DAVIES

DAVIES WARD PHILLIPS & VINEBERG LLP

Canada FDI control

Mark Katz

Originally published by LexisNexis (part of RELX (UK) Limited)
Prepared with the assistance of Teraleigh Stevenson

Canada FDI control

Produced in partnership with Davies Ward Phillips & Vineberg LLP

A conversation with Mark Katz, partner at Canadian law firm Davies Ward Phillips & Vineberg LLP, on key issues on foreign direct investment (FDI) merger control in Canada under the Investment Canada Act.

General overview of the Investment Canada Act regime

The Investment Canada Act (the ICA) authorises the Canadian government to review certain investments by non-Canadians in Canadian businesses and, where considered appropriate, to either prohibit these investments from proceeding, order investments to be unwound or divestitures made, or condition approval on undertakings and commitments by the investor.

There are two key aspects to ICA review:

- the 'net benefit review' process, and
- the 'national security review' process.

Pursuant to the net benefit review process, a non-Canadian proposing to acquire control of a Canadian business (including a business in Canada owned by a foreign entity), and whose acquisition exceeds certain thresholds, must satisfy the government that its investment will be of net benefit to Canada. Although the ICA sets out various factors to be considered in this regard, the decision is largely discretionary and will depend on the type and quality of commitments (undertakings) that the non-Canadian investor is prepared to provide the Canadian government with respect to the conduct of the Canadian business post-investment. Typical undertakings relate to the role of Canadian management; employment; and investments in the Canadian business, such as for capital expenditures and research and development.

In addition to net benefit review, the ICA authorises the Canadian government to review and prohibit proposed foreign investments if they are potentially injurious to Canadian national security interests. In this case, there are no monetary thresholds and no requirement that control be acquired. There is also no statutory definition for what constitutes 'injurious to national security', which gives the Canadian government considerable discretion in this regard. That said, the Canadian government has published guidelines that outline areas of potential concern, including foreign investments involving: (a) defence related industries; (b) the transfer of sensitive technology or know-how outside of Canada; (c) the supply of critical goods and services to Canadians or to the Government of Canada; (d) critical minerals and critical mineral supply chains; (e) the security of Canada's critical infrastructure, i.e., assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government; and (f) access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including, but not limited to: personally identifiable health or genetic (e.g., health conditions or genetic test results); biometric (e.g., fingerprints); financial (e.g., confidential account information, including expenditures and debt); communications (e.g., private communications); geolocation; or personal data concerning government officials, including members of the military or intelligence community. The jurisdiction of the investor is another critical factor in determining whether a national security review will be commenced. Perhaps not surprisingly, a large percentage of national security reviews have involved Chinese investors.

Net benefit reviews of acquisitions of non-cultural Canadian businesses are conducted by the Investment Review Division (IRD) of the federal Ministry of Innovation, Science and Economic Development; Net benefit reviews of acquisitions of cultural Canadian business are conducted by the Cultural Sector Investment Review division (CSIRD) of the federal Canadian Heritage ministry. National security reviews are carried out by the IRD in consultation with the federal ministry of Public Safety and Emergency Preparedness and Canada's national security agencies.

Interface between Competition Act and Investment Canada Act reviews

The Canadian Competition Bureau (the Bureau) is responsible for administering the merger review provisions of the Competition Act (the Act), which is the principal merger control legislation in Canada The Bureau's mandate is to determine if a merger is likely to result in a substantial prevention or lessening of competition and to initiate enforcement proceedings against any transaction it believes will have this anti-competitive effect.

One of the net benefit criteria that IRD/CSIRD will consider in assessing a transaction is the impact on competition. In carrying out this part of the analysis, IRD/CSIRD will, as a matter of course, seek the Bureau's views on potential competition issues arising from the transaction. This is done by providing written notice to the Bureau that a foreign investment proposal is under review, and by providing basic information about the transaction and the parties involved, as well as any plans submitted by the investor. In some cases, the Bureau will have already commenced, or completed, a review of the transaction under the = Act prior to receiving this written notice. In other cases, such a review is initiated following receipt of the written notice. In all cases, the Bureau conducts its own independent review of the transaction, and shares its conclusions with IRD/CSIRD regarding the effects of the transaction on competition. The Bureau's analysis and ultimate conclusions are considered in the context of the broader assessment of net benefit.

Because the Bureau's input is considered as part of the net benefit analysis, the Bureau also shares timing and other procedural information relating to its review, as necessary. Generally speaking, the net benefit review analysis will not be finalised until after the Bureau's analysis is complete.

The Bureau and IRD/CSIRD will not exchange information if doing so would contravene any relevant legislation, international instruments, policies or guidance documents. Moreover, neither organisation will disclose any privileged or confidential information obtained from the other organisation to any third party without the written consent of the other organisation, except as required by law.

1. Have there been any recent developments regarding the Canadian FDI regime and are any updates/developments expected in the coming year?

The past year generated substantial interest in the operation of the ICA, especially as it relates to the ICA's national security review process. Recent events involving Russia and Ukraine have only increased this interest, as the Canadian government has issued new policies under the ICA to address the situation. We expect foreign investment review to remain an issue of public and political concern in 2022, as the Canadian government continues to search for the proper balance between encouraging foreign investment and guarding against national security risks.

(i) Increase in Importance of National Security Reviews in Comparison to Net Benefit Reviews

The best place to start for a recap of the past year's developments is the most recent annual report on the ICA ('Annual Report'), which was released on February 2, 2022 and covers the period from April 1, 2020, through March 31, 2021.

The Annual Report confirms the growing importance of national security reviews in relation to the ICA's net benefit review process. Thus, in 2020-21, foreign investors submitted 826 filings under the ICA for acquisitions of control of Canadian businesses that were not Canadian 'cultural' businesses; this number was 20% lower than the 1,032 filings submitted in 2019-20. Of these 826 filings, 823 were notifications and only three were applications for net benefit review and approval. The three applications for review were down from nine in each of the previous three fiscal years, and much lower than the 22 applications in 2016-17. Indeed, 2020-21 saw the fewest applications for net benefit review since the first Annual Report was published in 2010-11. This continues a material downward trend in applications for review since the financial thresholds for such reviews were significantly increased starting in 2009.

In contrast to the decline in net benefit reviews, national security reviews under the ICA increased to new highs in 2020-21, with 23 notices sent to non-Canadians informing them of a potential national security review. This number set a new record by a substantial margin and was almost the same number as had been issued in the four previous years combined. In addition, one other investment proceeded straight to a formal national security review.

Eleven of these 24 investments were subject to a formal national security review (12 did not proceed to formal review and one was withdrawn by the investor). This number represents a notable increase compared with the seven reviews initiated in the previous year, and constitutes more than one-third of the 32 national security reviews commenced over the past five years. Of the 11 investments that were subject to formal review, four were allowed to proceed at the completion of the review with no remedies required, and sanctions were imposed in three cases. In the remaining four cases, investors abandoned their transactions after the formal reviews were initiated. In the three cases involving sanctions, one investor was prohibited from proceeding with the investment, and the other two were required to wind up or divest their investments.

The increase in the number of transactions subject to a formal national security review process is at least partly attributable to the government's decision to expand the scope of potential national security concerns after the onset of the COVID-19 pandemic. This policy was first articulated in the government's Policy Statement on Foreign Investment Review and Covid-19 released in April 2020, which stated that 'foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the critical supply of goods and services to Canadians or the Government' would be subject to 'enhanced scrutiny' under the ICA. The policy also announced that all investments by foreign states or foreign SOEs would be subject to 'enhanced scrutiny' as well. The April 2020 policy attributed this new approach to the need 'to ensure that inbound investment does not introduce new risks to Canada's economy or national security, including the health and safety of Canadians', and the federal government's concern that foreign investors might engage in 'opportunistic behavior' in acquiring vulnerable companies.

In March 2021, the government released revised Guidelines on the National Security Review of Investments, which affirmed many of the changes in the April 2020 policy. The guidelines also identified two other areas of growing concern, i.e., foreign investments impacting (i) certain critical minerals, including critical mineral supply chains; and (ii) sensitive personal data.

(ii) Continued Focus on Investments from China

The Annual Report also implicitly confirms that the jurisdiction of the investor remains a key factor in determining whether a transaction may be subject to national security review. Chinese investments accounted for seven of the 11 investments subjected to a formal national security review in 2020-21; one of the investments was blocked, one required divestiture, three were withdrawn, and two were permitted to proceed. This is no surprise given that Chinese investments have constituted a majority of the investments subjected to formal national security reviews in four of the past five years. The other countries of origin subject to formal reviews in 2020-21 were Taiwan, Russia, the United Kingdom and the United Arab Emirates (which involved the other transaction requiring a divestiture).

While the Annual Report does not identify the parties to transactions subjected to national security review, at least two of the China-related transactions may be discerned from the public record. The blocked Chinese transaction is likely the proposed acquisition by Shandong Gold Mining Co., Ltd. ('Shandong') of TMAC Resources Inc., which the Canadian government prohibited in December 2020. Observers have speculated that political and diplomatic tensions between Canada and China, as well as concerns about the impact on Canada's ability to defend its sovereignty in the Canadian Arctic, were at the root of the government's decision to block the transaction.

Similarly, it is likely that the Chinese investment that was required to be wound up or divested refers to the case of China Mobile International (Canada) Inc. ('China Mobile Canada'), a subsidiary of a Chinese-state-owned company, China Mobile Communications Group Co., Ltd. ('China Mobile'). China Mobile Canada was established as a new business in Canada in 2015 and commenced operations in 2016. However, China Mobile failed at the time to notify the government of this fact, which it was required to do under the ICA (as described above). When the government inquired about this omission in 2020, China Mobile Canada filed the required notification in October of that year. The government then initiated a formal national security review process, which culminated in an order in August 2021 requiring China Mobile to wind-up or divest its Canadian operations. China Mobile and China Mobile Canada filed an application for judicial review of the government's decision in September 2021, with an accompanying motion to stay the government's divestiture order pending the resolution of the application for judicial review. In arguing against the motion for a stay, the federal government characterized the Chinese government as 'a foreign entity posing a strategic threat to Canada and carrying out activities detrimental to the national security and economic prosperity of

Canada and other likeminded countries.' The Court agreed and held that there was sufficient evidence to support the government's claim that the Chinese government could use its indirect control over China Mobile to 'facilitate espionage and foreign interference activities in Canada.' China Mobile's motion to stay was dismissed and it was ordered to comply with the divestiture order, even though its challenge to the order will not be heard until later this year.

That said, it must be recognized that the vast majority of Chinese investments are not subjected to national security review and are allowed to proceed. For example, of the 42 Chinese investments for which ICA filings were made in 2020-21, only two (less than 5%) were ultimately prohibited or ordered to be unwound. One Chinese investment that successfully cleared the national security hurdle was the acquisition of Neo Lithium Corp. by Zijin Mining Group Co., a Chinese SOE, which was allowed to proceed without undergoing a formal national security review. Once the matter became public, however, the government's decision attracted harsh criticism from opposition politicians and certain security experts, and resulted in special hearings of a parliamentary committee being convened to examine the matter. The government defended its decision by asserting that a proper and complete review of the Neo Lithium transaction had been conducted, which ultimately concluded that the transaction would not be injurious to Canadian national security and that a formal national security review was not required. The government appears to have reached this conclusion because, among other things, Neo Lithium's lithium mine is e located in South America and, according to the government at least, the type of lithium produced by Neo Lithium is of relatively lesser strategic importance than other types of lithium.

(iii) New ICA Policy in Reaction to Russian Invasion of Ukraine

On March 8, 2022, the government of Canada issued a policy statement regarding the review of Russian investments under the ICA. The policy statement was issued in response to Russia's invasion of Ukraine, which the government called 'unprovoked and unjustifiable'. The new policy provides that, effective immediately and until further notice:

- all investments by Russian investors that are subject to net benefit review will only be approved on 'an exceptional basis'; and
- all investments that have 'ties, direct or indirect, to an individual or entity associated with, controlled by or subject to influence by the Russian state' will be subject to a full and formal national security review, regardless of value.

Investors will be expected to pro-actively disclose any potential Russian connections. Any such investments can also expect lengthier than normal reviews, as the government will require detailed information setting out corporate data, structures and financing relationships, including for direct and indirect investors, beneficial ownership and trusts.

Russia was already considered a somewhat suspect source of foreign investment under the ICA, with at least three national security reviews in the last few years involving Russian investors. However, the new policy escalates this considerably, and will make it much more difficult – if not impossible – for Russian investments to be approved in the foreseeable future.

(iv) Possible Amendments

In his recent 'mandate letter' to the Minister responsible for administering the ICA, Prime Minister Trudeau directed the Minister to 'contribute to broader efforts 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.' Proposed amendments to the ICA were already being considered by other elements of the government, and it is possible that they may inform the Minister's execution of his instruction from the Prime Minister.

In March 2021, for example, the House of Commons Standing Committee on Industry and Technology ('INDU Committee') made several recommendations for amending the ICA, including the following:

- The review thresholds for all investments by SOEs should be reduced to $0, so that all such transactions are subject to the ICA's net benefit review and national security review regimes.

- The ICA should be used to protect strategic sectors, including health, pharmaceuticals, agri-food, manufacturing, natural resources, and intangibles related to innovation, intellectual property, data and 'expertise.'
- Any Canadian business or entity holding a 'sensitive asset' should be required to notify the federal government 30 days before implementing the transfer of that asset to a non-Canadian entity.
- The government should be required to explain the factors for decisions made under the ICA, and to make public any undertakings or conditions imposed on foreign investors as the basis for the approval of transactions.

In addition to the INDU Committee's efforts, a federal government task force is currently leading an interdepartmental policy review examining whether additional measures are needed to ensure Canada's continued ability to respond to economic-based threats to national security. Specific concerns include the loss of sensitive goods, technology and intellectual property; the malicious use of sensitive personal information of Canadians; and compromised critical infrastructure.

Among the issues the task force is exploring is whether the ICA should be amended, with a focus on three principal questions:

- Should the ICA's procedures be amended to expand the scope of transactions that are subject to mandatory pre-closing review?
- Are mitigation measures (e.g., undertakings) that permit a transaction to proceed subject to conditions effective in dealing with potential national security concerns?
- Should the penalties for non-compliance with the ICA be increased?

Based on what he already has to work with, it is certainly possible that the Minister will take steps in 2022 to turn the high-level directions in his 'mandate' letter into concrete changes to the ICA.

2. What is the control test and is control necessary to trigger a filing?

The acquisition of control is one of the required triggers for net benefit review under the ICA. The net benefit review process only applies to acquisitions of control by non-Canadians of Canadian businesses that exceed the prescribed thresholds. Acquisitions that fall short of control are not subject to review. The definition of control can vary depending upon the type of entity being acquired. For example, while acquisitions of interests above 50% in any type of entity are considered to be acquisitions of control, acquisitions of between one-third to 50% of the shares of a corporation are also presumed to be an acquisition of control (capable of being rebutted). This rebuttable presumption does not apply, however, to non-corporate entities (eg limited partnerships).

Two further points are worth noting:

- first, in certain cases, such as an acquisition by a state owned enterprise (SOE), the Minister of Industry can deem the acquisition to be one of control even if the normal thresholds are not met–the same applies to the acquisition of certain Canadian cultural businesses (see the response to question 4 below for the definition of cultural business)
- second, in contrast to the net benefit review process, the ICA's national security review process does not hinge on there being an acquisition of control by a non-Canadian; all foreign investments in Canadian businesses are potentially subject to national security review, including minority investments where control (including de facto control) is not acquired.

3. Are joint ventures caught by the FDI regime (including non-structural, cooperative joint ventures)?

Joint ventures may be subject to ICA review provided that the relevant criteria are met and thresholds exceeded. Importantly, at least for the purposes of the net benefit review process, the non-Canadian investor must be acquiring control of the joint venture (or deemed control in the case of corporations).

4. What are the notification thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

(A) Net Benefit Review

The ICA thresholds for net benefit review are based on the value of the Canadian business (book value or 'enterprise value') and vary depending on the ownership of the investor and vendor, the type of business being acquired, and the structure of the acquisition.

For example, where (i) either the non-Canadian investor or the vendor is a WTO investor or ultimately controlled by a WTO investor, and (ii) the Canadian business is not a 'cultural business':

- the direct acquisition of control of a Canadian business will generally be reviewable only when the 'enterprise value' of the entity carrying on the Canadian business (and all other entities in Canada the control of which is being acquired) is equal to or greater than CDN $1.141 bn for transactions completed in 2022 (adjusted annually)
- the 'indirect' acquisition of control of a Canadian business will generally not be subject to review, regardless of the value of that Canadian business.

Similarly, where (i) either the non-Canadian investor or the vendor is a 'trade agreement' investor or ultimately controlled by a 'trade agreement' investor, and (ii) the Canadian business is not a 'cultural business':

- the direct acquisition of control of a Canadian business will generally be reviewable only when the 'enterprise value' of the entity carrying on the Canadian business ((and all other entities in Canada the control of which is being acquired) is equal to or greater than CDN $1.711 bn for transactions completed in 2022 (adjusted annually)
- the 'indirect' acquisition of control of a Canadian business will generally not be subject to review, regardless of the value of that Canadian business.

However, where no WTO investor or trade agreement investor is involved, or where the transaction involves the acquisition of a 'cultural business':

- the direct acquisition of control of a Canadian business will generally be reviewable if the book value of the assets of the Canadian business, and of the assets of all other entities in Canada, the control of which is being acquired, exceeds CDN $5m
- the 'indirect' acquisition of control will be reviewable where the book value of the assets of the Canadian business exceeds CDN $50m and where the assets of the Canadian business represent less than 50% of the total assets being acquired in the transaction(if the book value of the Canadian assets exceeds 50% of the total assets being acquired in the transaction, the threshold is CDN $5m).

For these purposes:

- in general, a corporation or other entity will be a WTO investor if it is ultimately controlled by citizens of a country (other than Canada) that is a member of the WTO (World Trade Organisation) or individuals who have a right of permanent residence in a WTO member country
- similarly, a corporation or other entity will be a trade agreement investor if it is ultimately controlled by citizens or permanent residents of a prescribed list of countries with trade agreements with Canada (the United States, the EU's member states, the United Kingdom, Australia, New Zealand, Japan, South Korea, Singapore, Vietnam, Mexico, Chile, Colombia, Honduras, Panama and Peru)
- a widely-held public company will generally be a WTO investor or trade agreement investor:
  - if it can be established that a majority of the voting shares of the public company is owned by citizens/permanent residents of WTO/trade agreement countries, or
  - where no person or voting group controls the company, at least two-thirds of the members of the company's board of directors are any combination of citizens/permanent residents of WTO member countries/trade agreement countries and Canadians

- an direct acquisition of control occurs when the transaction involves the acquisition of control of an entity in Canada; an 'indirect' acquisition occurs where a foreign investor acquires control of a corporation incorporated outside of Canada that controls, directly or indirectly, an entity in Canada carrying on the Canadian business (i.e., the acquisition of a foreign partnership does not qualify under this definition)
- 'enterprise value' is generally based on the acquisition price for the Canadian business, subject to certain adjustments for non-operating liabilities and cash and cash equivalents on hand
- the book value of the Canadian business's assets are as reflected in its most recent audited financial statements
- 'cultural business's refers to businesses that are involved in any of the following activities: publication, distribution or sale of books, magazines, periodicals or newspapers; the production, distribution, sale or exhibition of film or video products or video games; the production, distribution, sale or exhibition of audio or video music recordings; the production, distribution, or sale of music in print or machine-readable form; radio communications, radio/television broadcasting, or satellite programming/broadcasting.

There are three important additional points to note:

- The enterprise value threshold for WTO investors/trade agreement investors does not apply if the investor is a SOE. In that case, the threshold is still based on the book value of the assets of the Canadian business. This threshold is CDN$454m for transactions completed in 20221 (adjusted on an annual basis)
- Foreign investments that do not exceed the applicable thresholds (including indirect acquisitions of control by/from WTO Investors) must still be notified to the Canadian government within 30 days of closing even though not subject to review. This requires completing and submitting a notification form, which is available on the IRD website.
- Foreign-to-foreign transactions can be caught by the ICA's net benefit regime, insofar as they constitute indirect acquisitions of Canadian businesses (as defined above). However, they will only be potentially subject to review if (a) neither the acquirer nor the vendor is a WTO investor/trade agreement investor, or (b) if the transaction involves the acquisition of r a cultural business in Canada, and (c) the relevant thresholds are otherwise exceeded.

(B) National Security Review

The above thresholds only apply to the ICA's net benefit regime. There are no thresholds for the ICA's national security regime; all foreign investments in Canada, whether direct or indirect, are potentially subject to review regardless of the value of the transaction.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

Regulations under the ICA provide additional explanation for the calculation of enterprise value and asset value for net benefit review threshold purposes. One key issue to note is that the thresholds are not necessarily limited to situations in which the Canadian business has operating assets in Canada, provided that there is a minimum nexus to Canada (eg head office functions are still carried on here). This is a particular issue for acquisitions in the resource sector, given that it is not uncommon for Canadian resource companies to have head offices in Canada but all of their operating assets outside of the country.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

When a direct investment by a non-Canadian exceeds the ICA's net benefit review thresholds, an application for review must be submitted prior to closing, and the transaction cannot be completed until either:

- a notice of approval is received from the Canadian government, or

- the relevant waiting period has expired without the Canadian government objecting to the transaction or extending the review period (either unilaterally or by consent).

In practice, the latter form of 'deemed approval' never occurs and notice of approval (or rejection) is always received from the government.

Indirect investments that are subject to net benefit review (most typically where cultural businesses are involved) are treated differently, in that investors may choose to submit their application for review following closing of the transaction. The obvious theoretical downside risk of a post-closing review is that, if the government decides that the transaction is not of net benefit to Canada, the non-Canadian investor may be required to divest all or part of the acquired business. This has not been a material risk in practice, however, given the infrequency of (a) indirect investments that are subject to review, and (b) rejections under the ICA.

As for the national security review process, if, prior to implementing a transaction, a non-Canadian investor receives notice that a 'national security review may be, or has been, initiated under the ICA, the investor is prohibited from closing the transaction until either receiving notice that the review will not be conducted or that the review has been completed.

7. Is there any discretion to review transactions that fall below the notification thresholds?

In the normal course, acquisitions of control that fall below the net benefit review thresholds are not subject to review, although the investor is required to submit a notification advising the government of the transaction. However, the responsible Minister does have authority under the ICA to determine that an entity is not, in fact, Canadian-controlled in cases involving the acquisition of Canadian cultural businesses, potential national security concerns, or where the Minister believes that the entity is controlled by a foreign SOE. The result of such deeming powers is to allow the Minister to make transactions subject to review that would not otherwise – at least on their face – qualify as such.

8. Is it possible to close the deal globally prior to local clearance?

There is no mechanism or precedent under the ICA for hold separate arrangements or other forms of carve outs in multi-jurisdictional deals. That said, this is something that could always be explored with the IRD.

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review?

The time frames for review differ as between net benefit and national security reviews.

(A) Net Benefit Review

There is an initial 45 calendar day review period which starts on the day after submission of a complete application for review, which the Canadian government may extend unilaterally by an additional 30 calendar days. Any further extension can only be made with the consent of the investor, which is typically provided. Most net benefit reviews are now concluded within 75-105 calendar days of the filing of the application for review, but reviews of more complicated transactions will extend beyond this timeframe.

(B) National Security Review

Unlike the net benefit review process, there is no procedure whereby investors can apply for clearance on the basis that their transactions are not injurious to Canadian national security. Rather, the government will determine, based on its own assessment, whether to initiate a national security review. The typical triggering event for the commencement of the national security review process is the filing of an application for net benefit review or a notification where no review is required. In cases, where a transaction is not subject to the net benefit review process, eg, minority investments where there is no acquisition of control, the review process only commences with closing of the transaction.

Once triggered, the government has 45 days to decide if a formal national security review is required, which it can extend by another 45 days. If the government decides to commence a formal review (either after the

first or second 45 day period), the review can take up to an additional 110 days to complete, subject to extension. In the last year, reviews took an average of 225 days to complete.

There are two timing issues relating to national security reviews that should be noted.

The first involves situations where the investor is not obliged to file an application for review but must file a notification advising the Canadian government of the transaction ('ICA Notification'), i.e., the vast majority of cases in which an ICA net benefit filing must be made. The ICA Notification can be filed either before closing or within 30 days after closing. The common practice had been to file the ICA Notification post-closing. However, with the growing importance of national security reviews, investors are now increasingly considering the strategic merits of filing the ICA Notification pre-closing and making ICA national security clearance a condition of closing. The purpose of doing so is to allow the national security review process to run before the target business has been acquired and therefore to avoid the potential risk of sanctions being ordered post-closing. The downside, of course, is that the process could take 7-8 months in a worst case scenario and the vendor may not agree to bearing the risk of such a significant delay to closing. As a result, the issue of when to file the ICA Notification may be an important negotiating point in transactions where there is a potential risk of a national security review.

The second issue relates to situations where there is no obligation to make any net benefit review filing, e.g., where the transaction only involves a minority investment and not an acquisition of control. As noted, the government is only obliged to decide whether or not to commence a formal national security review within 45 days of closing (or 90 days if the initial screening period is extended). Investors can informally contact the government to discuss such transactions pre-closing, but cannot obtain formal pre-closing comfort that they will not face a national security review until the expiry of the screening period following closing. The government has now proposed amendments to address this situation by permitting investors to submit prescribed information before closing and, if no issues are raised within 45 days of such filing, proceed with the assurance that the investment will not be challenged post-closing.

The wrinkle is that the government's proposal also provides that if the investor does not file a notification, the government will have up to *five years* following closing to decide if a formal review should be initiated. That is a dramatic increase from the current 45-day limit. In other words, if the amendments are adopted, foreign investors that may otherwise have elected not to advise the government of a transaction would now be faced with the choice of either providing notice or accepting the risk of a possible national security review for five years. The government's objective seems to be to increase the 'voluntary' reporting of transactions that might be of national security concern and that otherwise would have escaped its attention.

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

Applications for review are prepared and filed by the purchaser. There is no filing fee. The content of the application form is set by regulation and a form is available on the ICA websites. The key item to be provided is the investor's business plan for the Canadian business, setting out its intentions for achieving a net benefit for Canada.

Similarly, the post-closing notification form is also available on the ICA website. There is no filing fee for submitting this form either.

As noted above, there is no prescribed filing for national security reviews.

11. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the record/stance in terms of pursuing parties for failing to notify relevant transactions

Non-Canadian investors that fail to comply with the ICA's requirements, or post-closing undertakings provided to the Canadian government in respect of their investments, can be subject to a variety of court-ordered remedies if they do not otherwise cure their default upon demand by the Canadian government. Depending upon the circumstances, these court-ordered remedies can include an obligation to divest an acquired business or to pay an AMP of CDN $10,000 for each day of the breach.

There has been only one formal enforcement proceeding commenced under the ICA. That case involved an alleged breach of undertakings by a non-Canadian investor. The matter was eventually settled with the non-Canadian investor agreeing to provide revised undertakings to address the alleged breach.

12. Are there any other 'stakeholders' that are relevant (for example, any 'sector regulators' who might have concurrent powers)?

The IRD will consult with provincial governments (in addition to relevant federal government departments) as part of its net benefit analysis. In one transaction, provincial opposition to a proposed foreign investment proved to be a very important factor in persuading the Canadian government to deny approval. Although the IRD may not actively solicit the views of other stakeholders, given that decisions under the ICA are ultimately taken by elected officials, the impact of public opinion should not be discounted. As a result, foreign investors are cautioned to take into account any likely reaction by government bodies (whether federal, provincial or municipal), as well as by other stakeholders (eg employees, aboriginal groups) when considering how best to present their net benefit case to the Canadian government.

These considerations are also important in assessing the potential for issues under the ICA's national security review process. The Canadian government may also consult with other jurisdictions on national security matters. In cases where potential issues are identified, investors should consider the option of retaining government relations and public relations consultants, as well as the desirability of initiating contacts with the IRD and other stakeholders, possibly even before a deal has been finalised/announced.