadian Heritage.

⁵² *ICA*, *supra* note 2, ss. 11 and 14.

⁵³ For transactions below the mandatory review thresholds, notification can be completed by way of a simple, two-page form. The notification must be made to the Investment Review Division of the Department of Industry in most cases, and/or the Department of Heritage if the transaction involves a *cultural business*. Notification must be filed no later than 30 days after the investment is implemented, unless exempted under s. 10 of the *ICA*. The exemptions include situations such as the acquisition of voting shares or other voting interests by any person in the ordinary course of that person’s business as a trader or dealer in securities, and the acquisition of control of a Canadian business in connection with the realization of security granted for a loan or other financial assistance.

they are of “net benefit to Canada.”⁵⁴ There is also the possibility of review of smaller transactions when the acquiree is involved in a “cultural business” or where there are national security concerns.⁵⁵

[2] Review Thresholds

The level of voting equity is the starting point for determining whether an acquisition of control will occur (subject to additional control in fact tests described below for cultural businesses and SOEs):

- An acquisition of a majority of the voting rights or interests in a Canadian business will be deemed to be an acquisition of control.⁵⁶
- An acquisition of more than one-third, but not more than 50%, of the voting shares of a corporation is presumed to be an acquisition of control, unless it can be shown that “the corporation is not controlled in fact by the acquiror through the ownership of voting shares.”⁵⁷
- The acquisition of less than one-third of the voting shares in a corporation, or less than 50% of the voting interests in non-corporate entity (including interests in a joint venture), is deemed not to be an acquisition of control.⁵⁸

For investors from countries that are members of the WTO (“WTO Investors”), the review threshold for direct investments in 2013 is assets with a book value exceeding C\$344 million (until the Bill C-60 provisions come into force).⁵⁹ Indirect acquisitions⁶⁰ by WTO Investors are not reviewable (although still subject to notification).⁶¹ Since the WTO now includes most countries that are sources of significant outbound investment to Canada, including China and the other major jurisdictions in Asia, these are the thresholds that are usually applicable.⁶² These *ICA* review thresholds are increased annually according to an inflation index.⁶³

⁵⁴ *ICA*, *supra* note 2, ss. 14–16.

⁵⁵ *Ibid.*, ss. 15 and 28(2) and part IV.1; Industry Canada, “Thresholds for Review”, online: *Industry Canada* <http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_k00050.html> [Thresholds for Review]. A review can be ordered for a cultural business acquisition of any size and/or based on a control in fact test even if the regular shareholding thresholds are not exceeded. A review based on national security can be commenced regardless of the size of the transaction, nationality of the investor, or whether the acquisition is for control.

⁵⁶ *Ibid.*, s. 28(3)(a).

⁵⁷ *Ibid.*, s. 28(3)(c).

⁵⁸ *Ibid.*, ss. 28(3)(b) and (d).

⁵⁹ Unlike the *CA*, the *ICA* thresholds include the asset value of any foreign subsidiaries of the Canadian company being acquired.

⁶⁰ An indirect acquisition involves the acquisition of a company incorporated outside of Canada, which controls a Canadian entity, either directly or indirectly.

⁶¹ See Thresholds for Review, *supra* note 55.

⁶² The review threshold for non-WTO Investors is Canadian assets of C\$5 million for direct acquisitions and C\$50 million for indirect acquisitions: *ICA*, *supra* note 2, ss. 14(3)–(4).

⁶³ *ICA*, *supra* note 2, s. 14.1(2).

Bill C-60 will increase the review thresholds for investments by private WTO Investors to C\$600 million in “enterprise value” for a two-year period, immediately after the amendments come into force. The threshold will then rise to C\$800 million for the next two years, and reach C\$1 billion at the end of the four-year period.⁶⁴ The definition of “enterprise value” is still pending.⁶⁵ We expect that most of the inbound private investments from Asia and elsewhere will benefit from these higher review thresholds.

These Bill C-60 amendments do not apply to transactions undertaken by SOEs. The threshold for direct acquisitions by SOE investors from WTO countries will remain at the existing level (C\$344 million in book value in 2013, subject to indexing for inflation).⁶⁶ An acquisition of a “cultural business” (which includes books, magazines/periodicals, newspapers, film/video and radio and television broadcasting) is subject to lower review thresholds. There is an automatic review requirement if the assets of the Canadian business to be acquired exceed C\$5 million for direct investments and C\$50 million for indirect acquisitions, regardless of whether the investor and/or the vendor is from a WTO country.⁶⁷ In addition, the government may (by cabinet order) require a review of below-threshold investments of any size in the cultural sector.⁶⁸

The Minister may also review virtually any transaction involving a foreign investor if it may be injurious to national security. The power to initiate a review is available regardless of the size of the transaction, the nationality of the investor, and whether it is an acquisition of control or merely the purchase of a minority interest.⁶⁹ However, there have been very few cases to date and concerns that “national security” be interpreted to apply to a wide range of non-military/terrorism/defense situations have proven to be unfounded.⁷⁰

⁶⁴ Bill C-60, *supra* note 4, s. 137(1).

⁶⁵ Bill C-60 does not indicate when the enterprise value definition will be finalized. The draft regulations propose to calculate “enterprise value” as follows: (i) in the case of a publicly traded entity carrying on business in Canada, enterprise value would be calculated as market capitalization, plus the entity’s total liabilities, minus cash and cash equivalents; (ii) in the case of a non-publicly traded entity, or where there is acquisition of all or substantially all the assets of a Canadian business, enterprise value would equal the total acquisition value, plus the entity’s total liabilities, minus cash and cash equivalents: see Government Notices (Department of Industry), (2 June 2013), C. Gaz., I, vol. 146, no. 22 (*Regulations Amending the Investment Canada Regulations*), available online at: <<http://www.gazette.gc.ca/rp-pr/p1/2012/2012-06-02/html/reg1-eng.html>>.

⁶⁶ Bill C-60, *supra* note 4, s. 137(1). SOEs that are not WTO Investors are subject to the standard C\$5 million (direct) and C\$50 million (indirect) thresholds: see *supra* note 62.

⁶⁷ Thresholds for Review, *supra* note 55.

⁶⁸ ICA, *supra* note 2, s. 15.

⁶⁹ *Ibid.*, ss. 25.2–25.3.

⁷⁰ In 2009, when George Forrest International Antique S.P.R.L. proposed to acquire Forsys Metal Corporation, a TSX-listed Canadian company whose business involved the development of uranium deposits in Namibia, the Canadian government initiated a national security review. The proposed transaction ultimately fell through due to financing reasons. See “Forsys kills takeover deal”, *Canadian Press*, online: *Globe and Mail*. In October 2013, the Minister of Industry announced that proposed

[3] Net Benefit to Canada

The purpose of the *ICA* is to “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 to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.”⁷¹ Thus, absent national security issues, the *ICA* assessment focuses on whether the investment would likely be of net benefit to Canada, taking into account the following factors:

- the investment’s effect on the level and nature of economic activity in Canada;
- the degree and significance of participation by Canadians in the Canadian business;
- the investment’s effect on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada;
- the investment’s effect on competition in a Canadian industry or industries;
- the investment’s compatibility with national industrial, economic, and cultural policies; and
- the investment’s contribution to Canada’s ability to compete in world markets.⁷²

The net benefit test usually places heavy emphasis on employment and investment. Rationalization of functional overlaps will typically generate efficiency and/or productivity gains, but these are usually not given as much weight as employment losses. Nevertheless, it is often possible to secure approval for transactions that involve some down-sizing of personnel if the investor’s plans also include some incremental growth, investment, research and development, or other benefits for the Canadian economy. In practice, investment review officials have been prepared to take a relatively flexible approach in recognizing how benefits in certain areas may outweigh detrimental changes in other areas.

ICA reviews may occur regardless of whether the Canadian business is under Canadian or foreign ownership prior to the proposed transaction. The “participation by Canadians” factor is most likely to be of significance in situations involving a change from Canadian to foreign ownership (as opposed to a sale from an existing foreign owner to a new foreign purchaser). However, it is only one factor and detrimental impacts in this area can be outweighed by benefits under one or more other factors.

In reviewable transactions where the foreign investor is not already present in Canada (which is the case for many direct acquisitions by WTO Investors), the investor usually has a strategic interest in maintaining or expanding rather than

acquisition of Allstream by Accelero would not be permitted to proceed because of national security concerns, but detailed reasons for the decision were not provided: please see <http://news.gc.ca/web/article-eng.do?nid=778709>.

⁷¹ *ICA*, *supra* note 2, s. 2.

⁷² *Ibid.*, s. 20.

down-sizing the business. Thus, absent other situation-specific negative factors, the investor will usually be able to establish a net benefit to Canada through plans and commitments that will have some expected positive future trajectory, even if modest.

The “industrial, economic and cultural policies” factor is rarely of major significance, except in the cultural sector. With respect to cultural businesses, the government has specific policies and restrictions relating to foreign investments in the book and film sectors.⁷³ Nevertheless, foreign investment transactions have periodically been approved in these areas.⁷⁴

While the net benefit analysis is undertaken by investment review officials, the decisions are made by an elected cabinet Minister. In almost all cases, the staff analysis and recommendations are accepted by the Minister. However, broader policy and political considerations can enter into the calculus, particularly in high profile cases and transactions involving significant impact on regions of Canada which may have greater economic vulnerability. Contrary to some of the recent media fear-mongering about unpredictability of decision-making, this simply requires investors to consider these potential issues in their regulatory review strategies and, where relevant, complement the technical analysis and submissions with broader government relations and communications strategies.

Almost all proposed transactions subject to review under the *ICA* are approved on the basis of plans and commitments put forward by the investor. The two rejection decisions of significance in the 28-year history of the legislation are *Alliant Techsystems / MacDonald Dettwiler Associates* (“MDA”) and *BHP Billiton* (“BHP”) / *Potash Corporation of Saskatchewan* (“PCS”):

- *Alliant/MDA* involved a US-based investor seeking to acquire a Canadian firm whose business and technology involved national security and Arctic sovereignty dimensions.⁷⁵ This is generally not regarded as a controversial decision.

⁷³ Canadian Heritage, “*Investment Canada Act: Revised Foreign Investment Policy in Book Publishing and Distribution*”, online: *Canadian Heritage* <<http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/bkp-eng.cfm>>; Canadian Heritage, “*Investment Canada: The Canadian Film Industry and Investment Canada*”, online: *Canadian Heritage* <<http://www.pch.gc.ca/pc-ch/org/sectr/ac-ca/eiic-csir/film-eng.cfm>>.

⁷⁴ See, e.g., Random House’s acquisition of McClelland & Stewart: John Barber, “Bertelsmann takes full control of McClelland & Stewart”, *The Globe and Mail* (10 January 2012), online: *Globe and Mail* <<http://www.theglobeandmail.com/arts/books-and-media/bertelsmann-takes-full-control-of-mcclelland-stewart/article1355844/>>; and Amazon’s establishment of a fulfillment centre in Canada: Canadian Heritage, News Release, “The Government of Canada Announces Results of Investment Canada Act Review of Amazon” (12 April 2010), online: *Canadian Heritage* <<http://www.pch.gc.ca/eng/1294862405999/1294862406002>>. More recently, the Canadian government elected not to order a review of the indirect acquisition of control of the Pearson plc’s Canadian book publishing and distribution subsidiary by Bertelsmann SE & Co. in the context of the proposed international joint venture between the Random House and Penguin book businesses: see Canadian Heritage, *Cultural Sector Investment Review—Summary of decisions and notifications—January–February–March 2013*, online: *Canadian Heritage* <<http://www.pch.gc.ca/eng/1366025666046>>.

⁷⁵ MDA is an information technology and space products company: see <<http://www.mdacorporation>>.

- *BHP/PCS* has been more controversial because the investor (an Australian company) made public the fact that it was offering significant undertakings that it perceived to be of benefit to Canada. However, the transaction was a hostile takeover which raised concerns for the provincial government in Saskatchewan (namely the possibility of delayed or cancelled future potash mining projects and undermining of the export marketing consortium for potash).⁷⁶ The transaction also occurred at a time when the federal conservative government held only a minority position in Parliament and was heading towards an upcoming election in which seats in the province of Saskatchewan were likely to figure significantly. As a leading investigative journalist documented, there were many unique factors in this case and it does not signify general Canadian government hostility to foreign investment.⁷⁷

Notably, both these cases involved investors from countries with close historic business and political relationships with Canada. Despite frequent media coverage regarding the apprehension by some Canadians about foreign investment from China and elsewhere in Asia, the Canadian government has approved several major investments by Chinese and other Asian companies before and after *BHP/PCS* (as described more fully below).

[4] Review Process and Timing

As with the *CA*, there is no deadline for making an application for review under the *ICA*; the investor must simply allow enough time for the review and approval process to be completed prior to closing. Generally, a reviewable investment cannot be implemented prior to an approval decision by the Minister. However, reviews of indirect acquisitions, some national security reviews and below-threshold reviews ordered in the cultural sector are conducted post-closing.⁷⁸

The initial no-close period for an *ICA* review is 45 days. The Minister may extend the review period by 30 days and often does so.⁷⁹ Many cases are approved within the combined 75-day timeframe. Further extensions are only available with the consent of the investor, but investors will accede to such requests in most cases⁸⁰ and there have

com/corporate/index.cfm>. At issue was MDA's well-known Radarsat-2 satellite technology, which, among other things, monitors Canada's Arctic region.

⁷⁶ *Supra* note 33.

⁷⁷ Jacquie McNish, *et al.*, "Potash: The deal that didn't have to die", *The Globe and Mail*, online: *Globe and Mail* <<http://m.theglobeandmail.com/globe-investor/potash/potash-the-deal-that-didnt-have-to-die/article1788174/?service=mobile>>.

⁷⁸ *ICA*, *supra* note 2, ss. 14–16 and part IV.1. There is also the possibility of requesting an interim approval to close prior to receipt of a net benefit approval in exigent circumstances (see *ICA*, s. 16(2)(a)) but this power is almost never used.

⁷⁹ *Ibid.*, ss. 21(1) and 22(1).

⁸⁰ The likely consequence of declining an extension request is that the staff will not make a positive recommendation to the Minister to approve the transaction, and the application is likely to be denied (albeit with scope for the investor to re-apply). A rare example is the initial rejection in the *Petronas/Progress* acquisition: see Boyd Erman *et al.*, "How Malaysia's oil-patch bid 'came unglued'"

been cases that have taken many months (some of which are post-closing reviews in which neither the parties nor the investment review officials perceive as much time pressure as for proposed transactions).

National security reviews have a more complex series of time limits.⁸¹ Bill C-60 implements previously announced intentions to provide the Minister with greater flexibility in national security reviews. The amendments propose to extend a number of five day deadlines for the Minister to take specified steps to 30 days and fine-tune other prescribed time periods.⁸² Timelines will also be subject to extension through agreement between the Minister and the non-Canadian investor.⁸³ Although these amendments will increase the length of national security review periods from the current 135-day theoretical maximum (if all steps are undertaken and require the maximum allowable time), the timelines in Canadian foreign investment reviews are not out of line with reviews by other agencies. For example, in the *CNOOC/Nexen* transaction, the Committee on Foreign Investment in the United States approved the transaction seven months after CNOOC first made its bid, and two months after the *ICA* review was completed.⁸⁴

[5] Undertakings

The *ICA* review process uses the investor's plans for the Canadian business as a starting point for assessing each of the net benefit factors. Unlike the CCB, investment review officials generally do not initiate customer or other market contacts (although they may consider unsolicited input from interested parties). They do, however, regularly seek and place significant weight on the views of relevant federal and provincial government departments (including in each province where there are any significant assets and employees).

The current practice is for investment review officials to request and then negotiate binding commitments ("undertakings") by the investor as part of the net benefit process. If the investor's plans generally suggest that a net benefit to Canada is likely to occur, then the undertakings may essentially be confirmatory (*i.e.*, ensuring that the investor is committed to the implementation of key components of its plans).⁸⁵

after Ottawa pressed to extend talks", *The Globe and Mail* (20 October 2012), online: *Globe and Mail* <<http://www.theglobeandmail.com/globe-investor/how-malysias-oil-patch-bid-came-unglued-after-ottawa-pressed-to-extend-talks/article4626206/>>.

⁸¹ *ICA*, *supra* note 2, ss. 21(2)–(9); *National Security Review of Investments Regulations*, SOR/2009-271; *see also* Bill C-60, *supra* note 4, s. 138.

⁸² Bill C-60, *supra* note 4, s. 138. The precise effect of this extension will not be clear until the implementing regulations are finalized.

⁸³ *Ibid.* As noted above, this is currently the case for standard net benefit reviews as well.

⁸⁴ *See* Roberta Rampton and Scott Haggitt, "CNOOC-Nexen deal wins U.S. approval, its last hurdle", *Reuters* (12 February 2013), online: *Reuters* <<http://www.reuters.com/article/2013/02/12/us-nexen-cnooc-idUSBRE91B0SU20130212>>.

⁸⁵ There has been one case in which an investor sought to avoid undertakings based on industry/market changes that it claimed were uncontrollable. The Minister of Industry disagreed and initiated compliance proceedings. After a preliminary ruling which rejected the investor's constitutional arguments

However, in some cases, the review-officials may seek commitments that extend beyond the plans in certain areas in order to formulate an overall package that they are prepared to recommend as being of net benefit to Canada.

The usual time frame for undertakings is three years. However, longer undertakings are common in the cultural sector and commitments to operate in accordance with applicable cultural industry policies may be perpetual. Some of the undertakings applicable to the commercial orientation of SOEs can also be expected to apply beyond a three year time frame.

In the event that a reviewable investment is rejected, the investor has a 30-day “appeal” period in which to submit additional representations and undertakings.⁸⁶ Petronas used this process successfully after its application was rejected in response to a refusal to grant an extension request.⁸⁷

[6] Acquisitions by State-owned Enterprises

While the *CA* regime does not contain any distinctive provisions related to SOEs,⁸⁸ there are special considerations for SOE investors under the *ICA*. The *Revised SOE Guidelines* indicated that the definition of SOE would encompass enterprises that are directly or indirectly *influenced* by a foreign government, as opposed to simply being owned or controlled by a foreign state.⁸⁹ Bill C-60 implements this change and extends the definition of SOE to the government of a foreign state or an agency of such a government, as well as any individual acting under the direct or indirect influence of such a government or agency.⁹⁰ The degree or nature of the influence required is not clear. This is an area where further guidance would be welcome and we expect there to be precedents or guidance available in relatively short order, demonstrating that the influence aspect of the SOE definition will be applied in a responsible and workable manner.

The Bill C-60 amendments will also enable the Minister to look beyond share ownership to determine whether an entity is controlled in fact by a SOE, whether there

related to the penalties for non-compliance (see *Canada (Attorney General) v. United States Steel Corp.*, 2010 F.C. 642, *aff'd* 2011 FCA 176, leave to appeal to SCC refused, 430 N.R. 390 (note)), the case was settled (see Industry Canada, News Release, “Industry Minister Paradis Reaches an Out-of-Court Settlement in the U.S. Steel Litigation” (12 December 2011), online: *Industry Canada* <<http://www.ic.gc.ca/eic/site/064.nsf/eng/07011.html>>).

⁸⁶ *ICA*, *supra* note 2, s. 23.

⁸⁷ *Supra* note 80.

⁸⁸ The Competition Bureau has indicated that its current policy is not to treat foreign governments as “persons” for purposes of the merger pre-notification rules in the *CA*, *supra* note 1, Part IX. The practical implication of this approach is to reduce the number of affiliates whose Canadian assets and revenue must be included in the calculation of the “party-size” threshold under s. 109 of the *CA*. However, when analyzing substantive issues the CCB applies its usual analytical framework, including with respect to minority interests (see MEGs, *supra* note 22, parts 3 and 10). These policies were discussed in the CBA Competition Section Roundtable with the CCB Mergers Branch, Toronto, 10 May 2013.

⁸⁹ *Ibid.*

⁹⁰ Bill C-60, *supra* note 4, s. 136(2).

has been an acquisition of control by a SOE, and whether an entity which is otherwise Canadian-controlled is controlled in fact by a SOE.⁹¹ Where such control in fact is found, the investments (if they meet the financial review thresholds) are subject to the standard net benefit to Canada test. Similarly, the Minister could determine that an entity which is apparently Canadian-controlled is “non-Canadian” under the *ICA* if it is controlled in fact by a SOE. Such a determination would not have any immediate implications, but if the entity decides to invest in another Canadian business, such a transaction could be reviewed under the *ICA* (assuming, again, that the financial review thresholds are met).⁹²

The Minister may request information he considers necessary to making the various types of control in fact determinations.⁹³ If an entity fails or refuses to provide such information within a reasonable time, the Minister may make a declaration regarding the Canadian or SOE status of an entity, or determine that there has or has not been an acquisition of control in fact by a SOE.⁹⁴ These determinations may be made prospectively, or potentially retroactively as far back as the date of the Bill C-60 amendments.⁹⁵

Industry Canada already uses a standard list of questions to assess potential control in fact or influence by a foreign government or agency. “Influence” is a broader concept than “control in fact”, but many of the same factual considerations would apply to either assessment. The current Industry Canada checklist considers share ownership by a foreign state, decision-making rights associated with these shares, and the powers to nominate board members or appoint senior management, among other factors.

Control in fact tests are not new in the *ICA* and have generally not been used for protectionist purposes. Similar control in fact provisions apply to cultural acquisitions⁹⁶ and national security reviews⁹⁷ and have not raised major issues in practice. There is also a partial reverse onus control in fact test in the *ICA*. Control will be presumed by ownership of between one-third and one-half of the voting shares of a corporation, unless it can be shown that the investor would not acquire control in fact through the ownership of voting shares.⁹⁸ We do not expect the control in fact tests to be applied in a more protectionist manner in the SOE context.

Control in fact tests are also used in other regulatory regimes, where such control is defined as the ability to determine the strategic decision-making activities, or

⁹¹ *Ibid.*, ss. 143(4) and 144(4).

⁹² See Campbell and Meng, “Changes to Foreign Investment Review”, *supra* note 7.

⁹³ Bill C-60, *supra* note 4, ss. 142(4) and 144(4).

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, ss. 143(4) and 144(4).

⁹⁶ *ICA*, *supra* note 2, s. 26(2.1).

⁹⁷ *Ibid.*, s. 26(2.11).

⁹⁸ *Ibid.*, s. 28(3)(c).

manage the day-to-day operations of an enterprise.⁹⁹ The government has also not applied the control in fact test in an overly restrictive manner in these situations. Transactions are rarely rejected and modest variations to governance structures are commonly made as part of the approval process. Notably, when the Canadian Radio-television and Telecommunications Commission concluded that a new wireless service provider with foreign financial backing was controlled in fact by a non-Canadian, the government intervened and reversed the decision.¹⁰⁰

The *SOE Guidelines* provide guidance on the sensitivities that are at play for SOE investors. First published in 2007, the *SOE Guidelines* indicated that SOE investors would be expected to adhere to Canadian laws, practices, and standards of corporate governance. In addition, the Minister would assess the effect of the investment on economic activity in Canada, including its effect on the employment of Canadians, productivity, innovation, and level of capital expenditure, with a view to maintaining Canada's global competitiveness.¹⁰¹

The *Revised SOE Guidelines* issued in December 2012 confirmed the importance of the foregoing factors. They also provided more specific expectations concerning undertakings, including with respect to:

- the appointment of Canadians as independent directors;
- the employment of Canadians in senior management roles;
- the incorporation of the business in Canada; and
- the listing of shares of the acquiring company or the Canadian target on a Canadian stock exchange.¹⁰²

The tone of the *Revised SOE Guidelines* and the companion remarks by the Prime Minister when they were announced make clear that, while acquisitions by SOEs will be subject to careful review, Canada continues to welcome commercially-oriented investments from SOEs.¹⁰³ In one specific sector—the oil sands—further SOE acquisitions are likely to be found of net benefit “only in an exceptional circum-

⁹⁹ See, e.g., National Transportation Agency Decision No. 297-A-1993, 27 May 1993 (*Canadian Airlines* Decision), available online at: <<http://www.cta-otc.gc.ca/eng/ruling/297-a-1993>>; *CRTC Broadcasting* Decision 2008-69, 27 March 2008 (BCE Decision), available online at: <<http://www.crtc.gc.ca/eng/archive/2008/db2008-69.htm>>; and *CRTC Telecom* Decision 2009-678, 29 October 2009 (*Globalive* Decision), available online at: <<http://www.crtc.gc.ca/eng/archive/2009/2009-678.htm>>, reversed on appeal to Cabinet. See *infra* note 100.

¹⁰⁰ Order-in-Council PC-2009-2008 (10 December 2009) online: *Privy Council Office* <<http://www.pco-bcp.gc.ca/oic-ddc.asp?lang=eng&txtToDate=2009-12-12&txtPrecis=&Page=&txtOICID=&txtAct=&txtBillNo=&txtFromDate=2009-12-08&txtDepartment=&txtChapterNo=&txtChapterYear=&rdoComingIntoForce=&DoSearch=Search+/+ List&pg=11& viewattach=21896&blnDispla>>.

¹⁰¹ Industry Canada, *Guidelines—Investment by state-owned enterprises—Net benefit assessment* (December 2007). This is not dissimilar to the general net benefit framework, except for the extra emphasis on international competitiveness.

¹⁰² *Revised SOE Guidelines*, *supra* note 5.

¹⁰³ Harper, “Foreign Investment Remarks”, *supra* note 8.

stance.”¹⁰⁴ However, there is still significant scope for investment in Canada by foreign SOEs in this sector through minority interest acquisitions and joint ventures.¹⁰⁵

In summary, the *ICA* regime must be taken seriously by foreign investors in the small number of cases where the review thresholds are exceeded. However, its purpose is to encourage inbound investment in a manner that is beneficial for Canada rather than to deter investment or protect Canadian business from acquisition. The *Revised SOE Guidelines* and Bill C-60 amendments do not appear to represent a major change in policy and practice. Commercially-oriented SOEs will likely continue to be able to meet the net benefit test in most cases if they are prepared to enter into reasonable undertakings.

§ 34.05 Separate But Parallel Reviews

[1] Interface Between the Two Review Processes

Foreign investments in Canada may trigger review under both the *ICA* and *CA*, depending on the nature and size of the proposed transaction. The *ICA* focuses on the net benefit to Canada, while the *CA* is concerned about maintaining competition. Thus it is possible for the two reviewing agencies to reach differing conclusions in the relatively small number of cases in which an *ICA* review is required.

Although the review and approval processes under the two regimes are separate, they typically run in parallel. Since the net benefit test under the *ICA* includes as a relevant factor the effect of the foreign investment on competition in a Canadian industry or industries,¹⁰⁶ the CCB is typically requested to provide input into the *ICA* review with respect to the competitive effects of the transaction (regardless of whether the merger is also subject to pre-notification under the *CA*).

The broader scope of the *ICA* often results in non-competition concerns being the focal point of the undertakings and approval process. However, the Minister of Industry (or Heritage) tends to be reluctant to approve a transaction as being of net benefit to Canada unless and until he has been advised by the CCB that the transaction does not raise competition concerns, or until such concerns have been addressed. Depending on the nature of the concerns and the preferences of the merging parties, they could be dealt with in a Consent Agreement between the Commissioner and the parties or through undertakings provided to the Minister under the *ICA*.

[2] Treatment of Efficiencies

The *CA* and the *ICA* consider efficiencies in different, but generally complementary ways. As noted above, efficiency/productivity as well as innovation/technological

¹⁰⁴ *Ibid.*

¹⁰⁵ Such approaches have been used in the past for commercial reasons (*e.g.* to spread the large investments and risks involved in this sector). *See, e.g.*, the \$105 million acquisition by Sinopec of a 40% interest in the Northern Lights Partnership oil sands project in 2005.

¹⁰⁶ *ICA, supra* note 2, s. 20(d).

development are relevant *ICA* factors,¹⁰⁷ but there is relatively little guidance as to how they will be applied. In contrast, the *CA* provides for an explicit defence where the efficiency gains created by a merger or proposed merger are greater than, and offset, the anti-competitive effects.¹⁰⁸ The efficiency gains that the CCB will consider are similar to the net benefit factors discussed above. They include productive efficiencies, as well as the introduction of new products and the development of more efficient processes (dynamic efficiency).¹⁰⁹ The gains must outweigh the negative (price and non-price) anti-competitive effects likely to result from the transaction (such as deadweight losses, redistributive effects, reduction in service, quality or choice, and losses in productive or dynamic efficiency).¹¹⁰

The *MEGs* note that under the *CA* “[t]he issue is whether the efficiency gains will benefit the Canadian economy rather than the nationality of ownership of the company.”¹¹¹ For example, productive efficiency gains resulting from the rationalization of the parties’ facilities located outside Canada may not be of benefit to the Canadian economy; however, where such efficiencies create lower prices in Canada, that result may be of benefit to the Canadian economy.¹¹² In practice, the *ICA* analysis is likely to focus on similar issues, since it is assessing the impact of the proposed investment on the future operations of the acquired Canadian business and on the Canadian economy.

§ 34.06 Concluding Observations—Still Open for Business

Generally, the track records under the *CA* and *ICA* demonstrate that neither regime has been applied in a protectionist manner. Under the *CA*, the CCB is concerned with the effects of the proposed transaction on competition in a relevant market and not the identity or nationality of the investor. The *ICA* review process does consider investor identity and nationality, but there is little sign of differential treatment based on the origin of investments from various locations outside Canada.

Given China’s growing importance in the world economy and the significant expansion of Chinese SOEs and private firms in resource industries, there has been particular media attention to potential Chinese investments in Canada. Nevertheless, there have been several investments greater than C\$1 billion by Chinese investors in Canadian businesses in recent years, including:¹¹³

¹⁰⁷ *Ibid.*, s. 20(c).

¹⁰⁸ *CA*, *supra* note 1, s. 96; *MEGs*, *supra* note 22 at part 12. The burden of proof is on the parties to provide detailed information substantiating the efficiency gains.

¹⁰⁹ *MEGs*, *supra* note 22 at paras. 12.14–12.18.

¹¹⁰ *Ibid.* at paras. 12.25–12.31.

¹¹¹ Gains that would likely be attained through alternative means if an order under the merger provisions were made, redistributive gains, or gains that are achieved outside of Canada which would not benefit the Canadian economy are not included in the trade-off analysis: see *ibid.* at para. 12.20 and fn. 66.

¹¹² *Ibid.*

¹¹³ There have also been many investments by Chinese and other foreign SOEs that have not been

- a C\$1.74 billion investment by Chinese Investment Corporation in Tech Resources Ltd. in 2009;
- a C\$4.7 billion investment by Sinopec to acquire ConocoPhillips Co.'s 9% stake in Syncrude Canada in 2010;
- a C\$1.9 billion investment by PetroChina to acquire a majority stake in Athabasca Oil Sand Corp. in 2011 (Athabasca later sold its remaining 40% stake in the MacKay River oil sands project to PetroChina in January of 2012, for another C\$680 million);
- a US\$2.1 billion acquisition by CNOOC of OPTI Canada Inc. in 2011;
- a C\$2.9 billion merger between Sinopec and Daylight Energy at the end of 2011; and
- a C\$2.2 billion shale gas joint venture between Encana Corp. (50.1%) and PetroChina (49.9%).

Although they attracted more media attention, the 2012 *CNOOC/Nexen* and *Petronas/Progress* acquisitions noted previously are merely the latest examples of Canada diversifying its trade and investment partners and strengthening its economic ties with China and other Asian nations.¹¹⁴ Shortly before these transactions were concluded, Canada and China signed a Foreign Investment Promotion and Protection Agreement (FIPA), which is designed to facilitate the flow of investment between the two nations.¹¹⁵ The recent tax treaty between Canada and Hong Kong is another indicator of Canada's efforts to facilitate investment flows with Asia.¹¹⁶ Canada is also currently in the midst of FIPA negotiations with a number of other countries, including India, Mongolia, and Vietnam.¹¹⁷

Canada has also made changes on other fronts consistent with a positive orientation towards foreign investments. In 2012, the government removed the foreign ownership

subject to *ICA* review (they are known though the informational post closing notification requirements applicable to non-reviewable transactions). They include the following significant transactions (among others): a C\$217.7 million acquisition by China National Gold Group Corporation of Ivanhoe Mines Ltd.'s 42% interest in Jinshan Gold Mines Inc. (2008); a US\$240 million acquisition by Wuhan Iron and Steel (Group) Corporation of just under 20% of Consolidated Thompson Iron Mines Ltd. (2009); a C\$100 million joint venture between Yunnan Chihong Zinc and Germanium Co. Ltd. and Selwyn Resources Ltd. (2010); and a \$150 million acquisition by CNOOC of a 60% stake in North Cross (Yukon) Ltd. (2011).

¹¹⁴ For further discussion, see, e.g., Candice Mak, "Courting the Chinese," *ASIAN LEGAL BUSINESS* (September 2012) at 25.

¹¹⁵ See Neil Campbell and Robert Wisner, "Canada and China conclude major investment treaty" (February 2012), online: *McMillan* <<http://www.mcmillan.ca/Canada-and-China-conclude-major-investment-treaty-negotiations>>.

¹¹⁶ See Peter Botz, Christine Man and Stephen D. Wortley, "Hong Kong and Canada sign income tax treaty" (November 2012), online: *McMillan* <<http://mcmillan.ca/Hong-Kong-and-Canada-sign-income-tax-treaty>>.

¹¹⁷ See Foreign Affairs and International Trade Canada, Negotiations and Agreements, online: *Foreign Affairs and International Trade Canada* <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>>.

restrictions on telecommunications carriers with less than 10% of total Canadian market share, measured by revenue.¹¹⁸ Other recent amendments to the *ICA* aim to increase transparency in the *ICA* review process by allowing the Minister to disclose information about approved transactions, and to provide reasons in the rare cases where he or she concludes that an investment is not of net benefit to Canada.¹¹⁹

In March of 2013, Chinese-owned computer giant Lenovo mused about a possible takeover of the challenged Canadian telecommunications equipment firm BlackBerry (Research in Motion, or “RIM”), noting that while further market analysis would have to be completed, the deal “could possibly make sense.”¹²⁰ Any takeover would likely require approval under the *ICA*. The Minister of Industry was quoted as expressing hope that “Blackberry will continue to be a Canadian champion in the world, that it grows organically” and indicating that the government could examine any bid under the national security guidelines of the *ICA*.¹²¹ These comments could be perceived as suggesting an inclination not to approve the acquisition of a national champion, but a fairer reading is that the Minister was simply responding to media questions about possible scenarios in a general way.¹²²

The current government has also demonstrated restraint in the face of pressure to use the *ICA* to block high profile foreign investments. For example, in 2009, RIM urged the government to intervene in the proposed sale of selected assets of Nortel Networks Corporation (“Nortel,” formerly a national champion) to Swedish telecommunications company Telefon AB LM Ericsson (“Ericsson”). The sale included patents or license agreements and related assets for CDMA and LTE wireless technology.¹²³ RIM complained that the *Ericsson/Nortel* deal could harm the Canadian technology sector and compromise national security.¹²⁴ Despite political pressure,¹²⁵

¹¹⁸ See Carl DeVuono, “Telecommunications Act amended to remove foreign ownership restrictions on certain telecommunications providers” (July 2012), online: *McMillan* <<http://www.mcmillan.ca/Telecommunications-Act-amended-to-remove-foreign-ownership-restrictions-on-certain-telecommunications-providers>>.

¹¹⁹ See Neil Campbell and Devin Anderson, “Canada continues to welcome foreign investment with *Investment Canada Act* changes” (September 2012), online: *McMillan* <<http://www.mcmillan.ca/Canada-continues-to-welcome-foreign-investment-with-fine-tuning-of-Investment-Canada-Act>>.

¹²⁰ Hugo Miller, “BlackBerry Shares Jump as Lenovo CEO Mentions Possible Deal”, *Bloomberg* (11 March 2013), online: *Bloomberg* <<http://www.bloomberg.com/news/2013-03-11/blackberry-shares-jump-after-lenovo-ceo-mentions-possible-deal.html>>.

¹²¹ David Ljunggren, “Industry Minister Paradis hopes BlackBerry remains a ‘national champion’”, *The Globe and Mail* (18 March 2013), online: *Globe and Mail* <<http://www.theglobeandmail.com/globe-investor/industry-minister-paradis-hopes-blackberry-remains-a-national-champion/article9882602/>>.

¹²² The Minister qualified his comments by noting that this was his personal opinion, and that he was not sending a signal or prejudging a deal as the Industry Minister: *ibid*.

¹²³ Campbell Clark, “RIM says it had deal with Nortel”, *The Globe and Mail*, online: *Globe and Mail* <<http://m.theglobeandmail.com/technology/rim-says-it-had-deal-with-nortel/article1201313/?service=mobile>>.

¹²⁴ Ericsson won a court-approved auction for the Nortel assets. The deal between Ericsson and Nortel included only licensing agreements for the LTE patents, giving Nortel the ability to sell the patents

the Canadian government did not review, let alone block, the deal and the matter proceeded by way of notification under the *ICA*.¹²⁶ Similarly, despite considerable pressure to limit SOE investment in the oil sands in the fall of 2012, the Minister of Industry evaluated and approved *CNOOC/Nexen* and *Petronas/Progress* based on the guidelines and practices in place when the transactions were made public, and then announced changes to the treatment of SOE investments that would be applied on a go-forward basis.¹²⁷

In summary, the Canadian government's actions over the past few years demonstrate a stable and liberal approach towards foreign investment, consistent with the Prime Minister's recent remark that the "Government continues to strongly encourage inward investment in Canada."¹²⁸

themselves later on. Prior to the auction, RIM had been in talks with Nortel to purchase the LTE patents and assets, but felt that the deal with Ericsson undermined the value of those patents. See "RIM, Ericsson spar over Nortel wireless sale", *CBC News* (7 August 2009), online: *Canadian Broadcasting Corporation* <<http://www.cbc.ca/news/technology/story/2009/08/07/nortel-sale-committee.html>>.

¹²⁵ Hearings were held by a parliamentary committee which questioned government officials, Ericsson Canada's president, and RIM's co-CEO. See Campbell Clarke, "Ericsson, RIM to face off over Nortel", *The Globe and Mail*, online: *Globe and Mail* <<http://m.theglobeandmail.com/technology/ericsson-rim-to-face-off-over-nortel/article4213599/?service=mobile>>.

¹²⁶ See Industry Canada, *Investment Canada Act* (September 2009), online: *Industry Canada* <<http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk-30909.html>>. While Ericsson paid C\$1.3 billion for the assets, the book value of the assets was C\$149 million, falling short of the *ICA* review thresholds. Book value, unlike enterprise value, does not include the market value of intellectual property, which was substantial in this case. This is the type of situation that led to the proposal to change to review thresholds based on enterprise value: see Industry Canada, News Release, "Government of Canada Releases Policy Statement and Revised Guidelines for Investments by State-Owned Enterprises" (7 December 2012), online: *Canada News Centre* <<http://news.gc.ca/web/article-eng.do?nid=711489>>.

¹²⁷ See Industry Canada, News Release, "Statement Regarding Investments by Foreign State-Owned Enterprises" (7 December 2012), online: *Industry Canada* <<http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81147.html>>.

¹²⁸ Harper, "Foreign Investment Remarks", *supra* note 8.

