

# CANADA EXPANDS INTERIM MEASURES AND DISCLOSURE POWERS FOR FOREIGN INVESTMENT NATIONAL SECURITY REVIEWS

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Effective September 3, 2024, the Minister of Industry (“**Minister**”) has significant new powers when conducting national security reviews under the *Investment Canada Act* (“**ICA**”).<sup>[1]</sup>

These new rules:

- i. allow the Minister to order reviews without a Cabinet authorization, to extend timelines and to impose interim conditions during a review;
- ii. increase information-sharing and disclosure powers during national security reviews, including greater scope to communicate with foreign governments and the power to identify the investors and the target business investment when publicly disclosing that the federal Cabinet has issued an order taking measures to protect national security; and
- iii. increase the penalties for non-compliance.

A new pre-notification regime for sensitive sectors and technologies requires implementation regulations and will not come into force until sometime in 2025 or thereafter.

The ability to negotiate resolutions with the Minister rather than requiring Cabinet approval may be helpful for foreign investors and Canadian businesses in suitable cases. However, the additional powers to extend timelines, make interim orders and disclose the identity of parties where national security concerns arise may interfere with transaction planning for investors and Canadian businesses.

## 1. New Ministerial Powers in the National Security Review Process

The Minister now has significantly more flexibility over the national security review process:

- A Cabinet order is no longer required to conduct a formal review — The Minister may order a review immediately after consulting with the Minister of Public Safety and Emergency Preparedness.
- The Minister also may unilaterally extend the national security review period beyond the initial 45-to-90-

day window, without the previously required Cabinet approval.

- The Minister has a broad new power to impose interim conditions on an investor during a review, after consultation with the Public Safety Minister but without any need for Cabinet approval.

The Government of Canada has clarified in an [Administrative Note on Interim Conditions](#) that interim conditions “will be imposed when necessary for the purpose of preventing injury” and such decisions will be determined on a case-by-case basis. These interim conditions may include monitoring requirements, limitations on access to intellectual property of the Canadian business during the review, and changes to the governance of the target. As noted in our earlier [bulletin](#), we anticipate that interim measures are most likely for transactions involving Canadian businesses in defence, critical minerals, critical infrastructure, critical goods and services, and sensitive technologies such as artificial intelligence.

The Minister’s new power to accept undertakings from parties (including from both foreign investors and vendors) to address possible national security concerns provides a faster and more flexible mechanism for resolving concerns on a negotiated basis at the Ministerial level rather than waiting for a Cabinet order.

The Government has released an Administrative Note on National Security Undertakings, which provides greater detail on the process by which the Government provides foreign investors with opportunities to make representations and propose undertakings to address national security concerns. Measures may include altering transaction documents, corporate structures, governance, and operations, and the use of monitoring and reporting protocols. These measures may be negotiated and refined in consultation with the Minister’s staff.

## **2. Information Sharing and Disclosure**

The new rules permit more information sharing with both foreign governments and the public than was previously authorized. The Minister is now authorized, without waivers from the investor, to share any information obtained through the administration or enforcement of the ICA with foreign governments or agencies for the purpose of conducting national security reviews of foreign investments. This is comparable to the authorization granted to the Competition Bureau when conducting merger reviews or other investigations; waivers from the parties providing information are not required if the communication is for the purpose of administering or enforcing the *Competition Act*.

The ICA now also expressly permits the Minister to identify both the investor and/or the business that is the subject of the investment when disclosing that the federal Cabinet has issued an order taking measures to protect national security. This is a significant change, since historically only the industry sector and the country of origin of the investor were disclosed. While the Government [announced](#) its intention to be more transparent regarding the outcome of national security reviews in a statement from November 2022, it was not clear

whether the investor's and Canadian business's identities could be disclosed publicly until the Bill C-34 amendments.

In contrast, investors are not receiving additional rights to disclosure or transparency during national security reviews. Instead, the new rules authorize a judge conducting a judicial review of the Minister's or Cabinet's decisions to hold hearings without the applicant or their lawyers present, at the Minister's request, if the disclosure of evidence could harm national security or jeopardize public safety. The judge may base a decision on such evidence or other information, even if the applicant has not been provided such information. However, the Government is required to provide a summary of information sufficient for the investor "to be reasonably informed" of the government's case.

### **3. Increased Penalties**

The Minister must make a demand to a party to comply with any obligations that are being breached under the ICA before applying to a court to have penalties imposed. The amendments significantly increase the extent of the penalties for not adhering to a justified Ministerial demand for compliance from C\$10,000 to C\$25,000 per day. Such penalties continue to apply predominantly<sup>[2]</sup> to foreign investors, not to the vendor or the Canadian business.

### **4. Upcoming Changes: Mandatory Pre-Closing Filings and Other Amendments Still not in Force**

Some amendments enacted by Bill C-34, most notably the mandatory pre-implementation filing requirements for investments in sensitive industries, and the new ministerial powers to review investments by state-owned or state-influenced entities, are not yet in force. These amendments also will introduce new penalties of up to \$500,000 or more for foreign investors who fail to make required pre-closing filings for investments involving prescribed sensitive industries. These amendments are expected to come into force in 2025 (or potentially later), following public consultations on the proposed regulations.

[1] For an in-depth review of the Bill C-34 amendments, see our previous bulletins: [Modernization of the Investment Canada Act is Underway](#), December 2022, [Industry Committee Expands Scope of National Security Powers and Other ICA Updates](#), October 2023 and [New Era of Foreign Investment Scrutiny Starts in Canada with Passage of Investment Canada Act Amendment Bill](#), March 2024.

[2] The national security review provisions do include the ability for the Minister to demand information from vendors and other persons relevant to a national security review. If a vendor (or another person who is the subject of such a demand) fails to comply, they could also be found liable for these penalties.

Please contact any member of McMillan's Foreign Investment Group if you have questions about how these recent changes to ICA may impact a transaction.



by [McMillan's Foreign Investment Group](#)

### **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.

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