Cassels

Canada Toughens National Security Reviews of Foreign Investments

April 7, 2021

The Canadian government has toughened its approach to national security reviews of foreign investments by adding to the list of factors that it considers during national security reviews and confirming that investments by state-owned enterprises (SOEs) will continue to face increased scrutiny. This new approach is set out in updates to the Guidelines on the National Security Review of Investments (Guidelines) that were released on March 24, 2021.

While the new guidance brings increased transparency to national security reviews under the *Investment Canada Act* (ICA), it also signals a tougher approach to reviewing investments that may impact Canada's national security. Canada's move is reflective of a broader trend among states to strengthen their foreign investment review regimes, particularly where an investment could impact Canada's national security interests.

Under the ICA, non-Canadian investments that may be subject to national security include acquisitions of control of a Canadian business (including a Canadian subsidiary), minority investments, as well as the establishment of a new Canadian business or entity carrying on operations in Canada.

Under the national security review regime, the federal government can permit the investment, impose conditions on the investment, or disallow it in its entirety. In the case of investments that have already been implemented, the federal government can impose conditions or require the divestment of Canadian assets.

The Guidelines outline the approach being taken by the federal government in determining whether an investment could raise national security issues, in particular the breadth of business activities that may attract scrutiny and the increased scrutiny of investments by SOEs.

Factors Considered in National Security Reviews

The Guidelines expand on the list of factors considered by the government when determining whether an investment could be "injurious to national security."

There are now eleven factors enumerated in the Guidelines:

i. The potential effects on Canada's defence capabilities and interests.

ii. The potential effects on the transfer of sensitive technology or know-how outside of Canada. This includes consideration of whether the investment provides access to non-public information related to the research, design, or manufacture of technologies with military, intelligence, or dual military/civilian applications.

iii. Involvement in the research, manufacture or sale of controlled goods/technology as identified in the *Defence Production Act*.

iv. The potential impact on the supply of critical goods and services to Canadians or the Government of Canada.

v. The potential impact on critical minerals and critical mineral supply chains. Canada's Critical Minerals List, developed by National Resources Canada, sets out 31 minerals identified as critical to the success of Canada's economy and the economies of our allies, as well as to Canada's transition to a low-carbon economy.

vi. The potential impact on the security of Canada's critical infrastructure, including processes, systems, facilities, technologies, networks, assets, and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government.

vii. The potential to enable foreign surveillance or espionage.

viii. The potential to hinder current or future intelligence or law enforcement operations.

ix. The potential impact on Canada's international interests, including foreign relationships.

x. The potential to involve or facilitate the activities of illicit actors, such as terrorists, terrorist organizations, organized crime or corrupt foreign officials.

xi. The potential to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation. This includes: personally-identifiable health or genetic date; biometric data; financial information; communications; geolocation data; and personal data concerning government officials, including members of the military or intelligence community.

While many of these factors were listed in the prior guidelines, the formal inclusion of factors relating to critical minerals and sensitive personal data reflect the fact that the federal government is scrutinizing transactions in the mining and data sectors more closely than it has in the past. National security factors can and have been applied quite broadly, with the result that a much broader range of business activities are now being scrutinized from a national security perspective.

State-Owned Enterprises

The Guidelines also specify that *all* foreign investments by SOEs, as well as private investors that may be closely tied to or subject to direction from foreign governments, will be subject to enhanced scrutiny, regardless of the transaction's value. The government's objective is to identify, and presumably prevent, investment by foreign SOEs that "may be motivated by non-commercial imperatives" and "could harm Canada's national security."

This guidance, along with factor (iv) listed above, is consistent with the April 2020 Policy Statement on Foreign Investment Review and COVID-19. In that statement, the Minister of Innovation, Science and Industry set out various measures intended to protect the Canadian economy and national security interests from opportunistic foreign investors seeking to take advantage of heightened vulnerability caused by the COVID-19 pandemic.

While the measures reflected in the policy statement were initially framed as being temporary, the updated Guidelines clearly indicate that the review of *all* investments by SOEs and private investors viewed as being closely tied to a foreign government is now a permanent feature of Canada's foreign investment policy.

Is Further Change on the Way?

Despite these updates, a House of Commons committee has urged even greater scrutiny of foreign investments. On March 26, 2021, the House of Commons Standing Committee on Industry, Science and Technology (also known as INDU) concluded that, "while the legislation remains strong in many respects, the evidence shows that the ICA would benefit from a more cautious, responsive, and transparent approach to regulating foreign investments," in a report entitled The Investment Canada Act: Responding to the COVID-19 Pandemic and Facilitating Canada's Recovery.

The report set out nine recommendations for change, some of which focused on strengthening the government's powers to review and act on transactions that may affect national security. Other recommendations were: to regularly review thresholds; study ways to improve the treatment of intangible assets during net benefit reviews; increase transparency of net benefit review decisions; encourage retention of certain intangible assets; and provide additional protection for identified strategic sectors.

While it is unclear how much change will result from this report, given that the MPs from the ruling Liberal Party of Canada dissented on six of the nine recommendations, what is clear is that foreign investors should consider the potential impact of the national security review regime at an early stage when planning to invest in Canada, and in particular where the investor is a SOE or a private investor with ties to a foreign government.

Cassels

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.