

WIND-UP AND HANG-UP: CHINA MOBILE'S MOTION TO STAY AN ICA ORDER PENDING JUDICIAL REVIEW DISMISSED

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This past December, the Federal Court dismissed a motion to stay an order of the Governor in Council (the “**GiC**”) under the *Investment Canada Act* (“**ICA**”), requiring a Chinese state-owned telecom company to divest or wind up the operations of its Canadian subsidiary (the “**Order**”), pending resolution of a judicial review application. For additional details on the facts and circumstances that led to the Order, please consult our [previous bulletin](#) from October.

Key Takeaways

As we noted in our previous bulletin, this is only the second litigated challenge of a national security review under the ICA. However, with the number of national security reviews increasing, such challenges may become more common in the future. This case raises three important points for businesses to consider:

1. Operating a Canadian business without providing the required notice in contravention of the ICA ensures that an investor remains at risk of a future national security review and counts against the investor when a court considers whether it is equitable to grant a stay.
2. Even where a judicial review application is pending, a foreign investor may be required to comply with an order under the ICA to divest or wind up the operations of a Canadian business.
3. Even with evidence of potential harm to jobs and economic opportunities, the government benefits from a strong presumption that its decisions are in the public interest.

Test for Injunctive Relief

To obtain relief, China Mobile Communications Group Co., Ltd. (“**China Mobile**”) was required to prove on balance that: (i) there was a serious issue to be tried; (ii) it would suffer irreparable harm if the stay was not granted; and (iii) the balance of convenience lied in its favour. While the court found that China Mobile satisfied the first two elements, it denied the stay on the grounds that the harm to the public interest exceeded the harm to China Mobile. Moreover, in obiter, the court would have considered the non-filing by China Mobile of its required notice under the ICA as a consideration against China Mobile on the equities of making an order.

1. Serious Issue to Be Tried

China Mobile argued that there were two serious issues to be tried. First, it argued that the Minister of Innovation, Science and Industry (the “**Minister**”) applied the incorrect legal test in referring China Mobile’s investment in its Canadian subsidiary, China Mobile International (Canada) Inc. (“**CMI Canada**”) to the GiC. The national security risks identified in the Order all referred to concerns about what CMI Canada may do, whereas the ICA provides for an investment to be referred to the GiC when the Minister is satisfied that it would be injurious to national security. The court accepted this argument, but noted that it was an open question as to whether the Minister can be satisfied that an investment would be injurious to national security based on risks that are mere possibilities, rather than likelihoods. China Mobile also argued that the Minister and the GiC were biased, in part due to the prevailing political climate. The court rejected this allegation due to a lack of evidence.

2. Irreparable Harm

China Mobile argued that it would suffer irreparable harm if a stay was not granted because the judicial review application would not be heard until after January 5, 2022, the day that it was required to comply with the Order. The specific harms identified included (i) the loss of CMI Canada’s client base, and the costs associated with terminating their agreements; (ii) the loss of CMI Canada’s licence; (iii) the loss of CMI Canada’s employees; (iv) reputational damage; and (v) forgone revenues and costs associated with the winding-up. Despite a lack of any evidence presented by China Mobile to support these claims, the court said that at least some of these outcomes could be inferred from the Order itself.

3. Balance of Convenience

In dismissing the motion, the court accepted the government’s evidence, including reports from various national security organizations, and the United States Federal Communications Commission, which identified the Chinese government as a threat and noted its indirect control over CMI Canada.

By contrast, China Mobile raised several arguments regarding why the balance of convenience favoured the stay. The court rejected the extent of irreparable harm due to insufficient evidence. The court also noted that if China Mobile prevailed on its main challenge, it had the ability to re-establish the Canadian business and to reverse many of the alleged irreparable harms. The court did not find that the Minister or GiC contributed to a delay in the proceedings, nor did it find that the granting of extensions during the review period prejudiced the government’s position.

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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