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Canada Signals High Bar for *Investment Canada Act* Approvals for Acquisitions of Critical Minerals Businesses

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Traduction en cours.

Canada's Minister of Innovation, Science and Industry (Minister) recently issued a Ministerial Statement on Net Benefit Reviews of Canadian Critical Minerals Companies. Transactions involving important Canadian mining companies engaged in significant critical minerals operations that are subject to a net benefit review under the *Investment Canada Act* (ICA) "will only be found of net benefit in the most exceptional of circumstances". Concurrently, the Minister announced his approval of Glencore's US$6.9 billion acquisition of control of Elk Valley Resources, the metallurgical coal business of Teck Resources Limited, subject to extensive undertakings following a seven-month ICA net benefit review.

The Ministerial Statement evidences a rigorous foreign investment review environment in the critical minerals space. While the Ministerial Statement does not foreclose future net benefit approvals in the sector, and transactions will continue to be reviewed on a case-by-case basis, approval will be granted only where there is a strong basis to conclude that the acquisition is likely to promote the goals of protecting and growing Canadian strategic leadership in the development of critical minerals value chains.

While the Ministerial Statement applies to all foreign investors—an expansion beyond the Canadian government's prior focus on critical mineral investments by foreign state-owned enterprises (SOEs) – it applies only to critical minerals transactions large enough to require net benefit approval. The Ministerial Statement does not apply to non-controlling minority investments, debt financings, acquisitions of control that fall below net benefit review thresholds (including most acquisitions of exploration stage critical minerals companies), acquisitions of mining companies not engaged in critical mineral operations, or acquisitions of companies whose critical mineral operations are not a core business.

The approval of the Glencore-Elk Valley transaction similarly demonstrates a rigorous foreign investment review environment for high-profile, politically sensitive transactions, including the potential requirement for longer undertakings, as well as a focus on environmental considerations in net benefit reviews.

Ministerial Statement on Net Benefit Reviews of Canadian Critical Minerals Companies

A direct acquisition of control of a Canadian business by a non-Canadian investor that exceeds specified financial thresholds requires approval under the ICA on the basis that the investment is likely to be of net benefit to Canada. The net benefit assessment considers, among other things, the impact of the transaction on Canada's economy, productivity, efficiency, technological development, innovation, competitiveness and industrial policies, and on Canadian participation in the acquired business. The financial thresholds for a reviewable transaction (outside the cultural sector) are high. For most private sector investors, the threshold is at least C$1.326 billion in enterprise value of the Canadian business (C$1.989 billion for investors from countries with which Canada has specified trade agreements). Accordingly, net benefit reviews are relatively rare, with the Minister conducting only six such reviews in the last fiscal year.

Generally speaking, foreign investors have been able to obtain net benefit approval for acquisitions in the mining and other sectors provided that they offer sufficient undertakings to the Canadian government concerning the future operation of the Canadian business (see the discussion of the Glencore transaction below). However, especially in the evolving national security context, the Canadian government has recently become more focused on foreign investments in the critical minerals sector. (The Canadian government currently considers 34 different minerals to be critical minerals.) Indeed, in 2022, the Minister issued a Policy Regarding Foreign

Investments from State-Owned Enterprises in Critical Minerals under the *Investment Canada Act*, which states that acquisitions of control of a Canadian business involving critical minerals by a foreign SOE will be granted net benefit approval only "on an exceptional basis". In addition, the participation of a foreign SOE in an investment involving a Canadian entity operating in a critical minerals sector in Canada will support a finding that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.

The recent Ministerial Statement confirms the Canadian government's rigorous scrutiny of critical minerals sector investments. According to the Ministerial Statement, any foreign investment requiring net benefit approval that involves "important Canadian mining companies engaged in significant critical minerals operations…will only be found of net benefit *in the most exceptional of circumstances*." Importantly, this policy statement is not limited to foreign SOE investors.

In a briefing hosted by Industry, Science and Economic Development Canada about a week after the Ministerial Statement was released (Briefing), a government representative stated that transactions will continue to be reviewed on a case-by-case basis.

Key points arising from the Ministerial Statement include the following.

Application to All Foreign Investors

In contrast to the Minister's 2022 Critical Minerals Policy, which applies only to investments by foreign SOEs and closely associated private entities, the recent Ministerial Statement on its face applies to all foreign investors, whether or not they are SOEs and whether or not they are from nations with non-like-minded governments.

Implications for National Security Reviews

The Ministerial Statement applies only to net benefit reviews (which can be undertaken only in respect of an acquisition of control of a Canadian business—generally meaning an acquisition of at least a one-third voting interest), and not to national security reviews (which can be undertaken in respect of a much broader range of investments, including small minority investments).

The limitation of the scope of the Ministerial Statement to only net benefit reviews means that the Statement is not intended to limit minority investments in Canadian critical minerals businesses by private sector foreign investors (e.g., to provide funding for development and expansion). Indeed, the Ministerial Statement clarifies that "Canada welcomes foreign investment and recognizes how important it is, particularly for small Canadian firms to advance exploration and site development efforts."

It is less clear whether the Ministerial Statement should be interpreted as an indication that private sector foreign investor acquisitions of control of smaller Canadian critical minerals companies that do not require net benefit approval are now more likely to be subjected to an ICA national security review.

Core Assets

The Briefing suggested that the Ministerial Statement applies only to investments in "core" assets. Accordingly, it may not signal a stricter standard of review for acquisitions of companies that have only minor or non-core critical mineral activities or assets. While is unclear what the Minister would consider to be "core," the Briefing suggested that acquisitions of early stage exploration companies and smaller asset sales – which in themselves are likely to fall below net benefit review thresholds—would not be affected by the Ministerial Statement. For example, a company with non-critical mineral mines that put it over the net benefit review threshold might not fall within the scope of the Ministerial Statement only because it also has some early stage exploration activities or assets in the critical minerals space.

Important Canadian Mining Companies

Likewise, the Ministerial Statement does not say what will be considered to be an "important" Canadian mining company engaged in "significant critical minerals operations." The Briefing, however, indicated that the Ministerial Statement focuses on "large Canadian headquartered firms engaged in critical minerals." It also emphasized the importance of protecting and growing Canadian strategic leadership in the development of critical minerals value chains, which appears to include not only exploration, extraction, processing, downstream product manufacturing and recycling activities themselves, but also the management of such activities.

The Briefing confirmed that a Canadian company with limited or no critical mineral operations in Canada but with critical mineral mines or operations outside Canada could fall within the scope of the Ministerial Statement and may face extensive review. The Briefing suggested that the Minister could consider a company to be "Canadian headquartered" if it had some meaningful management operations in Canada, even if management activities were not exclusively carried out in Canada.

Notably, an ICA net benefit review can be required for a direct acquisition of a Canadian business (i.e., a Canadian-incorporated entity with some assets, employees and a place of business in Canada), whether or not the Canadian business is currently ultimately owned or controlled by Canadians — that is, acquisitions of foreign-controlled Canadian businesses can be reviewable. It remains to be seen whether and how the Ministerial Statement will be applied to acquisitions of Canadian businesses that are already controlled by foreign persons.

Exceptional Circumstances

Where an acquisition of control of a Canadian company is subject to the Ministerial Statement, it also remains to be seen what it will take to constitute the "most exceptional of circumstances" in which net benefit approval would be granted, or how frequently such approvals might be given. It seems reasonable to expect that the bar for approval will be relatively lower for investors from Canada's close trading partners compared with foreign SOEs from less aligned countries. The financial position of the Canadian company and the absence of a viable Canadian purchaser would normally be relevant factors in a net benefit review. The Briefing confirmed that the degree of competition and existing concentration of foreign ownership in the sector, as well as whether appropriate levels of capital investment are planned to maintain the Canadian company as a global leader (as reflected in the government's Critical Minerals Strategy) are also relevant considerations for a net benefit review. For example, according to the Briefing, the Minister may look favourably on a reviewable acquisition that significantly increases the strategic importance and value of the Canadian business as part of a more integrated value chain whose benefits are likely to accrue to Canada.

At least in the near term, the uncertainties associated with the Ministerial Statement risk having a chilling effect on foreign investment and domestic growth in the Canadian critical minerals sector. If critical minerals mining companies believe they may have difficulties obtaining financing and may have restricted exit options if they incorporate and list on a stock exchange in Canada, that would likely influence their incentives and decisions about where to conduct business.

The issuance of the Ministerial Statement was likely influenced by the current Canadian political climate, which has resulted in a generally more protectionist environment and significant recent statutory amendments that expand the scope of Canada's foreign investment and competition laws, with the support of all the major political parties. Time will tell whether a similar investment review climate will persist following the next federal election, due to take place in or prior to October 2025.

Glencore-Elk Valley ICA Undertakings

As noted above, the Ministerial Statement was issued concurrently with an announcement approving Glencore's acquisition of Elk Valley, subject to extensive net benefit undertakings.

In 2023 Glencore launched a hostile bid to acquire the entirety of Teck Resources Limited, a leading Canadian resources company producing copper, zinc and other products. That transaction was eventually abandoned in the face of significant opposition.

Glencore and Teck subsequently announced a negotiated deal for Glencore to acquire Teck's Elk Valley coal operations. (Notably, coal is not on Canada's list of critical minerals.) In announcing the net benefit approval for this acquisition, the Minister highlighted "strict conditions" of his approval and a "significant package" of undertakings provided by Glencore in support of the transaction. Glencore also released a detailed summary of its undertakings, which include 10-year commitments to do the following:

- establish and maintain a Canadian head office for Elk Valley in Vancouver, British Columbia;

- maintain two regional offices for Elk Valley in Western Canada;
- ensure that the majority of Elk Valley's directors are Canadians; and
- ensure that at least 66% of all executive and senior management roles at Elk Valley are filled by Canadians.

Glencore also made a five-year commitment for Elk Valley to maintain "significant employment levels in Canada." The 10-year length of many of these commitments is longer than is normally required, with a term of three to five years typically accepted for most undertakings provided in a net benefit review.

Glencore also provided significant undertakings relating to environmental preservation and stewardship. Glencore agreed to maintain responsibility for payment of any environmental obligations under Canadian law through 2050, even if the company sells or otherwise disposes of Elk Valley before that date, unless the Minister is satisfied that the terms of sale suitably provide for environmental stewardship of the liabilities. Glencore has also committed to an additional C$350 million investment in rehabilitation and closure activities over the next five years. These environmental undertakings may have been prompted in part by vocal environmental groups, including a formal petition that advocated that the government should take measures to ensure that Elk Valley would have the resources to carry out its remediation obligations if it were split from the larger Teck group into a stand-alone company.

The Minister's press release also indicated that Teck committed to reinvest a significant portion of the proceeds from the Elk Valley transaction into its copper growth portfolio. (Copper is on Canada's critical mineral list.) ICA approval of a transaction typically focuses on the plans and undertakings of the foreign investor, and not the vendor's use of proceeds. While the Minister can take a wide range of factors into consideration in assessing whether a proposed transaction is likely to be of net benefit to Canada, we are not aware of another transaction in which the Minister received an undertaking from a vendor in connection with a net benefit approval.

The scope and duration of some of the commitments go beyond what is typically required to obtain net benefit approval. However, these undertakings may not be instructive generally, given the particular circumstances of the transaction, including the high public profile of both the initially proposed acquisition of Teck and the significant environmental concerns associated with Elk Valley.

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