

CANADA'S NEW POLICIES ON INVESTMENTS IN THE INTERACTIVE DIGITAL MEDIA SECTOR

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Introduction

On March 1, 2024, the Canadian government introduced new policies to increase scrutiny of foreign investments in Canada's Interactive Digital Media ("IDM") sector, including video games and virtual reality devices. This initiative comes in the wake of proposed amendments to the national security regime of the *Investment Canada Act* ("ICA") that are likely to pass in early 2024, which were discussed in our prior bulletins [here](#) and [here](#).

IDM is non-exhaustively defined:

Interactive digital media includes, but is not limited to, digital content and/or an environment in which users can actively participate or that facilitates collaborative participation among multiple users for the purposes of entertainment, information or education, and commonly delivered via the Internet, mobile networks, gaming consoles or media storage devices. Examples of activities that fall under the category of interactive digital media include, but are not limited to, video gaming (including online gaming, consoles) and technology platforms that can be used for entertaining, education, training, and e-commerce (including some mobile apps, virtual and/or extended reality devices).^[1]

A [joint statement](#) by the two Ministers responsible for administering the ICA notes that IDM represents a significant part of Canadians' lives and that "hostile state-sponsored or state-influenced actors may try to leverage foreign investments in the interactive digital media sector to spread disinformation and manipulate information". These issues are addressed primarily in a policy statement issued by the Department of Innovation, Science and Economic Development Canada ("ISED"): [Policy Statement on Foreign Investment Review in the Interactive Digital Media Sector](#). In addition, the Department of Canadian Heritage ("Canadian Heritage") issued a policy statement focused on "net benefit reviews" of investments that involve IDM cultural businesses: [Policy Statement on the benefit reviews of Foreign Investments in Cultural Businesses in the Interactive Digital Media Sector under the Investment Canada Act](#).

ISED's National Security Policy Statement on IDM

ISED's statement focuses on preventing hostile foreign actors from using investments in Canadian IDM businesses to spread disinformation, manipulate information or take other actions that would be injurious to Canada's national security. Information manipulation is considered to include omitting facts, amplifying narrative in an inauthentic manner, doctoring audio/visual content, "trolling", and censoring or coercing the self-censoring of information. This new policy continues a years-long trend in which the Canadian Government has broadened its approach to what may be considered injurious to national security (see our [2022 bulletin](#) describing Canada's revised approach to foreign investment in critical minerals and the evolving national security regime).

Under the ICA, any investment by a foreign-controlled person in Canada can be reviewed on national security grounds (including control acquisitions, minority investments and new business establishments). The new policy provides that foreign investments in IDM businesses by entities owned or influenced by foreign states, particularly hostile foreign states, will be subject to enhanced national security scrutiny under the ICA due to the increased risk that IDM could be used for misinformation. State-owned and state-influenced entities include state enterprises, sovereign wealth funds, government-directed pension plans, and private investors assessed as being closely tied to, subject to influence from, or who could be compelled to comply with extrajudicial direction from foreign governments.^[2]

This policy indicates that the following factors will be considered in assessing whether investments in IDM could be injurious to Canada's national security:

- the content's reach and audience;
- online features (e.g., in-game chats, purchases, microphone/camera access);
- the investor's ties to foreign governments;
- potential use of the Canadian business for disinformation or censorship contrary to Canadian values;
- the composition of the business; and
- the extent of investor influence over the Canadian business and its content.

Most investments requiring net benefit review (discussed in the section below) already require pre-closing filing under the ICA, as will investments in certain types of businesses that might raise national security concerns (see our annual [merger thresholds update bulletin](#) and our bulletin on the [modernizing of the ICA](#) for a broader discussion of these items). For an investment that does not require a pre-closing filing under the ICA, an investor has the option of submitting an ICA filing pre-closing in order to confirm whether the Government plans to review the investment on national security grounds. ISED has 45 days from the day it receives a complete ICA filing to determine whether or not to engage the ICA's national security regime. In the new policy, ISED includes an implicit recommendation that investors who are making an investment in a Canadian

business that is, or potentially could be considered, IDM should submit their ICA filing at least 45 days pre-closing.

Net Benefit Review Policy Statement on IDM

In addition to national security reviews, the ICA allows foreign investments in Canadian “cultural” businesses to be reviewed to confirm that such investments are of “net benefit” to Canada. Cultural businesses are defined in the ICA to include, among other similar activities, businesses engaged in book publishing and distribution, film, video and music production and dissemination, and radio, television, cable and satellite broadcasting. Canadian Heritage has taken the view consistently that activities relating to video games and similar products are caught by the ICA’s definition of cultural business.

Many investments in cultural businesses automatically require net benefit reviews pursuant to low financial thresholds based on the balance sheet assets of the target. Please see our annual [merger thresholds update bulletin](#) for a brief overview of the ICA net benefit review thresholds. Additionally, cultural investments that do not meet these thresholds can be reviewed on a discretionary basis, and the new policy indicates that such discretionary reviews usually will be ordered for investments in an IDM cultural business. IDM that is considered “cultural” includes the following:

Examples of cultural activities that fall under the category of interactive digital media include, but are not limited to, PC gaming, console gaming, cloud gaming, mobile gaming, and certain immersive technology/augmented reality.

In order to obtain net benefit approval, investors often need to commit to binding undertakings to demonstrate that their investments will be of net benefit to Canada. The Canadian Heritage policy is focused on ensuring that "Canadian stories are created and owned by Canadians in the Cultural IDM Sector" and that Canadian-owned and created intellectual property is preserved. As a result, the policy indicates that net benefit reviews of investments in Canadian cultural IDM businesses that create their own intellectual property (IP) will likely be subject to stringent undertakings.

The Canadian Heritage policy provides a list of factors that will be considered in performing the net benefit assessment of IDM investments. The factors include the same factors highlighted in the ISED national security policy statement. Other general net benefit factors will also apply. Additionally, where the IDM business includes the creation and ownership of IP, required undertakings will typically include:

- preserving the creative independence of the Canadian business;
- ensuring effective corporate governance and decision-making transparency; and
- mandating regular reporting, auditing, and inspection rights.

Please contact any member of McMillan's Foreign Investment Group if you have questions about how a transaction may be impacted by the ICA and these policy statements. We would be very pleased to explore whether your transaction triggers any filing requirements or raises any national security or net benefit review considerations.

[1] See the policy statement made by the Department of Innovation, Science and Economic Development Canada available [here](#).

[2] See our [prior bulletin](#) discussing the government's 2022 critical minerals policy for a broader discussion on what might be captured as a state-owned or state-influenced enterprise.

[3] McMillan's Foreign Investment Group thanks Mishail Adeel (Articling Student) for her contributions to this bulletin.

by [McMillan's Foreign Investment Group](#)[3]

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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