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China Mobile Case Illustrates Breadth of Canada's National Security Review Regime

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After operating in Canada for five years, China Mobile International (Canada) Inc. (CMI) was ordered by the Canadian government in August 2021 to shut down or divest its Canadian operations because of national security concerns. CMI has applied for judicial review of the government's decision and brought a motion to stay implementation of the order pending determination of its application. On December 7, 2021, in *China Mobile Communications Group Co., Ltd. v AGC*, the Federal Court of Canada denied the motion to stay, with reasons publicly released on December 11.

The CMI matter serves as another reminder that the establishment of a new business by a non-Canadian is subject to notification under the *Investment Canada Act* (ICA) and can attract national security scrutiny in the same way as M&A activity. The court file in CMI's stay application also provides a rare (but nevertheless limited) glimpse into national security decision-making under the ICA, including the sources of intelligence that may contribute to a national security review and order. A further and potentially clearer window into the national security process, including the legal test for issuing a national security order, may be revealed if CMI's judicial review application proceeds to a hearing and decision in the new year.

We discuss the background and key implications for foreign investors in more detail below.

Background

CMI's Business in Canada

CMI is a subsidiary of China Mobile Communications Group Co., Ltd., a Chinese state-owned company that provides mobile communications services, including voice, data, text messaging, roaming and network services to customers throughout China.

CMI was established in 2015 and commenced operations in Canada in 2016. It acquired a 10-year basic international telecommunications services licence from the Canadian Radio-television and Telecommunications Commission and sells various mobile communications services, principally under an agreement with a domestic telecom company, Telus Communications Inc., to resell Telus products.

The Government Makes Contact

CMI's problems began in fall 2020 when it was contacted by the Investment Review Division at the federal Department of Innovation, Science and Economic Development about its failure to submit the ICA notification that all foreign investors must file if they establish a new business in Canada. This notification must be filed either before the new business is established or within 30 days thereafter. (The same notification must also be filed by foreign investors acquiring control of Canadian businesses when the threshold for pre-closing "net benefit" review is not exceeded.)

CMI did not file the required ICA notification when it started its business in Canada in 2016. However, after being contacted by the government, it filed its notification on October 13, 2020, approximately four years after the statutory deadline.

National Security Review and Order

But the matter did not end there. The filing of an ICA notification also commences a timeline for a screening process under which the government can decide if a foreign investment could be "injurious" to Canadian national security, in which case a formal review process will be started. Ultimately, the government can order such an investment to be unwound or divested. And that is what happened to CMI. The government initiated a formal national security review in January 2021 and issued an order on August 6, 2021, requiring CMI to wind up or divest its Canadian business. The order gave CMI 90 days to comply. CMI requested and received extensions until January 5, 2022, which is now the current deadline for compliance.

CMI Challenges the National Security Order

In the interim, CMI brought its judicial review application and motion for a stay of the Canadian government's order. In this application, CMI argues that the government applied the wrong legal test in issuing its order, because it never actually concluded that the establishment of CMI's operations "would" be harmful to Canadian national security, but rather only that it "may" cause such harm. CMI also makes a more pointed argument that the government was motivated by bias against China and thus improperly based its order on "irrelevant considerations unrelated to national security." Although no date for the hearing of this application has yet been scheduled, it will not take place until after the order's January 5, 2022 compliance deadline because at least one more preliminary motion remains to be heard and decided.

The Court's Decision

The fact that the hearing will not take place until after the compliance deadline underscores the importance of the stay motion. In denying CMI's motion to stay the order, Chief Justice Paul Crampton of the Federal Court of Canada applied the three-part test from *RJR-MacDonald Inc v Canada (Attorney General)* for injunctive relief and held that (i) while CMI had demonstrated that there was a "serious issue to be tried" and (ii) it would suffer "irreparable harm" if the motion were denied, (iii) the "balance of convenience" favoured allowing the order to be implemented. In reaching this conclusion, Chief Justice Crampton found that the government identified and established with reliable and objective evidence that significant harm to the public interest and Canadian national security would result if CMI were allowed to continue operating pending the outcome of the judicial review application.

The Chief Justice referred to a number of sources the government advanced as evidence of the significant national security harms being weighed in the balance. These included reports from both the Canadian Security Establishment and the Canadian Security and Intelligence Service (CSIS), a speech delivered by a CSIS Director and a 2019 decision of the U.S. Federal Communications Commission (FCC) that denied China Mobile International (USA) Inc. (China Mobile US) authorization to provide international telecommunications services between the United States and foreign destinations. (This FCC decision was reached after a recommendation was submitted on behalf of U.S. Executive branch agencies that authorization be denied due to "substantial national security and law enforcement risks that cannot be resolved through a voluntary mitigation agreement.") Chief Justice Crampton concluded that, for the purposes of the stay motion, these materials were sufficient evidence to substantiate the government's allegations that the Chinese government could use its indirect control over CMI to "facilitate espionage and foreign interference activities in Canada." By contrast, the Chief Justice was critical of CMI's failure to adduce "clear and non-speculative" evidence about the actual harm that denying a stay of the order would have caused its business.

As things stand, CMI will have to unwind or divest its business before its judicial review application is heard.

Implications

The CMI case is of significant interest for a number of reasons, not the least of which is that lawsuits by foreign investors to challenge national security orders are uncommon. Indeed, there has been only one other challenge of this nature since the ICA's national security regime was enacted in 2009. (That case was settled with the Canadian government agreeing to rescind the order blocking the transaction and allowing it to proceed subject to conditions.) Here are some key takeaways from the CMI case so far:

1. **National security reviews are not limited to M&A.** It is important that foreign investors be aware that the ICA's national security provisions also potentially apply to the establishment of new businesses in Canada and not just to the acquisition of an interest in an existing business. Although this is not the first time that the government has taken action to block the establishment of a new

business by a foreign investor, most cases involve acquisitions, and so it is easy to forget that the establishment of a new business could also be vulnerable to review. Accordingly, foreign investors thinking of establishing new businesses in Canada must assess any potential national security implications to the same extent as any foreign investor contemplating an acquisition.

2. **Notification requirements under the ICA similarly extend to greenfield entry.** In the same vein, the CMI case is an important reminder that the ICA notification obligation also applies to the establishment of new businesses and not just to acquisitions of control that fall below the financial thresholds for net benefit review. In most cases, an omission to file can be remedied by simply filing the form late without any consequences. But the CMI case shows that sometimes the results are anything but benign. In addition, beyond the order itself, the Court found that CMI's continued operation without having filed a notification (i.e., "in contravention of the ICA") was a further equitable factor supporting the Court's decision to deny CMI's stay application.

3. **The government monitors for non-notified foreign investments and national security risk.** It is also noteworthy that the government approached CMI about its failure to file the notification, although it is not clear how or why this happened four years after CMI started operating in Canada. That said, the government lawyers' reference to the FCC's decision against China Mobile US on national security grounds does provide some insight into what may have prompted the national security review and order in Canada; it may also reflect an important level of international coordination and cooperation between like-minded intelligence agencies to detect and assess national security threats. The Investment Review Division's guidelines on national security review note that it may reach out to non-Canadian investors if it believes that an application for net benefit review or a notification has not been properly filed. The CMI case indicates that this is not an empty threat and that Canada may be taking a more deliberate approach to monitoring for non-notified foreign investments, especially ones that could pose national security threats.

4. **Lack of transparency in national security reviews persists.** The CMI case underscores once again the extent to which national security reviews under the ICA remain secretive and opaque. In this instance, the government did not announce that it had made the order against CMI; nor does the order provide much detail about why the government decided to require CMI to unwind or divest its business. All it contains are high-level and generic conclusions (allegations) – for example, that CMI "may gain access to highly sensitive telecommunications data and personal information that could be used for non-commercial purposes such as military applications or espionage" and that CMI "may disrupt or otherwise compromise Canadian critical telecommunications infrastructure." There may be no way around this level of vagueness given that sensitive issues are involved, but the lack of specifics is frustrating for foreign investors and their advisers trying to assess risk in a given case. If CMI's judicial review application proceeds, the related court materials may provide further details about the factual matrix underpinning the order.

5. **Chinese state-owned enterprises continue to feature prominently in Canadian national security discourse.** Finally, it is clear from the CMI case that investors from China may be more likely to trigger a national security review, although this does not necessarily entail the sort of "bias" that CMI alleges. The Canadian government lawyers opposing CMI's motion for a stay used notably strong language in this regard, describing the government of China as "a foreign entity posing a strategic threat to Canada and carrying on activities detrimental to the national security and economic prosperity of Canada and other likeminded countries." No doubt there is an element here of rhetorical flourish for advocacy purposes, and it is an inescapable fact that the vast majority of Chinese investments in Canada proceed without challenge. At the same time, however, it is also true that the majority of investments that have been challenged on national security grounds (albeit a much smaller number in absolute terms) have involved Chinese investors. There are few signs that this trend is likely to change in the short term, given, for example, ongoing diplomatic issues surrounding the upcoming Beijing Olympics and the impending government decision about whether to bar Chinese telecom company Huawei from participating in Canada's 5G mobile network rollout.

The CMI case is unfolding against the backdrop of an evolving national security environment where an increasing emphasis is placed on detecting and managing economic security risks, in addition to more traditional national security concerns. In this connection, Public Safety Canada's Economic Security Task Force has conducted consultations recently on possible proposals to amend the ICA to enhance Canada's economic security, including the introduction of mandatory pre-closing notification under the ICA of investments by particular types of investors and/or in sensitive sectors. Also, the prime minister's December 16, 2021 mandate letter to the minister

responsible for the ICA refers to the government's "commitment to promote economic security and combat foreign interference by reviewing and modernizing the [ICA] to strengthen the national security review process and better identify and mitigate economic security threats from foreign investment." According to this letter, one particular area of focus will be the protection and development of Canada's critical minerals sector.

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