2024 CHANGES TO CANADA'S THRESHOLDS FOR MERGER NOTIFICATION AND *INVESTMENT CANADA ACT* REVIEWS

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The 2024 updates to the notification thresholds under Canada's *Competition Act* and *Investment Canada Act* have been announced. For the third year in a row the Minister of Innovation, Science and Industry elected to **"freeze" the *Competition Act* size of target threshold at C$93 million** to ensure that "a greater share of potential merger transactions will be automatically reviewed by the Commissioner of the Competition Bureau".[1] In prior years, the threshold was increased in line with changes to Canada's GDP. The Backgrounder published by Innovation, Science and Economic Development Canada ("**ISED**") on the decision to freeze the threshold includes a graph showing how many mergers would have avoided mandatory notification if the thresholds had been increased.

The ISED Backgrounder adds that "maintaining the notification threshold is the latest in a series of steps taken [by the Canadian government] to strengthen Canada's competition law, including by holding public consultation on the future of Canada's competition policy, by making meaningful amendments to the *Competition Act* through Bills C-56 and C-59, and by increasing the Competition Bureau's budget, among others." The Backgrounder is certainly correct that we are in a time of considerable competition and regulatory change in Canada. In particular, we are seeing transformative changes to the *Competition Act* and the *Investment Canada Act*, including (but by no means limited to) new rules for mergers and foreign investments in Canadian businesses. We have summarized these changes and the timing for their implementation are summarized in recent Bulletins:

- Competition Act Amendments Proceed at Pace (December 27, 2023)
- Transformative Change: Your Guide to Canada's Breathtaking Competition Act Changes (December 5, 2023)
- Industry Committee Expands Scope of National Security Powers and Other ICA Updates (October 3, 2023)
- Modernization of the Investment Canada Act is Underway (December 12, 2022)

This Bulletin focuses on the announced changes to the notification thresholds.

Competition Act Notification Updates

Thresholds

The *Competition Act* requires advance notification to the Commissioner of Competition when a transaction exceeds two monetary thresholds, as described below:

- "Size-of-target": where either (i) the book value of assets in Canada to be acquired, or the assets owned by a corporation the shares of which are to be acquired, or (ii) the annual gross revenue from domestic and export sales generated by those Canadian assets, exceeds **C$93 million** (unchanged in 2024).
- "Size-of-parties": where the parties to a transaction, together with their affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, exceeding **C$400 million** (this threshold has remained constant since 1986).
- The **proposed amendments** to the *Competition Act* that are expected to pass in the first half of 2024 will expand the revenue branch of the "size-of-target" test to include **sales that the target makes *into* Canada** in addition to domestic sales and exports. **This change will capture transactions not previously notifiable, where the target has a modest Canadian "on the ground" presence, but significant sales into Canada from its foreign operations.**

The Competition Bureau's **filing fee** for submitting a merger notification or request for an Advance Ruling Certificate currently is C$82,719.12. This fee is expected to be adjusted for inflationary changes on or about April 1, 2024.

Statistics

Below we present some key merger review statistics from the Bureau's most recent fiscal year ended March 31, 2023:[2]

- The Bureau conducted 208 merger reviews:
  - 200 involved formal filings[3] under the *Competition Act*.
  - Eight did not meet the notification thresholds but were nevertheless reviewed either through voluntary filing or a call-in by the Bureau.
- Of the 200 merger reviews involving formal filings:
  - The Bureau classified 128 (64%) as non-complex and completed its merger review in an average of 10 calendar days.
  - The Bureau classified 72 (36%) as complex, and the Bureau completed its merger review in an average of 39 calendar days. Of the complex cases, 13 (6.5% of all transactions) were very complex and received Supplementary Information Requests.
- The Commissioner of Competition, who heads the Bureau, challenged 14 transactions (~7%):

- 7 transactions (~3% of all transactions) were resolved by consent agreement between the parties and the Commissioner.
- 3 transactions (~1% of all transactions) were resolved by contested proceedings in the Competition Tribunal (with the Tribunal ruling in favour of the merging parties in 2 of these proceedings).[4]
- 2 transactions (~1% of all transactions) were abandoned by the parties.
- 2 transactions (~1% of all transactions) had unspecified results (with one likely being the WestJet/Sunwing deal that was approved under the *Canada Transportation Act* and the other not known).

Investment Canada Act

Threshold Updates

The *Investment Canada Act* requires that a non-Canadian investor file either a notification or an application for review when that investor acquires control of a Canadian business or establishes a new Canadian business.[5]

Investors have the option to file notifications on a pre- or post-closing basis (although there are amendments before Parliament that would require more pre-closing filings for investments that may raise national security concerns, as described in more detail in our bulletin *Modernization of the Investment Canada Act is Underway*). Additionally, such acquisitions of control of a Canadian business that exceed certain financial thresholds are subject to "net benefit reviews" and approval from the Minister of Innovation, Science and Industry and/or the Minister of Canadian Heritage, which generally has to occur pre-closing. The Minister must confirm that such an investment is of "net benefit to Canada" after considering any undertakings provided by the investor that provide assurances about the expected benefits.

Investors from countries with most-favoured-nation ("**MFN**") treatment under Canada's free trade agreements ("**Trade Agreement Investors**"), including the EU member states, the United States, Australia, Brunei, Chile, Colombia, Honduras, Japan, Malaysia, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, the United Kingdom and Vietnam, that are not State-Owned Enterprises ("**SOEs**") are generally required to file a pre-closing application for review and approval when they directly acquire control of a non-cultural Canadian business if the enterprise value of the target exceeds **C$1.989 billion** for 2024.[6] **This represents a 3% increase** from the C$1.931 billion threshold for 2023 (which represented **a 13% increase** from the C$1.711 billion threshold for 2022). This threshold also applies in respect of an investment to acquire control of a Canadian business that was, immediately prior to the investment, controlled by an investor from one of these countries.

Investors classified as "**WTO Investors**" – i.e., where the principal shareholders are based in countries that are World Trade Organization signatories (other than the Trade Agreement Investor countries) – also benefit from a high threshold of **C$1.326 billion** for 2024 for direct acquisitions of non-cultural Canadian businesses. **This also**

represents a 3% increase from the C$1.287 billion threshold for 2023 (which also represented **a 13% increase** from the C$1.141 billion threshold for 2022).

SOE investors, regardless of their country of origin, are subject to an asset size test for direct acquisitions (based on the target's business in Canada). The 2024 asset size threshold is **C$528 million** for acquisitions of non-cultural businesses. **This also represents a 3% increase** from the previous C$512 million threshold in 2023 (which itself also represented **a 13% increase** from the C$454 million threshold in 2022). Additionally, proposed amendments before Parliament would allow for the government to order discretionary net benefit reviews of below-threshold SOE investments for any SOE investors who are not Trade Agreement Investors (both for direct and indirect investments).

Indirect acquisitions of non-cultural businesses involving WTO Investors,[7] including ones involving SOEs, are only subject to a notification requirement.[8]

The asset size thresholds for investments involving Non-WTO Investors and for investments in Canadian cultural businesses remain at C$5 million for direct acquisitions and C$50 million for indirect acquisitions.

Net Benefit Reviews

In the government's fiscal year ended March 31, 2023, there were 1,010 non-cultural filings made under the *Investment Canada Act*, including for acquisitions and for the establishment of new businesses, which represents a decrease of just under 20% from the previous fiscal year, when there were 1,255 filings (a record high). The government attributes the decrease as representing a return to the normal range following an abnormally low number of filings in the 2021 fiscal year due to COVID (only 826 filings), which was followed in fiscal year 2022 by an abnormally high number of filings, reflecting the recovery from COVID. Of the 1,010 investments, there were **only five net benefit reviews**, because of the high thresholds for Trade Agreement Investors and WTO Investors.[9]

National Security Reviews

The *Investment Canada Act* also contains a national security review regime. Any investment (even the acquisition of a minority interest in a Canadian business) by a non-Canadian investor in a business with Canadian operations that "may be injurious to national security" can trigger a national security review. The government has 45 days following certification of an investor's notification or application for review under the *Investment Canada Act* to start a national security review process. For investments that are not notifiable or reviewable, the government has a 5-year look back window to initiate a national security review if the investor did not submit a voluntary notice.

Roughly 3% (or 32) of the 1,010 non-cultural investment filings made in fiscal 2023 triggered a national security

review process. Of these 32:

- The government cleared 10 investments in which investors were notified that a full-scale national security review might be required, but then no such review was ordered.
- The government undertook a full national security review of the other 22 investments, which is more than double the number from the prior fiscal year and well above the long run average of just under 10 per year.
- Of the 22 investments that triggered a full-scale review:
    - The government unconditionally cleared 10.
    - Investors from eight of the investments decided not to proceed.
    - The government ordered divestitures in three other cases (which we discussed in our November 2022 bulletin).
    - One review was ongoing at year end.

The average length of national security reviews has increased from 133 days in fiscal 2022[10] to 174 days or nearly 6 months in fiscal 2023.[11]

Over the years, an increasing percentage of investments of Chinese origin have triggered national security reviews. Of the 59 transactions that have been subject to full-scale national security reviews since fiscal 2019, 36 (61%) originated from China. In fiscal 2023, 43 filings were made by investors of Chinese origin, of which 16 (37%) resulted in a full-scale national security review.

Investments that have been the subject of national security reviews have most commonly involved industries relating to technology/computer systems, manufacturing, scientific research and natural resources, with a particular focus on critical minerals.[12] For more information concerning recent changes to Canada's national security regime, please see our recent bulletins on the proposed amendments to the *Investment Canada Act*.

Additional Background on Mergers in Canada

- **Thresholds Chart:** Please see our Canadian *Competition Act* and *Investment Canada Act* Threshold Chart which summarizes the 2024 thresholds and filing fees.
- **Panoramic (formerly Getting the Deal Through):** For a more detailed discussion of the Canadian merger review regime, see **James Musgrove, Mark Opashinov, Joshua Chad and Joshua Krane** *"Canada", Merger Control 2024 – Panoramic* (Lexology).

Please contact any member of McMillan's Competition and Foreign Investment Group if you have questions about how a transaction may implicate Canada's *Competition Act* or *Investment Canada Act*. We would be very pleased to explore whether your proposed transaction exceeds relevant thresholds for notification and

review, and also to consider any national security or substantive competition law risks related to transaction under consideration.

by the Competition and Foreign Investment Group

[1] Department of Finance Canada, "Government announces new action to build more than 5,000 affordable homes and strengthen competition to lower prices for Canadians" (February 27, 2024).
[2] Competition Bureau, Competition Bureau Performance Measurement & Statistics Report 2022-2023 for the period ending March 31, 2023.
[3] Formal filings include the statutory forms that are mandated by Part IX of the *Competition Act* and letters requesting advance ruling certificates.
[4] The Commissioner's successful challenge of the Secure/Tervita transaction was upheld on appeal, and the Supreme Court of Canada has dismissed the application for leave to appeal. See: Competition Bureau, Supreme Court dismisses Secure Energy's application to appeal the successful challenge of Secure and Tervita merger (February 26, 2024).
[5] For the purposes of the Act, a "non-Canadian" includes any entity that is not controlled or beneficially-owned by Canadians.
[6] With the exception of the thresholds for investments made by investors who are controlled from non-WTO countries and investments made into Canadian cultural businesses, where in both cases the thresholds stay the same every year, the *Investment Canada Act* net benefit review thresholds for other types of investments are subject to an adjustment based on the annual percentage change in nominal Gross Domestic Product. The next adjustment is expected in early 2025.
[7] An indirect acquisition is a transaction involving the acquisition of the shares of a company incorporated outside of Canada, which owns subsidiaries in Canada. Asset transactions are always considered direct acquisitions.
[8] As noted, proposed amendments would allow the government to initiate discretionary net benefit reviews for SOE investments by SOEs that are not Trade Agreement Investors.
[9] Innovation, Science and Economic Development Canada (ISED), *Investment Canada Act Annual Report 2022-2023* at 6. This count does not include investment filings received by the Department of Canadian Heritage in respect of the acquisitions of cultural businesses. Canadian Heritage's FY2021, FY2022 and FY22023 annual reports on the administration of the *Investment Canada Act* have not been released. Looking at its most recently reported 12 months (ended December 31, 2022), Canadian Heritage's registry suggests that Canadian Heritage received 44 filings during this annual period, including 11 requiring net benefit reviews.
[10] ISED, *Investment Canada Act Annual Report 2022-2023* at 27.
[11] ISED, *Investment Canada Act Annual Report 2021-2022* at 22.

[12] ISED, *Investment Canada Act Annual Report 2022-2023* at 28, ISED, *Investment Canada Act Annual Report 2021-2022* at 23 and ISED, *Investment Canada Act Annual Report 2020-2021* at 21-22.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.