

## What is the Investment Canada Act, and why should I care?

Canada is a key market for many global investors. However, while Canada is very welcoming to foreign investment, global investors should be aware that Canada's government keeps a close eye on foreign investment and has the ability to review and reject investments that do not satisfy certain criteria. This foreign investment regime is set up pursuant to the *Investment Canada Act (ICA)*. The *ICA* mandates that foreign investments be subject to either a notification requirement or a formal review process. The question of whether a foreign investment is subject to notification or review depends on several factors, although generally it is based on a monetary threshold

If you are a non-Canadian seeking to invest in Canada, it is important to be familiar with the *ICA* regime and how it might affect you.

### When are foreign investments subject to notification?

Any investment by a non-Canadian<sup>[1]</sup> investor that is below the relevant monetary threshold (described in detail below) will be subject to a notification requirement. The sole exception to this is if you are a resident of a World Trade Organization (WTO) member state and you make an *indirect*<sup>[2]</sup> investment that allows you to acquire ownership and control in a non-cultural Canadian business. In that case, no notification is required.

A notification can be filed any time before, and no later than 30 days after, the investment is made. Once received, the government will provide you with a notice certifying either the date on which your completed notification was received, or a notice specifying any outstanding information on your notification, and requesting that you provide it.

Within 21 days of receiving your completed notification, the government will provide you with an additional notice which will either confirm that your investment is not reviewable, or will indicate that your investment is subject to review (the process of a review is outlined below).

### When will your investment be reviewable by the Canadian government?

Below is a brief overview of the monetary thresholds that are used to assess whether a foreign investment into a Canadian business will be subject to government review:

- If you are a resident of a WTO member state, you will be subject to review if you *directly*<sup>[3]</sup> acquire ownership and control of a non-cultural Canadian business that has an enterprise value of \$600 million or more (in 2016)<sup>[4]</sup>
- If you are not a resident of a WTO member state, you will be subject to review if your investment allows you to *directly* acquire ownership and control of a non-cultural Canadian business that has assets of \$5 million or more. If the acquisition is *indirect*, then the threshold for review is \$50 million or more.
- Whether you are a resident of a WTO member state or not, if your investment allows you to acquire control of a Canadian cultural business<sup>[5]</sup> with assets in excess of \$5 million, then you will be subject to review. If the acquisition of the Canadian cultural business is *indirect*, then the threshold for review is \$50 million or more.

In addition to these monetary thresholds, there are other mechanisms the government may use to determine whether a review is necessary. For instance, if your investment is made into a Canadian cultural business that is below the monetary threshold, the government may take the position that it is in the public interest to review the investment anyway. Another example is if the government considers the investment to be potentially injurious to Canada's national security.

## What the government looks at when reviewing a foreign investment

If your investment is subject to review, you will be required to satisfy the government that the transaction will be a "net benefit" to Canada. Some of the factors considered in assessing whether this is the case are as follows:

- how the investment will impact competition within Canadian industry
- the level of participation of Canadians in the Canadian business
- whether the investment is consistent with Canada's economic and cultural policies
- the impact of the investment on research and development, as well as productivity
- the impact of the investment on Canadian employment and resources and
- the impact of investment on services and parts produced in Canada.

## How long will it take for my investment to be reviewed?

If your investment is being reviewed, you can expect the approval process to take up to 45 days, although the government can unilaterally extend that time period by an additional 30 days. Any further extensions of time can be made only if both you and the government agree. It should be noted that investments involving cultural businesses or national security issues tend to have a longer approval process, with cultural businesses typically requiring 75 days, and national security concerns between 105 and 130 days.

## Undertakings as a condition of approval

In many circumstances where a transaction is reviewed, approval will be contingent upon you agreeing to binding undertakings. These undertakings usually involve entering into an agreement to maintain or increase production and employment in Canada, maintain or increase research and development, expenditures, and a number of other similar obligations. These undertakings typically are in force for a period of three to five years. After this, there usually are no further obligations placed on the non-Canadian investor.

## I've been approved; what's next?

Once you have obtained approval for your investment, you are required to submit progress reports to the government about a year to a year and a half after the closing. In addition, you are required to submit a progress report every 12-18 months for the duration of the undertakings period. This affords the Responsible Department the opportunity to determine whether the non-Canadian investor is in compliance with the undertakings.

## What if I fail to comply with the ICA?

The penalties for failing to comply with the ICA are varied. Sanctions can include compulsory divestiture of the non-Canadian's

interest in the Canadian business, a revocation or suspension of the non-Canadian's voting rights. There are also stiff financial penalties, with a potential maximum penalty of CA\$10,000 for each day that the non-Canadian is in violation of the *ICA*. It should be noted that financial penalties are not typically enforced.

## Where can I find additional information?

The relevant forms to be filed with the government for transactions subject to either a notification or review are available [on this page](#).

For further information on the *ICA* regime in Canada, please check out [Canada adopts significant changes to foreign investment review framework](#).

[1] A *non-Canadian* is any person or government that is not Canadian. It also includes any entity that is not Canadian-controlled.

[2] An *indirect* acquisition is when an investor acquires control of a corporation that is incorporated outside of Canada which controls an entity in Canada that is carrying on a Canadian business.

[3] A *direct* investment is when an investor acquires control of a corporation directly, typically through a share or asset purchase.

[4] Note that this enterprise value will increase to CA\$800 million on April 24, 2017, and will again increase to CA\$1 billion on April 24, 2019.

Beginning on January 1, 2021, all subsequent increases to the threshold will be completed on an annual basis based on growth in Canada's nominal gross domestic product.

[5] A *Canadian cultural business* includes any business that is involved in cultural activities, including book publishing and distribution; recorded music and music publishing; film production and distribution; and online media development and distribution.

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