

# INDUSTRY COMMITTEE EXPANDS SCOPE OF NATIONAL SECURITY POWERS AND OTHER ICA UPDATES

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**Categories:** [Insights](#), [Publications](#)

The House of Commons Standing Committee on Industry and Technology has completed its [study of Bill C-34](#) (the “**Bill**”) – the most consequential set of amendments to the *Investment Canada Act* since the introduction of the national security review provisions more than a decade ago. The Bill is expected to become law this fall.

As described in our December 2022 [bulletin](#), once passed, the Bill will confer the Government of Canada additional national security review powers over inbound investments. Specifically, it will require pre-closing filing requirements for “red-list” investments in sensitive sectors, even where there is no change in control.<sup>[1]</sup> Other changes include conferring the Minister of Innovation, Science and Industry the authority to impose interim conditions during a national security review, allowing the Minister to accept undertakings from investors during that process and enhancing the penalties for non-compliance with the ICA.

Below we outline the Committee’s proposed additional changes to the Bill, and describe their key implications for Canadian businesses, their shareholders and non-Canadian investors. We also summarize the most recent Annual Report released by the Director of Investments below.

## Key Takeaways

- **Expanded scope of national security reviews** – With these amendments, the Committee is attempting to close a significant gap in the government’s authority to review investments. In particular, the amended Bill proposes to expand the scope of the national security review provisions to include asset acquisitions that do not result in a change of control (e.g., do not comprise substantially all the assets of a business). This appears to be intended primarily to capture transfers of intellectual property from Canadian companies to foreign investors. The amendments also provide that a corruption conviction is sufficient grounds to initiate a national security review – the first specific triggering factor listed in the ICA.
- **Greater powers to review investments by state-owned-enterprises** – The amendments would provide the federal Cabinet with authority to order “net benefit” (i.e., economic) reviews of any investment by a state-owned enterprise from a country without a trade agreement with Canada. Today, this power is

limited to investments in Canadian cultural businesses. This discretionary review power could be used to require state-owned investors from China and other countries to apply for approval to acquire Canadian businesses and potentially provide undertakings to satisfy the Minister that a transaction is likely to be of “net benefit to Canada.”

- **“Net Benefit” to include data and IP rights** – The “net benefit to Canada” criteria would be expanded to include explicit consideration regarding the effect of an investment on rights relating to intellectual property funded by the government and the investment’s effect on the use and protection of Canadians’ personal information. Both considerations arose during testimony before the Committee.
- **More information for legislators, not investors** – The Minister would be required to notify the National Security and Intelligence Committee of Parliamentarians (“**NSICP**”) and National Security and Intelligence Review Agency (“**NSIRA**”) on a confidential basis of any investments that Cabinet approves or denies. The Minister would also be expressly permitted, but not required, to disclose to the public the identities of the parties involved in such an investment. [Recommendations](#) by witnesses, including a co-author of this bulletin, to introduce an amicus process to provide additional transparency to investors during the process were not accepted by the Committee.

## Annual Report

The Director of Investments has released the [2023 annual report](#) on the administration of the ICA describing investment activities during the April 2022 – March 2023 reporting period. The report includes data on the establishment of new businesses and acquisitions of control by foreign investors in addition to details on national security reviews.<sup>[2]</sup>

A record number of national security reviews occurred during this period – nearly double from the prior year (22 compared to 12). That said, the Government permitted 10 of the 22 reviewed investments to proceed without remedies. While more time is being taken to review investments that might raise security concerns, receiving an order that commences a national security review order will not necessarily lead to a conclusion that investment will be found to be injurious to national security.<sup>[3]</sup>

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

[1] Specifically, where the non-Canadian investor (i) could gain access to material non-public technical information or material assets, and (ii) would have the power to appoint or nominate any person who has the capacity to direct the business and affairs of the business or prescribe special rights with respect to the business. The Government will identify the specific list of sectors in regulations after the passage of the Bill.

[2] During this period, as in recent years, investors from the United States, the European Union, and the United

Kingdom accounted for most investments on a number and value basis. Collectively, these jurisdictions accounted for 804 filings (80% of the total number of filings), 52% of investments measured by Asset Value, and 81% measured by Enterprise Value. China's share of the total number of investments in Canada increased slightly to 4.3% in 2022-23, compared to 4.0% the year prior. See Innovation, Science, and Economic Development Canada, "[2022-2023 Annual Report: Investment Canada Act](#)", 22.

[3] These include [the three divestiture orders from November 2022 aimed at investments in Canada's critical minerals sector, which we reported on previously](#). Besides these divestitures, ten transactions were allowed, one review remained ongoing and eight were withdrawn.

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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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