

CHINA MOBILE CASE RAISES NATIONAL SECURITY HANG-UP

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On August 6, 2021, the Governor in Council issued an order under the *Investment Canada Act* (ICA) requiring a Chinese state-owned telecom company to either divest or wind up the operations of its Canadian subsidiary within 90 days (the “**Order**”). This followed from a national security review that began in early 2021. On September 7, 2021, the company filed an application for judicial review challenging the Order.

Key Takeaways

This is the second litigated challenge of a national security review under the ICA. While the Canadian Government conducts national security reviews for around 1% of foreign investment transactions per year, the number and percentage of interventions is increasing. This case raises three important points for businesses to consider:

1. The Government can commence a national security review at any point until 45 days after an investor submits a completed notification under the ICA.
2. The Government appears to be considering a broad range of factors when it makes a national security assessment particularly where the Canadian business does not own or operate any physical or technical infrastructure.
3. The Government might not provide investors or Canadian businesses with complete information about the Government’s case, but that issue will likely be the subject of the ongoing litigation.

Additional Background

In 2015, China Mobile Communications Group Co., Ltd. (“**China Mobile**”) established its Canadian operations through a Canadian subsidiary, China Mobile International (Canada) Inc. (“**CMI Canada**”). CMI Canada supplies pre-paid call plans, mobile communication services, and business support services (e.g., marketing) but does not own or operate any telecommunications network facilities or infrastructure. Instead, CMI Canada partnered with Telus to provide CMI Canada customers with access to the Telus network.

China Mobile did not file an ICA notification when it established CMI Canada and only filed its notification five years later after being contacted by the Government. Over the three months following submission of the notification, the Minister issued requests for information, and, on January 28, 2021, informed China Mobile that

a national security review was underway. The review concluded on August 9, 2021, when China Mobile received the Order.

This decision highlights the Government's authority to review inbound foreign investments when they involve changes of control or the establishment of a new Canadian business. The ICA contemplates a 200-day review process, but the process can be extended on consent of the investor. Indeed, the review in the CMI Canada matter lasted approximately 300 days.

As this case progresses through the courts, investors may learn more about the Minister's reasoning and the evidence that led to the Order. Typically, the Minister does not provide detailed reasons to the investor about the grounds for conducting a national security review or the reasons for an Order. The court process could change the practices around disclosure and reveal factors beyond more conventional security concerns that inform Government decisions to block or unwind inbound investments in Canada. The only prior national security review case challenged in court did not result in a decision.

Please reach out to us, or to your usual McMillan contact, if you have any questions about these developments, or in connection with a new investment in Canada.

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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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