

# HEIGHTENED SCRUTINY OF FOREIGN INVESTMENT IN THE TIME OF COVID

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## Broader Approach to National Security

Canada has quietly but dramatically expanded the breadth and depth of its review of foreign investments in response to the unprecedented health, safety and economic challenges arising from the COVID-19 pandemic. In a low-key policy statement issued on Saturday, April 18th, the Minister responsible for the *Investment Canada Act* (“**ICA**”) has indicated that the national security powers in the ICA will be used to carefully scrutinize investments in health-related sectors as well as other sectors involved in the supply of critical goods and services.<sup>[1]</sup>

While the policy announcement reiterates Canada’s longstanding recognition of the benefits of foreign investment as a driver of growth, trade, competition and innovation in a global economy, Prime Minister Trudeau’s tone was firm during his Sunday, April 19, press conference: “there are vulnerable businesses that are going to be important to our recovery who are perhaps exposed to foreign purchases in a vulnerable time... So we will be strengthening our oversight and paying close attention to foreign investment in this country to ensure there [aren’t] people taking advantage of this crisis.”<sup>[2]</sup>

Any investment by state-owned firms or by private investors with close ties to foreign governments, regardless of the size of the investment, will also face scrutiny. The Canadian government is concerned that some investments into Canada by state-owned enterprises may be motivated by non-commercial imperatives that could harm Canada’s economic or national security interests.

Until the economy recovers from the impact of the pandemic, there will be enhanced attention to any type of investment that could negatively impact critical sectors. While the concern about the ability of Canada to secure supplies of medical equipment, drugs, tests and similar supplies is well known, these measures go beyond just responding to that. There is a clear desire to protect Canadian businesses from ‘predatory’ acquisitions while business values are low. We expect the approach will be reflect caution, but not protectionism. For the immediate future, however, the ICA regime is likely to become less predictable and significant planning and advice may be required with respect to meaningful transactions. Government

relations efforts, including direct lobbying and media relations to present transactions positively, will become strategic imperatives for investors to consider.

### **Canada is Following an International Trend**

Canada is not alone in taking steps to allow for scrutiny of foreign investment during the COVID-19 crisis. Several jurisdictions have announced regulatory or policy changes in respect of foreign direct investment. For example, on March 25, 2020, the European Commission (EC) [issued guidance](#) to Member States noting that COVID-19 has increased the risk of attempts to acquire “healthcare capacities” and “related industries” via foreign direct investment that requires “vigilance” to ensure that such investment does not have a “harmful impact on the EU’s capacity to cover the health needs of its citizens. Similarly, Australia announced [temporary changes to its foreign investment review framework](#) on March 29, 2020 that requiring approval by the Australian Foreign Investment Review Board for all proposed foreign investments. In India, the Ministry of Commerce & Industry’s Department for Promotion of Industry and Internal Trade released a [“press note”](#) on April 17, 2020 requiring investments from countries that share land borders with India, like China, to obtain approval.

### **What is Changing**

Over the past decade, Canada has substantially raised its thresholds for pre-closing review and approval of foreign acquisitions of sizeable Canadian companies under the “net benefit to Canada” provisions in the ICA, with the result that many investments which were formerly subject to review no longer are. It has also introduced a national security regime focused primarily on military / defence and terrorism risks, critical infrastructure and technology (primarily telecom), and certain investments by state-owned enterprises that may not operate in a normal commercial manner. Net benefit and national security reviews have been relatively infrequent, with few blocked transactions and a strong “open for business” track record.<sup>[3]</sup>

The new COVID-19 policy statement enlarges the historic approach to national security review in three key areas:

- i. There is a clear signal that health-related and other critical goods, services and technologies will be systematically examined to identify any national security concerns. This is a potentially substantial expansion of the concept of national security, given the many health, food, transportation and other supply chains that are being viewed as critical in government responses to the pandemic.<sup>[4]</sup>
- ii. Investments by state-owned enterprises, and by “private investors assessed as being closely tied to or subject to direction from foreign governments”, will be scrutinized particularly carefully. This suggests a larger potential range of concerns than the historic focus on state-owned enterprises of countries that are not close allies.

- iii. The observation that “sudden declines in valuations could lead to opportunistic investment behaviour” and the comment that “direct investments of any value” may be reviewed indicate a new type of concern about loss of decision-making in Canada by entities whose decisions to supply Canadian versus export customers may be important to Canadians. This sensitivity is not surprising having regard to the populist and protectionist sentiments recently observed in various other jurisdictions, including in respect of medical equipment and supplies.

### **What is not Changing**

There are no changes to the formal national security review process, the net benefit review thresholds, the special (lower) review thresholds applicable for state-owned enterprise investors, or the related formal time limits for notification and review processes under the ICA.

Every acquisition of control of a Canadian business (even if already foreign-owned) by a non-Canadian is subject to Notification before or within 30 days after closing. These Notifications play a crucial role in enabling the Government to consider whether to initiate a national security review of any transaction that is not subject to a pre-closing net benefit review and approval. The Government must take action within 45 days after receipt of a Notification if it wants to pursue a national security review.

The national security review provisions can also apply to foreign investments that do not result in an acquisition of control (e.g., a minority shareholding). The policy statement makes it clear that the Government plans to scrutinize non-controlling investments in the health and critical goods and services sector carefully. However, this power only becomes operative if and when the Government becomes aware of such a transaction, after which it has 45 days in which to pursue a national security review.<sup>[5]</sup>

The Government’s powers in a national security review are substantial. It can block transactions or impose mitigating measures on a proposed transaction. If a transaction has already been completed, the Government can order divestiture.

### **Practical Implications for Investors**

Investors should expect that various types of transactions, including smaller deals and even transactions involving investors from jurisdictions with which Canada has close trade and political relationships, are more likely to be considered for national security reviews as a result of the new policy. The policy statement reiterates the Investment Review Division’s recent practice of inviting investors to consult in advance regarding transactions that may attract scrutiny. It also notes the practical suggestion that investors who want to know before closing whether a national security review will occur should provide their Notification at least 45 days in advance of closing.

While economic predictions are always challenging, given the economic uncertainty, we might have expected investment volumes to be lower in 2020 than in prior years — although there is the offsetting consideration that with the Canadian dollar down, and the export and resource industries challenged, there may be perceived bargains. Added to this uncertainty, if the policy statement is applied as written, the potential increase in national security review activity will add complexity to deals. The Investment Review Division may need additional resources to implement the policy statement effectively while adhering to the time limits applicable to such reviews. In particular, it may be challenging to maintain the current triaging practice where most cases that do not raise significant issues have the file closed within the initial 45 day period in which a review may be initiated.

For cases that do raise issues in the broader contexts flagged by the policy statement, investors may need to invest more extensively in government relations and communications efforts to demonstrate that national security concerns would not be expected to arise, or to propose mechanisms that allow such concerns to be prevented or mitigated.

by Neil Campbell, Joshua Chad and Melanie Paradis

[1] The Investment Review Division of Innovation, Science and Economic Development, Ministerial Statement, “Policy Statement on Foreign Investment Review and COVID-19” (2020-04-18), available [online](#).<sup>[ps2id id='1' target='']</sup>

[2] See Prime Minister Justin Trudeau’s update on the federal response to COVID-19 from April 19, 2020, available [online](#). Please refer to the Prime Minister’s remarks starting at 11:20.<sup>[ps2id id='2' target='']</sup>

[3] See, for example, our 2018 bulletin discussing a rare instance where the national security power was used, [“Canada’s Use of its National Security Power” \(May 2018\)](#).<sup>[ps2id id='3' target='']</sup>

[4] See our bulletins discussing the essential service lists in [Alberta](#), [British Columbia](#), [Ontario and Quebec](#). Please also see our recent webinar discussing essential workplaces and services that is available for viewing online.<sup>[ps2id id='4' target='']</sup>

[5] The national security review process has multiple stages and may take up to 200 days (or longer with the consent of the parties) in cases in which a remedy is determined to be required. This process is set out in detail in section 8 of our recent bulletin providing an overview of the Canadian national security review system, [“Canadian National Security Reviews: 10 Takeaways”](#) (October 2019).<sup>[ps2id id='5' target='']</sup>

### **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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