

# **Foreign Direct Investment Restrictions in Canada**

Investing Across Borders: The World Bank Group Findings  
and Reactions From Different Countries

American Bar Association  
Section of International Law  
Spring Meeting 2011  
Washington, D.C.

**Y. Beth Riley**  
**Bennett Jones LLP**

March 2011

# Foreign Direct Investment Restrictions in Canada

## Investing Across Borders: The World Bank Group Findings and Reactions From Different Countries

**Y. Beth Riley**<sup>1</sup>  
**Bennett Jones LLP**

### **I. INTRODUCTION**

This paper examines restrictions on foreign investment in Canada and recent efforts by the Federal Government of Canada to unglue such impediments.

This examination will highlight (hopefully as opposed to providing the appearance of speeding from one topic to the next) Canada's approach to foreign investment relative to an international context. It will do so by examining the World Bank Group publication *Investing Across Borders 2010: Indicators of Foreign Direct Investment Regulation in 87 Economies* ("**Investing Across Borders 2010**")<sup>2</sup>; the *Investment Canada Act*<sup>3</sup> (Canada's legislation governing foreign investment); recent policy papers setting out Canada's position regarding foreign investment; and recent Canadian developments in this area.

### **II. INVESTING ACROSS BORDERS 2010**

In 2010, the World Bank Group published *Investing Across Borders 2010*, a publication which examines the laws, regulations and practices which affect levels of foreign direct investment in the 87 countries from which data was collected. *Investing Across Borders 2010* structures its conclusions based upon four policy indicators that measure foreign direct investment. These policy indicators, the "**IAB indicators**", are as follows: (i) sector-specific restrictions on foreign equity ownership; (ii) the process of starting a foreign business; (iii) access to industrial land; and, (iv) commercial arbitration regimes.

*Investing Across Borders 2010* posits that, generally, countries that rank relatively high on the four IAB indicators tend to attract more foreign direct investment relative to the size of their economies and population. However, *Investing Across Borders 2010* acknowledges that foreign direct investment levels are a function of multiple factors not captured by the four IAB indicators and whose connection to public policy is somewhat tenuous, such as market size, political stability, the degree levels of economic development, economic prospects, costs of production, levels of quality of infrastructure and the presence of natural resource. *Investing Across Borders*

---

<sup>1</sup> Y. Beth Riley is a partner in Bennett Jones LLP's Antitrust and Competition practice group and also and Corporate practice group.

<sup>2</sup> *Investing Across Borders 2010: Indicators of Foreign Direct Investment Regulation in 87 Economies*, online: The World Bank Group <<http://iab.worldbank.org>>.

<sup>3</sup> R.S., 1985, c. 28 (1<sup>st</sup> Supp.). For a review of the review and approval process under the ICA, see "*Investment Canada Act*" in this paper.

2010 focuses its survey on indicators which are largely within the control of governments. The focus of *Investing Across Borders 2010* is on laws, regulations and practices that influence foreign direct investment with the primary purpose of assisting with the identification of "specific, actionable, and practical steps that governments can take to increase domestic investment competitiveness in the policy and regulatory areas measured by the IAB indicators".<sup>4</sup>

*Investing Across Borders 2010* collates its data by identifying the performance of each country within each IAB indicator and benchmarks the results by country, with a comparison to regional (i.e., in the case of Canada, "high-income OECD") and global averages.

#### ***Four IAB Indicators***

*Investing Across Borders 2010* describes the four IAB indicators of foreign direct investment as follows:<sup>5</sup>

- *Investing Across Sectors indicators measure the degree to which domestic laws allow foreign companies to establish or acquire local firms. The indicators track restrictions on foreign equity ownership in 33 sectors, aggregated into 11 sector groups, including primary, manufacturing, and service sectors.*
- *Starting a Foreign Business indicators record the time, procedures, and regulations involved in establishing a local subsidiary of a foreign company in the form of a limited liability company.*
- *Accessing Industrial Land indicators evaluate legal options for foreign companies seeking to lease or buy land in a host economy, the availability of information about land plots, and the steps involved in leasing land.*
- *Arbitrating Commercial Disputes indicators assess the strength of legal frameworks for alternative dispute resolution, rules for arbitration, and the extent to which the judiciary supports and facilitates arbitration. The indicators compare national regimes for domestic and international arbitration for local and foreign companies.*

#### ***Summary Conclusions of Investing Across Borders 2010***

The main findings of *Investing Across Borders 2010*, as set forth below, are not surprising and largely support arguments for legal change to facilitate increased levels of foreign direct investment.<sup>6</sup>

- **"Restrictive and obsolete laws and regulations impede FDI".** *Investing Across Borders 2010* data indicates that most of the 87 surveyed countries have foreign direct investment specific restrictions that limit foreign investment, which

---

<sup>4</sup> *Ibid.* at 4.

<sup>5</sup> *Ibid.* at 3.

<sup>6</sup> *Ibid.* under "Main Findings" at 8-11.

increase the costs and time to establish a business and, in some circumstances, limit a foreign investor's ability to participate in certain sections of the economy.

- "Red tape and poor implementation of laws create further barriers to entry". The IAB indicators assessed the experience of investors in respect of red tape, including, for example, leasing land, enforcing an arbitration award and starting a new business.
- "Good regulations and efficient processes matter for FDI". *Investing Across Borders 2010* reports that countries with "poor regulations" and "inefficient processes" have less foreign direct investment than other countries.
- "Effective institutions help foster FDI". Public institutions (such as courts) that are viewed as efficient and predictable, and, where information is easily accessible (i.e., current information available on the internet) and reliable, help foster a business environment that is receptive to foreign direct investment.

### ***Canada's Performance***

Canada is the only high-income OECD country with a formal investment review and approval process of foreign investments.<sup>7</sup> Such review is governed by the *Investment Canada Act* (the "ICA").<sup>8</sup> The ICA applies to all investments by non-Canadians to establish a new Canadian business or acquire control of a Canadian business and, to the extent any national security issues may apply, to all investments by non-Canadians in a Canadian business in Canada. The ICA is described in detail in this paper under the heading "*Investment Canada Act*" and is also assessed under the heading "*The Wilson Report*".

The review process under the ICA is complex, adds a regulatory burden and an element of deal risk (whether or not a practical risk) and increases the time and cost of investing in Canada, thus creating the perception of a regulatory and political environment that discourages foreign investment.

*Investing Across Borders 2010* compared Canada's performance to 11 other countries in the "high-income OECD" group.<sup>9</sup> A copy of Canada's profile from *Investing Across Borders 2010* is attached at Schedule "A" hereto. Below in bold font are extracts from *Investing Across Borders 2010* of the summaries of each of the four IAB indicators for the high-income OECD group, followed by my brief comments regarding Canada's performance relative to this group.

---

<sup>7</sup> Australia also has a foreign investment review process. The Foreign Investment Review Board examines proposals under the *Foreign Acquisitions and Takeovers Act, 1975*. The process is similar to that in Canada as Australia promotes foreign direct investment as a way to grow its economy.

<sup>8</sup> R.S., 1985, c. 28 (1<sup>st</sup> Supp.). For a review of the review and approval process under the ICA, see "*Investment Canada Act*" in this paper.

<sup>9</sup> Countries in the high-income OECD group are: Austria, Canada, Czech Republic, France, Greece, Ireland, Japan, Korea Rep., Slovak Republic, Spain, United Kingdom and United States.

## Investing Across Sectors

**High-income OECD countries have relatively few restrictions on foreign equity ownership, though foreign ownership of companies in transportation is far more restricted than in most other regions.**

The *Investing Across Borders 2010* findings indicate that Canada has greater restrictions on foreign investment (ownership) when compared to other high-income OECD countries. Sector limitations of foreign investment include:

- The *Telecommunications Act* requires that non-Canadians may not own more than 20% of the carrier's voting shares or more than 33 1/3% of the voting shares of a carrier's holding company, and a carrier may not be otherwise controlled in fact by non-Canadians. In addition, at least 80% of the members of the board of directors of the carrier must be Canadian.<sup>10</sup>
- The *Broadcasting Act* provides that broadcasting licences may only be issued to Canadians or to companies that are effectively owned or controlled, directly or indirectly, by non-Canadians, meaning that non-Canadians may not own more than 20% of the voting shares of a company, and the chair and directors are required to be Canadian.<sup>11</sup>
- Although there is not a specific requirement that limits foreign ownership of Canadian banks, the *Bank Act* prohibits any individual investor from holding more than 10% of the shares of a bank listed in Schedule 1 (i.e., a large bank) and the aggregate holdings of non-residents and their associates may not exceed 25% of all shares.<sup>12</sup> A similar rule applies to federally incorporated trust companies and loan companies under The *Trust and Loan Companies Act*. In addition, the *Bank Act* (Canada) includes other requirements, such as Canadian directors and holding annual meeting in Canada, which has the effect of reducing foreign influence.
- The *Canada Transportation Act* provides that non-Canadians may own and control up to 49% of the voting interests of a Canadian air carrier, subject to the requirement that the Canadian carrier be controlled in fact by Canadians.<sup>13</sup>
- The *Insurance Companies Act* limits foreign ownership in an existing Canadian owned life insurance company to 25% in the aggregate, and 10% for any individual non-resident.

Notwithstanding such foreign ownership restrictions, there are signs of liberalization on foreign ownership restrictions consistent with recommendations in the Wilson Panel's report, *Compete to Win: Final Report June 2008 ("Compete to Win")*.<sup>14</sup> For example, in 2009 the *Canada*

---

<sup>10</sup> S.C. 1993, c. 38.

<sup>11</sup> S.C. 1991, c. 11.

<sup>12</sup> S.C. 1991, c. 46.

<sup>13</sup> S.C. 1996, c. 10.

<sup>14</sup> *Compete to Win: Final Report June 2008*, online: Industry Canada <<http://ic.gc.ca>>, with a copy at [http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h\\_00040.html](http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html).

*Transportation Act* was amended to increase the foreign ownership limit from 29% to 49%. In addition, there are developments in the telecommunications industry which will likely result in some liberalization. Such liberalization was triggered by the grant of a spectrum licence by the Federal Government in 2008 to purchasers (who were required to satisfy the Canadian ownership restrictions). The "Canadian" status of one of the purchasers, Globalive Wireless, was questioned in light of a significant investment (through a combination of equity purchase and provision of loans) from Orascom Telecom, based in Egypt, which owns interests in mobile operators in various countries in North Africa, Europe and Asia. Ultimately, the Federal Cabinet determined that Globalive Wireless was not controlled in fact by non-Canadians. In confirming Globalive Wireless' status, the Federal Cabinet noted that, although the *Telecommunications Act* restricts ownership of voting shares, it does not otherwise limit foreign investment in telecommunications common carriers and that the *Telecommunications Act* should be interpreted in a way that ensures access to foreign capital, technology and experience is encouraged so as to support telecommunications policy objectives.

In the Speech to the Throne delivered on March 3, 2010, the Governor General stated that it was the Canadian Government's intention to "open Canada's doors further to venture capital and to foreign investment in key sectors, including the satellite and telecommunications industries, giving Canadian firms access to the funds and expertise they need." This statement is consistent with the recommendation in the Wilson Panel and indicative of a larger trend to liberalization of foreign investment restrictions. In pursuit of this liberalization, the House of Commons Standing Committee on Industry, Science and Technology is currently reviewing the ICA and has been charged with making recommendations for potential amendments to the ICA.<sup>15</sup>

### Starting a Foreign Business

#### **High-income OECD countries offer easy establishment processes.**

It is acknowledged that Canada is one of the easiest countries in which to establish a business. Foreign investors may incorporate a company in only Canada one day, similar to domestic investors - noting of course, the foreign ownership constraints in certain sectors as described above under "*Investing Across Borders 2010 – Canada's Performance*". Foreign investors and domestic investors must comply with the same regulatory and procedural obligations. Subject to the additional requirement that foreign investors must file a notification under the *Investment Canada Act* within 30 days of establishment of such new business. However, this filing is only procedural and, as a post-establishment filing, should not affect the time to establish a new business. See "*Investment Canada Act – General*".

### Accessing Industrial Land

**All the surveyed high-income OECD countries allow private ownership of land and provide strong lease and ownership rights. Access to land information is relatively easy throughout these countries, and many have land and geographic information systems.**

---

<sup>15</sup> House of Commons, News Release, 4423208, "Study on Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector" (15 April 2010) online: Standing Committee on Industry, Science and Technology <<http://www2.parl.gc.ca/committeebusiness/NewsReleases.aspx>>.

Similar to domestic investors, foreign investors may purchase or lease private and public land in Canada. *Investing Across Borders 2010* notes that the purchase of land in Canada may include requirements to develop such land within a specified time period (which is applicable to all purchasers of land), resulting foreign investors' preference to lease land. As compared to other high-income OECD countries, the time period to lease both private and public land in Canada is relatively high and the access to land information index is relatively low.

### Arbitrating Commercial Disputes

**Arbitration is a long-established, common mechanism for resolving commercial disputes in all surveyed high-income OECD countries. All have enacted laws on commercial arbitration and make them available online. In addition, all are members of the New York Convention, and only Canada has not ratified the ICSID Convention.**

The law of international commercial arbitration in Canada is based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law. This allows for the efficient and binding resolution of disputes outside of the domestic court system where the parties so choose. The benefit of international arbitration in Canada is an award that is not easily susceptible to challenge and which can be readily enforced in more than 140 countries around the world pursuant to the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the 1958 New York Convention). Of note, Canada has not ratified the International Centre for settlement of Investment Disputes ("ICSID") convention.

## III. THE INVESTMENT CANADA ACT

### *General Overview of the ICA*

The ICA applies to any investment by a "non Canadian" that involves a direct or indirect "acquisition of control" of a "Canadian business", an establishment of a "new Canadian business" or an acquisition of any interest in a "Canadian business" where such acquisition could be "injurious to national security".

Ultimately, in order to assess the obligations under the ICA, one must assess: (i) whether the investor is a "non-Canadian"<sup>16</sup> (ii) whether such investment involves the "acquisition of control"<sup>17</sup> of a "Canadian business"<sup>18</sup>, the establishment of a "new Canadian business"<sup>19</sup> or none

---

<sup>16</sup> A "non-Canadian" is defined in the ICA to be an individual, a government or an agency thereof or an entity that is not a Canadian. There are detailed rules and presumptions regarding a determination of whether or not an investor is Canadian.

<sup>17</sup> The concept of "acquisition of control" is subject to certain rules and presumptions set forth in the ICA depending upon the nature of the acquisition and the structure of the Canadian business (corporation, partnership, etc.). For example, control is deemed irrefutably to be acquired where a majority of the Canadian business's voting securities are acquired or where the assets of a Canadian business are acquired or where all or substantially all of the assets used in carrying on the Canadian business are acquired. An acquisition of less than one-third of the voting securities of a corporation, or less than a majority of the voting interests of a non-corporate entity is deemed not to be an acquisition of control.

<sup>18</sup> The meaning of "Canadian business" under the ICA is defined to mean a business carried on in Canada that has (a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the business. The concept of "business" is defined to include any undertaking or enterprise capable of generating revenue and carried on in anticipation of profit. For example, it is worthy to that the definition of "Canadian business" is sufficiently broad to include a business with an office in Canada without any real operating being conducted in Canada.

<sup>19</sup> A "new Canadian business" is defined in the ICA to mean business that is not already being carried on in Canada by the non-Canadian and that, at the time of its establishment, (a) is unrelated to any other business being carried on in Canada by that non-

of the forgoing, and (iii) whether the acquisition could be "injurious to national security". Notwithstanding these relatively simple concepts, the ICA is a complicated statute that is quite technical and includes many rules and presumptions.<sup>20</sup>

Depending upon the nature of the investment, and subject to "national security" issues discussed below under the heading "*Investment Canada Act - National Security Review*", an investment may either be subject to review and approval by the Minister of Industry (the "**Minister**") or, alternatively, be subject only to a post-closing notification.

Whether or not an investment is subject to review and approval or notification under the ICA depends largely on the nature of the business to be acquired, the structure of the investment, the size of the Canadian business to be acquired, the nature of the vendor of the Canadian business and the nature of the non-Canadian investor.

### ***Review Threshold***

Investments by non-Canadians that involve the acquisition of control of a Canadian business are subject to review and approval by the Minister under the ICA if certain financial thresholds in respect of the Canadian business are satisfied, subject to certain limited exemptions.<sup>21</sup>

A direct investment involves a direct acquisition of a Canadian business by the non-Canadian investor. In respect of direct investments by a non-Canadian investor, where the investor is ultimately controlled by a World Trade Organization ("**WTO**") member or the vendor of the Canadian business is ultimately controlled by a WTO member, the investment is only subject to review if the book value of the assets of the Canadian business as at the end of its most recent financial year-end exceeds CDN \$312 million.<sup>22</sup> If neither the investor nor the vendor of the Canadian business is ultimately controlled by a WTO member, the CDN \$312 million threshold is reduced to CDN \$5 million.

An indirect investment, generally, involves an acquisition of shares of a non-Canadian entity which directly or indirectly owns shares in a Canadian corporation representing the Canadian business. An indirect investment by a WTO investor or a sale by a WTO vendor is not subject to review. If neither the investor nor the vendor of the Canadian business is ultimately controlled by a WTO member, the investment will be subject to review if the value of the assets of the Canadian business is CDN \$50 million; provided, however, if the value of the assets of the

---

Canadian, or (b) is related to another business being carried on in Canada by that non-Canadian but falls within a prescribed specific type of business activity that, in the opinion of the Governor in Council, is related to Canada's cultural heritage or national identity.

<sup>20</sup> For a detailed overview of the ICA, please see Oliver Borgers, Emily Rix and Lorne Salzman, "Foreign Investment Screening Under Canada's *Investment Canada Act*" (September 2010) Canadian Bar Association: 2010 Annual Fall Conference on Competition Law.

<sup>21</sup> Exemptions include, generally: (i) the acquisition of voting shares by a person in the ordinary course of that person's business as a trader or dealer of securities; (ii) the acquisition of voting interests by any person in the ordinary course of a business carried on by that person that consists of providing, in Canada, venture capital; (iii) investments to realize security granted for a loan; and (iv) acquisitions of control of a Canadian business following which the ultimate control of the Canadian business remains unchanged.

<sup>22</sup> As noted above, the amendments to the ICA were intended to increase the thresholds for review of foreign investments, with the intent to initially increase the review threshold to CDN \$1 billion over a six year period, with annual adjustments thereafter based on the growth of the Canadian economy, with the value (for public companies) is to be based on the "enterprise value" of the Canadian business, as opposed to the book value of the assets. As at this time, such amendments have not been implemented, and no reason for such failure has been provided by the Minister of Industry. See [www.gazette.gc.ca/rp-pr/p1/2009/2009-07-11/html/reg2-eng.html](http://www.gazette.gc.ca/rp-pr/p1/2009/2009-07-11/html/reg2-eng.html) for further information.



Canadian business exceeds 50% of the value of all assets acquired by the investor, then the threshold is reduced to CDN \$5 million.

Of note, to the extent a Canadian business is involved in a "cultural business", which is defined broadly in the ICA, the review threshold is set at CDN \$5 million and the forgoing analysis concerning direct and indirect investment is of no import.<sup>23</sup>

### ***Timing of Review***

Upon receipt of a review application, and subject to the separate national security review process described below under "*Investment Canada Act – National Security Review*", the Minister is required to complete a review within 45 days, unless the Minister unilaterally extends such period by an additional 30 days. Additional extensions are permitted under the ICA to the extent the Minister and the investor agree on such extensions. A review of significant acquisitions will typically extend to roughly 75 days or more, depending upon the nature of undertakings required of the foreign investor, and the associated negotiation process. See "*Investment Canada Act – Contractual Undertakings*".

### ***Notification***

An acquisition of control of a Canadian business that is not subject to review under the ICA and an establishment of a new Canadian business is subject only to a notification under the ICA, subject to a review under the national security review provisions, described under the heading "*Investment Canada Act – National Security Review*". A notification may be filed at any time prior to the closing of the acquisition or establishment of the Canadian business, as applicable, or within 30 days thereafter.

### ***Review and Review Process***

If an investment is subject to review under the ICA, the investor may only close the investment once it has filed an application with the Investment Review Division of the Department of Industry ("**Industry Canada**") and the Minister is satisfied, or deemed to be satisfied, that the investment is of "net benefit to Canada". To the extent the Canadian business involves a cultural business, the application is also reviewed by the Cultural Sector Investment Review Officer of Heritage Canada.

In determining whether an investment is likely to be of "net benefit" to Canada, the Minister is required under section 20 the ICA to consider the following factors:<sup>24</sup>

---

<sup>23</sup> A "cultural business" is defined in the ICA to mean a Canadian business that carries on any of the following activities, namely, (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers, (b) the production, distribution, sale or exhibition of film or video recordings, (c) the production, distribution, sale or exhibition of audio or video music recordings, (d) the publication, distribution or sale of music in print or machine readable form, or (e) radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

<sup>24</sup> See section 20 of the ICA.

- the effect on the level of economic activity in Canada, including employment levels, resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;
- the degree and significance of participation by Canadians in the Canadian business;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition within Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; taking into account industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- the contribution of the investment to Canada's ability to compete in world markets.

The preparation and filing of a review application by a foreign investor requires information regarding the Canadian business, the investor and also detailed plans of the investor in respect of the Canadian business. These plans form the basis of the Minister's determination of whether the investment is of "net benefit" to Canada and the plans should address the factors to be considered by the Minister, as set forth above.

### ***Net Benefit Test***

The meaning of "net benefit" to Canada is not defined in the ICA. However, an investment which simply maintains the *status quo* of the Canadian business will not be approved by the Minister.

Moreover, it is clear that the net benefit assessment criteria, noted above, are broad and provide the Minister with a significant degree of discretion. This flexibility enables the Minister to tailor decisions based on the framework of each investment. However, this inherent flexibility is not always viewed as a positive - a review of the "net benefit" factors can, at times, lead to internal inconsistencies, and the broad scope allowed by the ICA can subject the ICA review process to delays and uncertainty.

### ***Contractual Undertakings***

The Minister typically requires investors to provide contractual undertakings to the Minister as a condition of the Minister's approval of the investment. The undertakings are based on the plans provided by the Investor and address any concerns of the Minister. The objective of the undertakings is to circumscribe a proposed acquisition to such a degree that the Investment Review Division is able to recommend that the Minister conclude that an acquisition is likely to be of net benefit to Canada. Such undertakings typically relate to, among other things, maintain specified capital or other types of expenditures in Canada, levels of employment, the location of

a head-office in Canada, and levels of Canadian participation by employees, management and directors, in addition to defining the minimum role of officers and directors. The term of such undertakings typically ranges from three to five years.

Investors are required to submit a "progress report" approximately 18 months after closing of an investment advising of the status of its compliance with undertakings made to the Minister.

The ICA permits the Minister to demand that an investor comply with its undertakings. If an investor fails to comply with a demand issued by the Minister, the Minister may apply to a superior court for an order (i) directing the investor to comply with the undertakings; (ii) requiring the investor to divest itself of the acquired assets or, (iii) imposing a penalty not exceeding \$10,000 for each day of contravention.

### *National Security Review*

#### Trigger for National Security Review

Any investment in a Canadian business by a non-Canadian is subject to national security review if the Minister of Industry considers that the investment could be "injurious to national security" and if the Governor in Council (i.e., the Federal Cabinet, on the Minister of Industry's recommendation) makes an order for review. Even investments not subject to review under the ICA, such as investments which do not involve an acquisition of control of a Canadian business or which are subject only to notification under the ICA may be subject to national security review.

#### National Security Review

The concept of national security is not defined in the ICA, and there is virtually no guidance regarding a national security review, especially as there has been no public review under the national security review provisions since implementation in March 2009.

To our knowledge, the only (public) investment that has raised national security issues under the ICA occurred in 2008, prior to the introduction of the current national security review provisions. In 2008, Alliant Techsystems Inc. (a U.S. defence company) unsuccessfully attempted to acquire the Information Systems and Geospatial Services operations (i.e., the space division of MacDonald, Dettwiler and Associates Ltd.). The acquisition was blocked by the Minister of Industry on the general "net benefit" to Canada test.<sup>25, 26</sup>

In 2009, Research In Motion and certain politicians urged the Minister to block Telefonaktiebolaget LM Ericsson's acquisition of Nortel Networks Corp.'s wireless assets on the

---

<sup>25</sup> MacDonald, Dettwiler and Associates Ltd., Press Releases, "MDA provides statement on Investment Canada" (April 10, 2008), online: News <<http://www.mdacorporation.com/corporate/news/>>.

<sup>26</sup> It appears that in 2009 the Department of Industry issued a notification to George Forrest International Afrique (part of the Forrest Group of companies in which Goerge Forrest has an ownership interest) prohibiting George Forrest International Afrique from implementing the acquisition of Forsys Metals Corp. pending further notice from Industry Canada. No additional information regarding the nature of Industry Canada's concerns has been made public. However, it should be noted that Forsys Metals Corp. is a Canadian public company with uranium interests in Africa. Uranium interests would likely be subject to a national security review, for obvious reasons. However, it should be noted that, upon a review of public documents, it appears that the acquisition was not subject to review and approval under the review provisions of the ICA. See the press release of Forsys Metals Corp. dated August 19, 2009 at [http://forsysmetals.com/?page\\_id=307](http://forsysmetals.com/?page_id=307).

basis of national security reasons under the ICA or otherwise and to maintain control of Nortel, a "national treasure" in Canada.<sup>27</sup> These arguments were not accepted, and Ericsson completed the acquisition of Nortel without review under the ICA or interference from the Minister.

### National Security Review Process

The Minister of Industry has a 45 day period to determine whether or not to provide non-Canadian investors with the first notification of a review, or possible review (in which case the Minister has an additional 25 days to determine whether an order for national security review should be issued), which 45 day period commences: (i) on the date the investor files an application for review in respect of investments subject to review under the ICA, (ii) on the date the investor files a notification in respect of investments subject only to notification under the ICA, or (iii) on the closing date of the investment for all other investments which are not otherwise subject to any review or notification under the ICA.

Once an order for national security review has been made, the Minister has 45 days (unless a further period is agreed to by the non-Canadian investor) to conduct a national security review of the investment. Where a national security review is ordered by the Federal Cabinet, other government departments and officials may be consulted, such as the Department of Public Safety and Emergency Preparedness, Canadian Security Intelligence Service, Department of National Defence, Department of Natural Resources and Department of Foreign Affairs and International Trade.

At the end of the 45 day review period, the Minister is required to either: (i) refer the investment to the Federal Cabinet together with a report of the Minister's findings and recommendations if the Minister concludes that the investment would be injurious to national security or if the Minister is unable to make a conclusion, or (ii) issue a notice indicating that no further action will be taken in respect of the investment if the Minister concludes that the investment would not be injurious to national security. From the date the Minister refers this recommendation to the Federal Cabinet, the Federal Cabinet has 15 days to take action with respect to the investment.

If the Minister submits a report and recommendations to the Federal Cabinet, the Federal Cabinet may, by order, take any measure it considers advisable to protect national security, including prohibiting the investment, requiring certain divestitures or permitting the investment, subject to certain conditions or undertakings.

### Uncertainty Associated with National Security Review

As the Minister must give the notification under the national security review provisions within 45 days after an application for review has been filed, investors will receive comfort with regard to any national security concerns in connection with investments subject to review and approval under the ICA, as such review and approval process generality takes in excess of 45 days.

---

<sup>27</sup> See the announcement of the Minister of Industry dated September 6, 2009 at <http://www.marketwire.com/press-release/Minister-Clement-Issues-Government-of-Canada-Decision-on-Nortel-Sale-to-Ericsson-1045900.htm>; Les Whittington and Joanna Smith, "Keep Nortel assets in Canada, RIM says", The Star (August 7, 2009) online <http://www.thestar.com>, and Josh Wingrove, "Ottawa signs off on Nortel-Ericsson deal", The Globe and Mail (September 16, 2009) at <http://www.theglobeandmail.com>.

Investments that are subject to notification under the ICA, as opposed to review, have no pre-closing filing requirements. Accordingly, to the extent national security concerns may arise in connection with an investment or establishment of a new Canadian business, it is recommended that the investor files the requisite notification 45 days prior to the proposed closing of the investment or establishment of a new Canadian business, thus triggering the 45 day period prior to closing. This filing requirement, however, clearly, increases the time that a foreign investor requires to become operational in Canada.

More troubling, at least until a proper national security review framework is prepared, is that there is no mechanism available under the ICA to receive any (binding) "pre-clearance" from the Minister under the national security provisions of the ICA for investments that are not subject to either review and approval or notification under the ICA, as the Minister may order a national security review within 45 days of closing of the investment. Accordingly, to the extent the business activities of the Canadian business to be acquired or the nature of the foreign investor may raise national security concerns, significant (if only theoretical) deal risk may arise. In such cases, the parties should assess such risk, seek guidance from experts, and allocate risk early in negotiations and in the transaction documents to deal with such potential event.

### **State Owned Enterprise**

In recent years, the rise of investments by state-owned enterprises and sovereign wealth funds (collectively, "SOEs") has led to a certain uneasiness amongst Canadians, similar to those sentiments expressed in the United States regarding China's bid for Unocal.<sup>28</sup> This public unease was clear in 2004, when China Minmetals Corp., a Chinese SOE, attempted to acquire Noranda (and its majority ownership in Falconbridge), Canada's largest mining company and the world's third largest zinc producer. At this time, many politicians, the unions, protectionists and others rallied the public against the acquisition, focusing on resource security and whether a foreign government should be allowed to acquire Canadian businesses.<sup>29</sup> The acquisition talks ultimately ended without an acquisition, resulting in a public perception that significant investments in Canada by SOEs and, in particular, China, would be challenging to complete.

On November 23, 2006, the Minister of Finance released *Advantage Canada: An Economic Plan to Eliminate Canada's Net Debt and Further Reduce Taxes (2006-069)* ("**Advantage Canada**"),<sup>30</sup> in which the Canadian Government announced plans to review Canada's foreign investment policy (including foreign ownership restrictions and the ICA) and develop rules to protect Canada's national interests. Note that Advantage Canada predates the Wilson Report, and was prepared by Canadian Government as opposed to independent business experts that comprised the Wilson panel.

This policy announcement was made in a political climate which had led to an increased demand for a more restrictive foreign investment policy in Canada following a number of significant foreign acquisitions in the Canadian steel, mining and oil and gas sectors.<sup>31</sup> While the Canadian

---

<sup>28</sup> U.S. officials sound alarm on China; Unocal bid painted as reserve grab", The Globe and Mail, July 14, 2005, p. B1.

<sup>29</sup> "PM lauds Chinese takeover of Noranda", The Globe and Mail, October 22, 2004, p. A1.

<sup>30</sup> A copy of *Advantage Canada: An Economic Plan to Eliminate Canada's Net Debt and Further Reduce Taxes (2006-069)* is available at <http://www.fin.gc.ca/ec2006/plan/pltoc-eng.asp>

<sup>31</sup> See *Advantage Canada* at page 87.

Government recognized the desirability to maintain foreign investment in Canada, it noted that there may be "rare occasions where a particular foreign investment might damage Canada's long-term interests".<sup>32</sup>

The Minister subsequently issued Guidelines regarding investments in Canada by non-Canadian SOEs, which provide that, when assessing whether acquisitions of control are of net benefit to Canada, the Minister will also examine the corporate governance and reporting structure of the investor (and its controlling entity).<sup>33</sup> The Guidelines require that this examination will include whether the SOE adheres to Canadian standards of corporate governance (including, for example, commitments to transparency and disclosure, independent members of the board of directors, independent audit committees and equitable treatment of shareholders) and to Canadian laws and practices. The examination will also cover how and the extent to which the SOE is owned or controlled by a state.

The Guidelines provide that the Minister will assess whether a Canadian business to be acquired by an SOE will continue to have the ability to operate on a commercial basis regarding: where to export; where to process; the participation of Canadians in its operations in Canada and elsewhere; support of on-going innovation, research and development; and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

#### **IV. CANADA - THE WILSON PANEL**

##### ***Purpose of the Wilson Panel***

The belief that foreign direct investment is a significant driver of growth is widely acknowledged by economists, business and, recently in Canada, the Wilson Panel.

In 2007, the Minister of Industry and the Minister of Finance (on behalf of the Canadian Federal Government) convened the Competition Policy Review Panel, referred to as the "Wilson Panel", to review Canada's laws and policies governing competition and investment matters with the objective to ensure that current laws and policies were working effectively to improve Canada's competitive environment and stimulate foreign investment.

##### ***Findings of the Wilson Panel***

In June 2008, the Wilson Panel submitted its final report, *Compete to Win*, to the Minister of Industry, on behalf of the Government of Canada.<sup>34</sup> A principal assumption of the Wilson Report is that "[g]oing forward, being an attractive destination for skilled labour and foreign investment will be a critical success factor for developed countries."<sup>35</sup>

Not everyone is in agreement with the need for foreign investment. Opposition to foreign investment is often based on fears of the "hollowing out" of the Canadian economy, loss of

---

<sup>32</sup> See the Minister of Finance's press release announcing "Advantage Canada" at <http://www.fin.gc.ca/n06/06-069-eng.asp>.

<sup>33</sup> *Guidelines—Investment by state-owned enterprises—Net benefit assessment*, Industry Canada,, available at <http://strategis.ic.gc.ca/epic/internet/inica-lic.nsf/en/lk00064e.html#state-owned>.

<sup>34</sup> *Compete to Win*, *supra* note 10.

<sup>35</sup> *Ibid.* at 8.

Canadian control, loss of a "Canadian" identity, the disappearance of head offices in Canada, and protectionism. Those in Canada opposed to foreign investment cite the significant acquisitions of "Canadian" companies, including Noranda, Falconbridge, Alcan, IPSCO, Nortel and Hudson's Bay in support of their position.

Notwithstanding that Canada was the second most popular country for foreign investment from 2000-2006<sup>36</sup> *Compete to Win* noted that the share of assets in Canada's non-financial industries under foreign control has not changed noticeably in recent years.<sup>37</sup> Since the date of *Compete to Win*, the most recently available Statistics Canada report on foreign ownership indicates that corporate assets, revenues and profits of Canadian-controlled firms all increased at a faster rate than foreign controlled assets, revenues and profits in 2008, resulting in a decline in the share of foreign control in the Canadian economy.<sup>38</sup>

The Wilson Report determined that existence of a formal review process of foreign investments in Canada "has not been an obstacle to foreign direct investment."<sup>39</sup> This claim is based, in part, on the fact that, notwithstanding declining levels of foreign direct investment in Canada, only one non-cultural investment has been disallowed by the Minister under the ICA since 1985 and that Canada's total stock of inbound foreign direct investment as a proportion of gross domestic product is relatively high among industrialized countries, twice as high as the United States and 12 times as high as Japan.<sup>40</sup>

### ***Recommendations of the Wilson Panel***

The Wilson Panel made 48 recommendations, all of which were premised on the belief that foreign direct investment generates positive benefits and is necessary for Canada's economic success in the increasingly globalized economy. With regard to foreign direct investment, the Wilson Panel made recommendations with the purpose of narrowing the scope of review of foreign investments under the ICA, lowering foreign ownership restrictions in certain sectors and improving the transparency, predictability and timeliness of decision-making, including the following specific recommendations:

- Increase the review threshold of foreign investments in Canadian businesses under the ICA to CDN \$1 billion in "enterprise value" from the then current review threshold of CDN \$295 million in gross assets - with an exception being made for cultural businesses. Such increase was expected to reduce the number of investments subject to review.

---

<sup>36</sup> *Ibid.* at 15. See also Andrea Mandel-Campbell, *Foreign Investment Review Regimes: How Canada Stacks Up* (Ottawa: Conference Board of Canada, April 2008), online: The Conference Board of Canada <<http://www.conferenceboard.ca>> and SECOR, *Positioning Canadian Firms in the Global Market for Corporate Control* (February 2008), online: SECOR <<http://www.secorgroup.com>>.

<sup>37</sup> *Compete to Win*, *supra* note 10 at 15. See Statistics Canada, *Foreign Control in the Canadian Economy* (14 June 2007) online: The Daily, Statistics Canada <<http://www.statcan.gc.ca>>.

<sup>38</sup> See Statistics Canada, *Foreign Control in the Canadian Economy* (3 March 2011), online: The Daily, Statistics Canada <<http://www.statcan.gc.ca>>.

<sup>39</sup> *Compete to Win* notes that in excess of 1,500 non-cultural investments reviewed by the Minister of Industry under the ICA since 1985, only one proposal has been disallowed, and only three cultural investments have been disallowed of the aggregate 98 cultural investments reviewed by the Minister of Canadian Heritage since 1999.

<sup>40</sup> *Compete to Win*, *supra* note 10 at 29. See also United Nations Conference on Trade and Development, *World Investment Report 2007*, Annex Table B.3, online: The United Nations Conference on Trade and Development <<http://www.unctad.org>>.

- Eliminate the concept of a lower CDN \$5 million review threshold of foreign investments under the ICA for "sensitive industries", which are Canadian businesses engaged in the transportation sector (which includes pipelines), non-federally regulated financial services and uranium mining.
- Eliminate the requirement for approval of reviewable investment under the ICA requiring a foreign investor to establish that the investment will be of "net benefit" to Canada, and instead require the Minister, as a condition for disallowing an investment, to establish that the investment is "contrary to Canada's national interest."
- Include an explicit national security test in the ICA to support Canadian trade and investment policies.
- Require the Minister(s) to: (i) report publicly on the disallowance of any investment under the ICA and provide reasons for the disallowance; and (ii) publish annually a report that would include (a) the development of policies and guidelines, (b) an overview of all transactions subject to the ICA, and (c) a summary of undertakings provided by foreign investors in relation to the disallowance test under the ICA.
- Increase the limit on foreign ownership of air carriers to 49% of voting equity on a reciprocal basis through bilateral negotiation and complete Open Skies negotiations with the European Union as quickly as possible.
- Liberalize the foreign ownership policy on uranium mining.
- Adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry: (i) initially amending the *Telecommunications Act* to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10% of the telecommunications market in Canada; and (ii) subsequently, liberalize foreign investment restriction in a manner that is competitively neutral for telecommunications and broadcasting companies.
- Retain the "widely held" rule applicable to large financial institutions and remove the *de facto* prohibition on bank, insurance and cross-pillar mergers of large financial institutions (subject to regulatory safeguards).
- Amend the *Competition Act* to, generally, among others, (i) increase the financial review thresholds, align the merger notification process under the *Competition Act* more closely with the merger review process in the United States; and (ii) update certain provisions of the *Competition Act* to be consistent with modern economic theory and international trends.



## V. THE INVESTMENT CANADA ACT: 2009 AMENDMENTS

On January 27, 2009, the 2009 Canadian federal budget was announced. The announced budget included a short statement that "the Government will implement improvements to Canada's competition and investment laws and policies ... [and] will encourage new foreign investment but will also add protections to make sure that these new investments cannot jeopardize Canada's national security."<sup>41</sup>

On February 6, 2009, Canada's Minister of Finance introduced Bill C-10 ("**Bill C-10**"), the *Budget Implementation Act*<sup>42</sup>, to implement measures set forth in the 2009 federal budget. In an unusual and unexpected decision, the Federal Government also included in Bill C-10 significant amendments to the *Investment Canada Act* and the *Competition Act*.<sup>43, 44, 45</sup> These amendments were largely based on recommendations set forth in *Compete to Win* and indicated the Federal Government's commitment to such recommendations.

The amendments to the ICA were intended to facilitate foreign investment in Canada, generally, as follows:

- Increasing the financial review threshold for direct acquisitions by WTO investors from the then threshold of CDN \$312 million in gross assets to CDN \$1 billion in "enterprise value" over a four year period.
- Eliminating the lower CDN \$5 million review threshold for Canadian businesses engaged in certain historically protected sectors, such the transportation services (which includes pipelines), uranium production and financial services sectors
- Introducing a "national security" review in respect of any investment in a Canadian business (regardless of whether or not the investment is subject to any review or notification provisions under the ICA) to assess whether it could be injurious to Canada.

While the amendments to the ICA were largely based on the recommendations set forth in the Wilson Panel and were initiated in a response to the global economic crisis in early 2009, the amendments did not include all recommendations of the Wilson Panel, and, with regard to those amendments included, not all such amendments have been implemented, as follow:

- Significantly, the Canadian Government did not reverse the onus as it relates to the approval of foreign investments under the ICA, such that the Minister would only be permitted to disallow an investment if he or she determined that the investment would be

---

<sup>41</sup> The 2009 Federal Budget, online: The Department of Finance Canada <<http://www.budget.gc.ca> >..

<sup>42</sup> S.C. 2009, c.2.

<sup>43</sup> Typically, proposed amendments to legislation are the subject of a separate parliamentary bill. The inclusion of amendments to the ICA and the *Competition Act* in a parliamentary bill to approve a federal budget is unusual, as the inclusion in a bill proposing a federal budget would limit the debate in Parliament in respect of, and modifications to, any amendments to such legislation, given the importance of a federal budget, and also pressure to pass such budget quickly, especially given the worldwide economic crisis. Moreover, it should also be noted that a vote in Parliament on a budget bill can constitute a "confidence vote", which could trigger a federal election.

<sup>44</sup> The amendments to the Competition Act included the adoption of a pre-merger notification review process (with a second request introduced) similar to the review process under the *Hart-Scott-Rodina Act Antitrust Improvements Act* in the United States.

<sup>45</sup> ICA, *supra* note 3, section 2.

"contrary to Canada's national interest." Instead, foreign investors must still establish to the Minister that the investment is of "net benefit" to Canada.

- The increase in the financial review threshold for direct acquisitions by WTO investors to CDN \$1 billion in "enterprise value" over a four year period has not been implemented. Part of the reason for such delay is the difficulty in establish a proper meaning of "enterprise value". That being said, a two year delay of the implementation of such amendment is confusing, especially as the purpose of this amendment was to reduce the number of foreign investments subject to review under the ICA.

## VI. INVESTMENT CANADA ACT: RECENT DEVELOPMENTS

### *Failure to Comply with Undertakings: US Steel's Acquisition of Stelco*

Industry Canada has adopted a policy regarding non-compliance with undertakings in light of changes in economic circumstances. It is a matter of public record that Xstrata plc, Companhia Vale do Rio Doce and Rio Tinto closed mines, reduced production and laid off workers in light of the global recession commencing in late 2007 / 2008 subsequent to the acquisitions of Falconbridge Limited, Inco and Rio Tinto, respectively, in contravention of undertakings to the Minister.<sup>46</sup>

Interestingly, the Minister initiated proceedings under section 40 of the ICA and filed an application against United States Steel Corporation ("US Steel") seeking to enforce compliance by US Steel of two undertakings made to the Minister to secure approval for its 2007 acquisition of Stelco, and seeking penalties against US Steel for such breaches.<sup>47</sup> The undertakings included commitments to increase the annual level of production of Stelco 10% over a three year period relative to the average of the previous three years and to maintain a certain number of employees over the term. These undertakings were made in 2007 prior to the unanticipated global recession and, in particular, the dramatic downturn in the US automobile manufacturing industry. In March 2009, US Steel closed two mills and laid off in excess of 1,000 employees, similar to decisions made by many steelmakers.

Since the initial application, US Steel has unsuccessfully sought a determination from the court that the provisions of the ICA were constitutionally invalid. US Steel was not successful in this motion and the court has not made a final determination as to the Minister's application against Stelco. Given the Minister's restraint in enforcing previous undertakings of foreign investors other than Stelco in light of significant changes in economic circumstances beyond the control of such foreign investors, additional guidance from the Minister (and the court) is necessary to ensure that potential foreign investors fully understand the implications of undertakings to the Minister in support of investments in Canada.

---

<sup>46</sup> Andy Hoffman, "Broken promises mark foreign mining deals", The Globe and Mail (3 Nov 2010) online: Globe and Mail <theglobeandmail.com>.

<sup>47</sup> *The Attorney General of Canada v. United states Steel Corporation and U.S. Steel Canada Inc.*, 2010 FC 642 (Federal Court of Canada Trial Division).

## *Chinese SOEs*

While Chinese SOEs have largely been focusing investments in Africa and Latin America since the release of Advantage Canada and the introduction of the additional scrutiny on SOEs, they have continued to invest in resources in Canada and the United States.<sup>48</sup>

This trend of continued significant investment in Canada by SOEs, notwithstanding the complex review process under the ICA and the additional scrutiny of acquisitions by SOEs, is largely based on: (i) the need for capital by Canadian businesses engaged in resource sectors (principally oil and gas and mining), especially in the wake of the global recession; and (ii) the desire of SOEs to secure strategic resources and capitalize on commodity prices in the long term.

Moreover, it appears that, in 2009, the Canadian Government shifted its policy towards China and has been publicly advising that it is open to foreign investment, including investments by Chinese SOEs, which historically had been regarded with unease.<sup>49,50</sup> While many of the investments constitute "acquisitions of control" under the ICA and were therefore subject to review and approval under the ICA (such as China National Petroleum Corporation's acquisition of control of Athabasca Oil Sands Corp., Korea National Oil Corporation's acquisition of Harvest Energy Trust and the proposed acquisition of Hunt Energy's Canadian assets, Abu Dubai's International Petroleum Investment Co.'s acquisition of NOVA Chemicals Corporation), a large number of such investments have been structured so as to avoid the review and approval requirements under the ICA. Such investments include, for example, PetroChina's partnership with Shell to acquire Arrow Energy, China Investment Corporation's acquisition of a 17% interest in Teck Resources Limited, China Investment Corporation's acquisition of a 45% interest in a joint venture with Penn West's Peace River oil to develop sands assets, PTT Exploration and Production Public Company Limited's acquisition of a 40% ownership interest in an oilsands partnership owned by Statoil, and PetroChina's proposed purchase of 50% of a shale gas project from EnCana Corporation.

Of interest is a paper released by the International Energy Agency in February, 2011, which notes that China's SOEs have undergone a "remarkable transformation into globally competitive energy companies" and that they are known entities characterized by independence from the Chinese government.<sup>51</sup> The report further concludes that Chinese SOEs appear to be motivated by commercial objectives and that their participation in the global economy has led to increased global supplies of oil and gas.

Given the appearance of increased openness to Chinese SOEs by the Canadian Government and the conclusions of the International Energy Agency in its paper, the perceived challenges facing SOEs to invest in Canada may be reduced in the future.

---

<sup>48</sup> *IEA backs investment by Chinese national oil firms, the Globe and Mail*, February 18, 2011), online: (theglobeandmail.com).

<sup>49</sup> As Canadian International Trade Minister David Emerson made clear at a gala for the Canada China Business Council in Beijing on January 10, 2008, China's investment – even by SOEs – is sought after: "Let me be clear ... Canada welcomes Chinese investment. Canada remains open and welcomes foreign investment – both private and state-owned."

<sup>50</sup> Wenran Jiang, "The Dragon Returns: Canada in China's Quest for Energy Security", (October 2010), Canadian International Council, online at [www.onlinecic.org](http://www.onlinecic.org).

<sup>51</sup> Julie Jiang and Jonathan Sinton, "Overseas Investments By Chinese National Oil Companies: Assessing the Drivers and Impacts", International Energy Association, (February 2011), online at: [http://www.iea.org/publications/free\\_new\\_Desc.asp?PUBS\\_ID=2350](http://www.iea.org/publications/free_new_Desc.asp?PUBS_ID=2350).

### ***(Interim) Decision of the Minister to Disallow the Proposed BHP Billiton investment in Potash***

The uncertainty as to the Minister's interpretation of the meaning of "net benefit" to Canada has become even more pronounced in light of the Minister's recent review of BHP Billiton Ltd.'s U.S.\$38.6-billion hostile bid to acquire Potash Corp. of Saskatchewan Inc. ("**Potash**") in late 2010. Unexpectedly, on November 3, 2010, the Minister issued an interim decision to BHP Billiton stating that, at that time, the Minister was not satisfied that the investment was likely to be of net benefit to Canada. Based on this decision, BHP Billiton subsequently withdrew its offer to acquire Potash.<sup>52,53</sup> The Minister announced on November 14, 2010 that he would not be making a final decision under the ICA on the matter in light of BHP Billiton's withdrawal of its offer.<sup>54</sup>

BHP Billiton's unsuccessful acquisition of Potash is only the second investment reviewed under the ICA (excluding investments in respect of cultural activities) where the Minister has determined that a proposed investment was not of "net benefit" to Canada, albeit on an interim basis.<sup>55</sup> The only other such case, involving MacDonald, Dettwiler and Associates Ltd. and noted under "*The Investment Act Canada - National Security Review*", was believed to be blocked on the basis of national security concerns. The BHP Billiton investment, however, did not raise any national security concerns.

Of import, there was significant opposition in Canada to BHP Billiton's offer to acquire Potash, much of which was of a protectionist nature, as part of which was based on claims that BHP Billiton would increase potash production, sell potash at market prices (rather than through the Canpotex marketing and distribution company jointly owned by Saskatchewan potash producers), costing the province of Saskatchewan roughly CDN \$8 billion in lost revenue from lower royalty payments and lost federal and provincial tax revenues, and that Potash was "strategic" to Canada and thus should not be subject to control by foreigners.<sup>56</sup>

The matter was further muddied by constitutional issues and questions regarding jurisdiction or heads of power. The Premier of Saskatchewan specifically argued that control over natural resources, such as potash, is a provincial matter under Canada's constitution.<sup>57</sup> This claim is significant, as it raises the question of the importance of the position and influence of the provinces of Canada on a decision by the Minister under the ICA. Recall that the criteria to be reviewed by the Minister includes "the compatibility of the investment with national, industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy

---

<sup>52</sup> BHP Billiton, Press Release, "BHP Billiton Withdraws Its Offer to Acquire PotashCorp And Reactivates Its Buy-back Program" (15 November 2010) online: BHP Billiton Investors & Media <<http://www.bhpbilliton.com/bb/investorsMedia.jsp>>.

<sup>53</sup> Note that section 23 of the ICA provided BHP Billiton the right to make additional representations and submit undertakings within 30 days from the date of the Minister's notice, BHP Billiton determined that the condition of its offer relating to receipt of a net benefit determination by the Minister under the ICA could not be satisfied.

<sup>54</sup> Industry Canada, Announcement, 1352981, "Industry Minister Clement Confirms BHP Billiton's Withdrawal of Its Application for Review under the Investment Canada Act" (14 November 2010), online: Marketwire <<http://www.marketwire.com>>.

<sup>55</sup> Note that the Minister does not disclose investments withdrawn prior to public announcement. Accordingly, non-public proposed investments may have been withdrawn in light of concerns identified by the Minister.

<sup>56</sup> Premier Brad Wall, Speech to the Economic Club of Canada (Toronto, October 29, 2010).

<sup>57</sup> James Wood, "Premier Brad Wall not ruling out legal fight with feds over potash," (Regina) LeaderPost (November 1, 2010) online: <http://www.leaderpost.com/news/Premier+Brad+Wall+ruling+legal+fight+with+feds+over+potash/3761076/story.html#ixzz14HdpdC17>.

objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment" [emphasis added]<sup>58</sup>

According to the BHP Billiton press release announcing the withdrawal of its offer for Potash, BHP Billiton offered undertakings which it considered to be "unparalleled in substance, scope and duration". Upon a review of the undertakings (as disclosed by BHP Billiton), it would appear that such undertakings were certainly in excess of undertakings typically provided in respect of investments approved under the ICA, and should have been able to satisfy the test of "net benefit" to Canada.<sup>59</sup>

Why such undertakings proved insufficient to meet the Minister's approval - we can only guess at. The Minister has not publicly disclosed his reasons for rejecting the BHP Billiton investment and, as a final decision was not required to be made by the Minister on the basis that BHP Billiton withdrew its offer for Potash in light of the Minister's interim decision, the Minister is not required to disclose such reasons and has claimed such disclosure would violate confidentiality requirements.

As noted above, the BHP Billiton investment was characterized by significant political opposition (especially from politicians in Saskatchewan and premiers of certain provinces in Canada) and a heightened media review. This has created the perception that the Minister's decision may have been influenced by political motives. This perception finds support in the fact that the ruling Conservative party is in power; but only having cobbled together a minority government. Regardless of its validity, such perception could undermine Canada's professed open approach to international trade. At a minimum, the BHP Billiton review process and the decision by the Minister has created uncertainty as to what is required to establish a "net benefit" to Canada in light of a proposed acquisition of a strategic resource where there is significant public and political opposition; especially as the Minister's decision – at least based on public documents – seems inconsistent with prior decisions, and more based on a political desire to maintain control of a strategic resource in Canada.<sup>60</sup>

Recognizing the potential chill on foreign investment resulting from the uncertainty created by the BHP Billiton review process, Federal Government officials have advised that they would provide guidance and clarity to the review process, and have reiterated that Canada continues to

---

<sup>58</sup> ICA, supra note 3, section 20.

<sup>59</sup> *Supra* note 48. The proposed undertaking offered by BHP Billiton, as reported by BHP Billiton, are indeed significant and included commitments to: (i) spend US\$450 million on exploration and development over the next five years over and above commitments to spending on BHP Billiton's current project in Canada (the Jansen project), (ii) spend US\$370 million on infrastructure funds in Saskatchewan and New Brunswick, (iii) apply for a listing on the Toronto Stock Exchange; (iv) forego tax benefits to which it was legally entitled; (v) remain a member of Canpotex for five years; (vi) relocate to Saskatchewan and Vancouver over 200 additional jobs from outside Canada; (vii) maintain operating employment at Potash's Canadian mines at current levels for five years; (viii) increase overall employment at the combined Canadian potash businesses by 15% over the first five years; (ix) include participation by Saskatchewanians and Canadians in senior management roles within the combined potash business, within a new Potash Advisory Board and also on the Board of BHP Billiton; (x) guarantee local suppliers a full and fair opportunity to provide goods and services; (xi) spend at least US\$8 million per annum on community programs, primarily in Saskatchewan and New Brunswick, while raising overall community spending from Potash's current levels to BHP Billiton's levels; (xii) invest in the University of Saskatchewan to create a Mining Centre of Excellence to enhance the province's mining capabilities and to raise the international profile of both the University and the province. In light of concerns that BHP Billiton would not comply with its undertakings, it also offered to provide the Minister of Industry with a US\$250 million performance bond.

<sup>60</sup> Eric Reguly, Andy Hoffman And Brenda Bouw, " BHP's hopes fade as Ottawa calls potash 'strategic', The Globe and Mail, (November 5, 2010) online: The Globe and Mail < <http://www.theglobeandmail.com>>;

welcome foreign investment.<sup>61,62,63</sup> Interestingly, in a recent interview, the Minister stated that foreign investors "totally understood" his position with regard to the BHP Billiton/Potash transaction and that foreign investors have continued to seek opportunities in Canada since the BHP Billiton decision.<sup>64</sup>

BHP has certainly confused things such that foreign investors and the business community are now seeking: (i) clarity on the review process of "strategic" Canadian businesses; (ii) clarity on the role of provincial governments (such as Saskatchewan premier's perceived influence in the BHP Billiton transaction) in the review process; (iii) transparency of the negotiation process; and, (iv) public disclosure of undertakings provided by foreign investors to the Minister as a condition to secure the Minister's approval.

However, until the Federal Government provides definitive direction regarding the ICA review process, uncertainty regarding the basis for decisions under the ICA will continue.

Notwithstanding the general concern resulting from the lack of transparency and associated uncertainty resulting from the Minister's rejection of the BHP Billiton investment, it is likely that the review by the Minister under the ICA of virtually all foreign investments will continue in the same manner as before. However, exceptions to such to the "business as usual" approach may involve that may be perceived as "strategic" or raising national security concerns, which investments may very well be subject to heightened scrutiny and, hence, uncertainty.

### ***TMX Group / LSE Group***

Canada's approach foreign investment of 'strategic' businesses is likely to be tested by the timely, for the purposes of this paper, announcement of the TMX Group/LSE Group merger. This strategic transaction was announced on February 9, 2011, as the proposed merger of equals between TMX Group Inc. and London Stock Exchange Group ("**LSE Group**"). This transaction is subject to review under the ICA and is clearly significant to Canada on many levels, including the ability of Canada's exchanges to survive in the absence of a strategic alliance the health of Canadian financial markets and provincial economies and economic sovereignty. The announcement has already generated a media frenzy. The myriad opinions voice a lack of consensus amongst industry participants and interested parties, and has raised significant political issues, which have been exacerbated by expectations of a provincial election in Ontario this spring 2011 and a possible national election in 2011 to be faced by the minority Federal Government.<sup>65 66</sup>

---

<sup>61</sup> Steven Chase and Shawn McCarthy, "Harper says he'll re-examine foreign-investment rules", *The Globe and Mail*, (4 November, 2010) online: *The Globe and Mail* <<http://www.theglobeandmail.com>>; and Jeff Gray, "What has Potash taught us? Not much, yet", *The Globe and Mail*, (2 March, 2011) online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

<sup>62</sup> Euan Rocha, "Canada to delay changes on foreign investment rules", *Reuters* (15 December 2010) online: <<http://www.reuters.com>>.

<sup>63</sup> Industry Canada, *supra* note 50. See the November 14, 2010 announcement of the Minister of Industry at <http://www.marketwire.com/press-release/Industry-Minister-Clement-Confirms-BHP-Billitons-Withdrawal-Its-Application-Review-under-1352981.htm>.

<sup>64</sup> "Canada Industry Minister Defends Foreign Investment Approval Process", *The Wall Street Journal* (16 February 2011) online: <<http://online.wsj.com>>.

<sup>65</sup> Pav Jordan and Solarina Ho, "Ontario hearings to highlight politics of TMX deal", *The Financial Post*, (6 March 2011) online: *Financial Post* <<http://www.financialpost.com>>.

The TMX Group/LSE Group merger is subject to reviews by the Ontario Securities Commission, and the provinces of Ontario and Québec, in addition to a review under the ICA. The Minister recently advised the House of Commons that he intends to wait to render his final decision until the provinces of Ontario and Québec have completed their public hearings and rendered their findings. In a presentation to the Select Committee of the Ontario Legislature, the TMX Group has advised that the benefits the merger would deliver to the Canadian economy have been a primary focus of deliberations with LSE Group, and that negotiations focused on the undertakings to be made as part of the ICA review prior to engaging in commercial discussions with LSE Group. The TMX Group recently stated "[a]s a result, we believe that we have formed a partnership with LSE Group that protects Canada's regulated exchanges for the future, positions them to make an even greater contribution to Toronto's, Ontario's and Canada's success; and enhances the role TMX Group's exchanges will play in the international arena."<sup>67, 68</sup>

It is clear that the Minister's review process and decision in respect of the TMX Group/LSE Group merger will be heavily scrutinized, with many commentators believing the Minister and Canadian Government, concurrent with this review process, will provide guidance and certainty to foreign investors and the business community.

## VII. CONCLUSION

Foreign direct investment is recognized as an important factor in economic development, as it is understood to stimulate competition by permitting the entry of efficient foreign investors, in addition to creating spillover effects such as introducing new technology and ideas. Such arguments are based on economic analysis and empirical studies.

Arguments against foreign investment are generally based on protectionism, preserving economic sovereignty (including control over strategic resources), preserving a Canadian identity (such as Canadian content in broadcasting), maintaining systems Canadian systems during a national emergency (telecommunication and transportation).

A principle thesis of *Investing Across Borders 2010* is that countries that rank relatively high on the four IAB indicators tend to attract more foreign direct investment relative to the size of their economies and population. Canada clearly has benefitted from foreign investment, and the

---

<sup>66</sup> John Greenwood, "Regional' TSX may not survive: RBC", The Financial Post (7 March 2011) online: Financial Post <<http://www.financialpost.com>>; John Ivison, "TMX-LSE tie up needs 'specific conditions': CIBC", The Financial Post (7 March 2011) online: The Financial Post 2011<<http://www.financialpost.com>>; Pav Jordan and Solarina Ho, "Ontario hearings to highlight politics of TMX deal", The Financial Post (1 March 2011) online: Financial Post <<http://www.financialpost.com>>; and Barbara Shecter, "Ontario's securities watchdog to review TSX merger plan", The Financial Post, (23 February 2011) online: Financial Post <<http://www.financialpost.com>>. John Greenwood and Lee Greenberg, Financial Post, (March 10, 2011) "Exchange governance tops regulator's list" online: Financial Post <<http://www.financialpost.com>>; John Greenwood, Financial Post, (March 10, 2011) "RBC CEO's take on TSX-LSE tie-up", online: Financial Post <http://www.financialpost.com>; and John Greenwood, Barbara Shecter and Paul Vieira, Financial Post, (March 10, 2011) online: Financial Post <<http://www.financialpost.com>>; and Toronto-Dominion, National Bank Apprehensive on TMX Sale, Bloomberg Businessweek, March 9, 2011, available at: <http://www.businessweek.com/news/2011-03-09/toronto-dominion-national-bank-apprehensive-on-tmx-sale.html>.

<sup>67</sup> Sunny Freeman, "TMX pitches merger to mining conference, says deal will give more visibility" The Canadian Press (7 March 2011) online: Canadian Business Online <<http://www.canadianbusiness.com>>.

<sup>68</sup> Tom Kloet and Xavier Rolet, *Remarks to Select Committee of the Ontario Legislature: Proposed Transaction of the TMX Group and the London Stock Exchange Group*, online: TMX <[http://www.tmx.com/en/media\\_kit.html](http://www.tmx.com/en/media_kit.html)>.

Canadian Government recognizes the benefits of foreign direct investment and has publicly adopted a policy of being open to foreign direct investment.

Upon a review of Canada's performance in respect of such IAB factors, it is clear that although it is relatively easy to establish a business in Canada, there is "stickiness" to foreign investment relative to other high-income OECD countries and globally, especially with respect to restrictions on foreign investment in certain sectors, including specifically, telecommunications, broadcasting, air transportation and banking. As noted in recent study by Transport Canada, "Canada might be one of the advanced economies with the most significant [foreign ownership] restrictions remaining in place."<sup>69</sup>

Notwithstanding these foreign investment restrictions, there seems to be a trend of liberalization and openness to foreign investment in Canada by the Federal Government and that most investments in Canada by foreign investors should not raise significant issues or risks. However, the Minister's (interim) decision to disallow BHP Billiton's proposed acquisition of Potash – without a valid policy reason – has undermined the Canadian Government's claims of openness to foreign investment and has created an element of unpredictability as to whether or not the Minister will approve an investment – at least for significant transactions that involve strategic resources and which are highly political.

---

<sup>69</sup> The Policy Group, Transport Canada, March 15, 2010, Restrictions on Foreign Ownership in Canada - TP 14500E, available at <http://www.tc.gc.ca/eng/policy/report-research-tp14500e-toc-1687.htm>.



**SCHEDULE "A"**

**Investing Across Borders 2010  
Profile of Canada**

INDICATORS	COUNTRY SCORE	IAB REGIONAL AVERAGE (12 COUNTRIES)	IAB GLOBAL AVERAGE (87 COUNTRIES)	HIGHLIGHTS
<b>INVESTING ACROSS SECTORS</b>				
Foreign equity ownership indexes (100 = full foreign ownership allowed)				Among the 12 high-income OECD countries covered by the Investing Across Sectors indicators, Canada presents more stringent restrictions on foreign equity ownership. It imposes overt statutory ownership restrictions on a number of service sectors. Foreign capital participation in the domestic and international air transportation sectors, for example, is limited to a maximum share of 49%. Furthermore, under the Canadian telecommunications and broadcasting regime, foreign investors may own only up to 20% of the shares of a Canadian operating company directly, plus an additional 33% of the shares of a holding company. In aggregate, total direct and indirect foreign ownership in the telecommunications sector (fixed-line and mobile/wireless infrastructure and services) and in the television broadcasting sectors is limited to 46%. The health care sector is de facto closed to FDI because private hospitals and clinics may not receive payments from provincial health insurance funds, which are critical for the financial viability of operators in the sector.
Mining, oil and gas	100.0	100.0	92.0	
Agriculture and forestry	100.0	100.0	95.9	
Light manufacturing	81.1	93.8	96.6	
Telecommunications	46.7	89.9	88.0	
Electricity	100.0	88.0	87.6	
Banking	65.0	97.1	91.0	
Insurance	100.0	100.0	91.2	
Transportation	79.6	69.2	78.5	
Media	73.4	73.3	68.0	
Sector group 1 (constr., tourism, retail)	100.0	100.0	98.1	
Sector group 2 (health care, waste mgt.)	50.0	91.7	96.0	
<b>STARTING A FOREIGN BUSINESS</b>				
Time (days)	6	21	42	With only 6 days and 2 procedures, Canada (Toronto) enjoys one of the fastest and simplest processes of establishing a foreign-owned limited liability company (LLC). Compared to domestic companies, a foreign company requires no additional procedure other than the post-incorporation notification of the Investment Canada Agency. This notification must be made within 30 days of incorporation. Under the Investment Canada Act, unless the investment is made in "cultural industries", affects the country's national security, or is made in restricted sectors, it is not subject to review. Foreign investors have the option of filing either for federal incorporation or provincial registration. Federal incorporation entails one procedural step that can be done online, using "Industry Canada's" electronic filing center. Filing can also be done by regular mail, fax, courier, or in person. A federally incorporated subsidiary has the right to operate anywhere in Canada. Foreign companies are free to open and maintain bank accounts in foreign currency. There is no minimum capital requirement for foreign or domestic companies.
Procedures (number)	2	9	10	
Ease of establishment index (0 = min, 100 = max)	81.6	77.8	64.5	
<b>ACCESSING INDUSTRIAL LAND</b>				
Strength of lease rights index (0 = min, 100 = max)	100.0	92.2	82.1	Although it is possible to lease or purchase both privately and publicly held land, the lease or purchase of private land is more common. The purchase of public land may be subject to requirements to build to certain specifications within a defined timetable, failing which the public body will have reserved the right to re-purchase the land from the buyer. Due to such contractual constraints, foreign companies rarely purchase public land. Leases with a term of 50 years or more are subject to a land transfer tax. There is no statutory maximum for the duration of leases. Leases can offer the lessee the right to sublease, mortgage the leased land, or use it as collateral, if provided by the contract. With respect to subdivision, leases for 21 years or more may require consent from public authorities. The province of Ontario, in which Toronto is located, is in the final stages of converting to a Register of Titles system from a Register of Deeds system.
Strength of ownership rights index (0 = min, 100 = max)	100.0	100.0	92.2	
Access to land information index (0 = min, 100 = max)	46.2	52.5	41.3	
Availability of land information index (0 = min, 100 = max)	85.0	84.2	70.6	
Time to lease private land (days)	68	50	61	
Time to lease public land (days)	131	88	140	
<b>ARBITRATING COMMERCIAL DISPUTES</b>				
Strength of laws index (0 = min, 100 = max)	89.9	94.2	85.2	Canada's arbitration legislation reflects its federal nature. All Canadian provinces and territories have enacted legislation that governs domestic commercial arbitrations and international arbitrations taking place in their provinces. The Province of Ontario has enacted the Arbitration Act (1991), which governs domestic arbitration and is based on the UNCITRAL Model Law, and the International Commercial Arbitration Act (1990), which governs international arbitration and expressly adopts the UNCITRAL Model Law. The legislation of the Province of Ontario is strongly governed by the principle of "party autonomy." Commercial disputes are arbitrable, unless legislation stipulates that certain matters are expressly within the courts' jurisdiction. Parties are free to appoint arbitrators of any nationality, gender, or professional qualifications. Foreign lawyers representing parties in an arbitration must be licensed by the Law Society in order to provide legal services in Ontario. The parties are free to choose any arbitral institution of their choice, the most common being the ADR Institute of Canada. Canada is also one of the few jurisdictions in the world to provide online arbitration. The courts are generally very supportive of commercial arbitration. On average, it takes around 11 weeks to enforce an arbitration award, whether rendered in Canada or in a foreign country, from filing an application to a writ of execution attaching assets (assuming there is no appeal). Appeals can be made to the Ontario Court of Appeal. Canada has not ratified the ICSID Convention.
Ease of process index (0 = min, 100 = max)	84.7	83.3	70.6	
Extent of judicial assistance index (0 = min, 100 = max)	94.0	77.6	57.9	

For more information on this country, please go to <http://www.investingacrossborders.org>