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Legislative Summary

BILL C-34:
AN ACT TO AMEND THE INVESTMENT CANADA ACT

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For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

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Ce document est également publié en français.

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LEGISLATIVE SUMMARY OF BILL C-34: AN ACT TO AMEND THE INVESTMENT CANADA ACT

1 BACKGROUND

Bill C-34, An Act to amend the Investment Canada Act, was introduced in the House of Commons on 7 December 2022 by the Minister of Innovation, Science and Industry; it also received first reading on that day.[1]

Bill C-34 amends the *Investment Canada Act* (ICA) to strengthen the Government of Canada's jurisdiction to detect, review and restrict proposed foreign investments which are potentially injurious to Canadian national security. According to the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry:

> While our government continues to welcome foreign direct investment, we need to be vigilant and protect Canadian interests. These new amendments will help bring the Act in line with today's reality, while ensuring we can work at the speed of business. We will continue to work toward an updated ICA framework that ensures Canada's continued prosperity and, at the same time, continue to act decisively when investments threaten our national security.[2]

The ICA establishes two separate, but interdependent, review regimes: net benefit and national security. A proposed investment by a non-Canadian (hereafter, foreign investor) gives rise to a net benefit review if the value of the potential transaction is at least equal to a specified monetary threshold.[3] In such cases, the foreign investor must file an application for a net benefit review and the potential transaction must be approved by the Minister of Innovation, Science and Industry. This type of investment can also be subject to a national security review by virtue of section 25.3(1) of the ICA. In particular, a national security review occurs if the Minister of Innovation, Science and Industry, after consultation with the Minister of Public Safety and Emergency Preparedness (Public Safety minister), considers that "the investment could be injurious to national security" and the Governor in Council orders the review.

If the value of the potential transaction is below the specified monetary threshold, the foreign investor need only file administrative notice. Regardless, the Government of Canada has a maximum of 45 days after receiving the application for a net benefit review or the administrative notice, as the case may be, to order a national security review if there are concerns about the transaction.

Under the current ICA, the only foreign investments subject to notification or review prior to implementation are those that are made to acquire control of an existing

Canadian business where the specified monetary thresholds are exceeded and that are subject to a net benefit review.[4] Where an investment made to acquire control of an existing Canadian business falls below the specified monetary threshold for a net benefit review, or where a foreign investor is establishing a new "Canadian business" – a business with assets, employees and a place of business in Canada – the investor may file an administrative notice any time prior to the implementation of the investment or within 30 days thereafter.[5]

Moreover, as of August 2022, notice concerning non-controlling investments and investments that involve a Canadian "entity" that does not meet the definition of a Canadian business may be given at the investor's discretion.[6] The ICA defines a Canadian entity as a corporation, partnership, trust or joint venture, whether or not it is capable of generating revenue, that has assets, employees and a place of business in Canada. Foreign investors who voluntarily notify the minister are subject to the same 45-day period for a national security review as investments subject to mandatory notification or net benefit applications. For foreign investors who do not voluntarily notify the minister, the period is five years. As a result, some foreign investments may not come to the attention of the government prior to their implementation.

2 DESCRIPTION AND ANALYSIS

Bill C-34 has 23 clauses; the most consequential are discussed in the following section.

2.1 NOTIFICATION PRIOR TO IMPLEMENTATION FOR PRESCRIBED BUSINESS ACTIVITIES (CLAUSES 2 TO 4)

Clause 2(1) amends section 11 of the ICA by expanding the categories of foreign investments subject to notification prior to implementation. In particular, clause 2(1) requires that notice be given before implementing any foreign investment to acquire, in whole or in part, an entity carrying on all or any of its operations in Canada and that has at least one of the following: a place of operations in Canada; an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations; or assets in Canada used in carrying on the entity's operations, provided:

- the entity carries on a "prescribed business activity";
- the foreign investor could, as a result of the investment, obtain access to, or direct the use of, "material non-public technical information or material assets"; and
- the foreign investor would, as a result of the investment, have the power to appoint a member of the board of directors or of senior management, or a trustee

or a general partner, or would have prescribed special rights with respect to the entity.

Bill C-34 does not define the terms "prescribed business activity," "material non-public technical information" and "material assets." Rather, under clause 2(2), it permits the Governor in Council to make regulations defining "material non-public technical information" and "material assets." That said, the *Guidelines on the National Security Review of Investments* provide a non-exhaustive list of sectors that may be considered for the purposes of review under the national security provisions of the ICA. These include activities related to advanced sensing and surveillance; artificial intelligence; quantum science; robotics and autonomous systems; and space technology.

Furthermore, clause 3 indicates that the new requirement to file notice prior to implementation applies to investments to acquire control of a Canadian business carrying on a "prescribed business activity" and that the notice must be filed according to a timeframe established by regulations. The requirement to file notice prior to implementation also applies to certain non-controlling acquisitions where additional criteria outlined in clause 2(1) are satisfied.

For other foreign investments requiring notification, the timeframe for filing notice of the investment is also established by regulations, but the notice does not have to be filed prior to implementation.

These amendments make notification mandatory prior to implementation for foreign investments that previously would have required filing administrative notice only after implementation or even at the investor's discretion.

As well, under clause 3, an investment in a Canadian business that is subject to notification prior to implementation cannot be implemented until the period for a national security review has elapsed, unless the national security review is completed before the end of the period.

2.2 DEFINITION OF WORLD TRADE ORGANIZATION AND TRADE AGREEMENT INVESTORS (CLAUSES 5 AND 6)

Currently under the ICA, the monetary thresholds that determine whether an acquisition is reviewable under Part IV depend on five factors: whether the acquisition is "direct" or "indirect"; whether the investor is a World Trade Organization (WTO) investor, a national or entity of a country that is signatory to certain trade agreements with Canada, or a state-owned enterprise; and whether it is a "cultural business."[7]

According to ICA section 14.1(6), "WTO investor" refers to a foreign national, permanent resident or government of one of the 164 member states of the WTO. It

also refers to an entity, corporation or limited partnership, or trust controlled by a WTO member.

Clause 5(1) amends the definition of WTO investor to include in its description the requirement that at least two-thirds of the members of the board of directors or the general partners of a corporation or limited partnership consist of – in any combination – Canadians and nationals of WTO members.

Similarly, clause 5(2) indicates that a foreign-controlled trust is a WTO investor if at least two-thirds of its trustees are any combination of Canadians or nationals of WTO members.

As well, clauses 6(1) and 6(2) modify the definition of "trade agreement investor." Under these clauses, a trade agreement investor includes a corporation or limited partnership or a foreign-controlled trust of which at least two-thirds of the members of the board of directors or the general partners or trustees are Canadians or nationals of countries that are signatories to certain trade agreements with Canada. These agreements include the Canada–European Union *Comprehensive Economic and Trade Agreement*, the *Canada–United Kingdom Trade Continuity Agreement* and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.

2.3 WHEN A FOREIGN INVESTOR'S APPLICATION FOR REVIEW MUST BE FILED (CLAUSE 8)

Clause 8 updates section 17(2)(b) of the ICA to address timelines regarding a foreign investor's application to the minister where an investment is reviewable under Part IV. In particular, a foreign investor acquiring control of an existing Canadian business through the acquisition of control of a foreign corporation or where the minister has allowed the investment to proceed pending the completion of a net benefit review must file an application containing the required information with the minister within the "prescribed period," as opposed to the current requirement of "at any time prior to the implementation of the investment or within thirty days thereafter."[8]

2.4 CERTAIN MODIFICATIONS AFFECTING THE FRENCH VERSION OF THE *INVESTMENT CANADA ACT* (CLAUSE 9)

Under section 21(1) of the ICA, the minister has up to 45 days after receipt of a foreign investor's application to complete a net benefit review, but that period may be unilaterally extended by the minister, including in cases where the investment is also subject to a national security review under Part IV.1.

Clause 9(1) replaces the word "*décret*" with the word "*arrêté*" in section 21(3) of the French version of the ICA to more accurately render the meaning of the Governor in

Council "order" referred to in the English version of this provision. Similarly, clauses 9(3), 9(4) and 9(6) replace the word "*décret*" with the word "*arrêté*" in sections 21(5), 21(6) and 21(8) respectively of the French version of the ICA.

2.5 DEFINITION OF *CANADA–UNITED STATES–MEXICO AGREEMENT* INVESTOR (CLAUSE 10)

Clause 10 amends the definition of a *Canada–United States–Mexico Agreement* (CUSMA) investor. According to ICA section 24(4), a CUSMA investor is an individual who has American or Mexican nationality; a government of a CUSMA country; or a CUSMA investor-controlled entity such as a corporation or limited partnership or a trust.

For a CUSMA-controlled corporation, limited partnership or trust to qualify as a CUSMA investor under clause 10, at least two-thirds of the members of its board of directors or its general partners or trustees must be any combination of Canadians, Americans and Mexican nationals.

2.6 NEW MINISTERIAL AUTHORITIES FOR NATIONAL SECURITY REVIEWS UNDER PART IV.1 (CLAUSES 12 TO 16)

Clause 13 introduces section 25.11 which states that national security reviews begin on the day that an investment first comes to the attention of the minister, generally upon notice from the foreign investor.[9] Previously, investments required a Governor in Council order under section 25.3(1) to be reviewable under Part IV.1.

Clauses 14 and 15 make corresponding amendments to sections 25.2(1) and 25.3(1), stating that orders made under section 25.3(1) are for "further review" of an investment, as the amendments clarify that national security reviews commence before these orders are issued.

Clause 13 also creates section 25.12 which authorizes the minister to require information "necessary for the purposes of the review" from parties to an investment. Clause 14(3) removes a similar provision concerning required information from section 25.2(3).

Clause 15 amends section 25.3 to grant the minister, in consultation with the Public Safety minister, new authorities, including issuing an order for further review of an investment under section 25.3(1) where the investment could be injurious to national security. Orders under this section were previously made by the Governor in Council on recommendation from the minister in consultation with the Public Safety minister.

New section 25.3(1.1) enables the minister, in consultation with the Public Safety minister, to impose interim conditions "necessary for the purpose of preventing injury to national security that could arise during" the review process and to remove interim conditions deemed no longer necessary. Amended section 25.3(4) gives foreign investors the option to submit written undertakings to address national security concerns, similar to the existing process for net benefit reviews.

Under new section 25.3(6)(c), the minister, with the concurrence of the Public Safety minister, may complete the review process and find an investment not injurious based on such undertakings. New section 25.31 allows the minister, with the concurrence of the Public Safety minister, to continue to accept new undertakings or release persons from existing undertakings following the end of the review process where the new undertaking would continue to address any national security risks or where existing undertakings are no longer necessary to address the risks. Clause 16 makes a corresponding amendment to section 25.4(1)(b) to exclude the possibility of concluding the review based on a written undertaking at a later stage of the process through a Governor in Council order.

2.7 PROTECTION OF SENSITIVE INFORMATION DURING JUDICIAL REVIEWS OF NATIONAL SECURITY REVIEWS (CLAUSES 17 AND 18)

Clause 17 introduces new section 25.7 regarding the protection of confidential or sensitive information during judicial reviews of decisions taken under Part IV.1. Section 25.7(1)(a) allows a judge conducting a judicial review, upon request from the minister, to receive evidence and other information "in the absence of the public and of the applicant and their counsel" where the judge determines that the disclosure of information "could be injurious to international relations, national defence or national security or could endanger the safety of any person." The judge is required to ensure the confidentiality of such information throughout the judicial process while providing the applicant with summaries of evidence that allow them to be "reasonably informed of the Government of Canada's case." New section 25.8 applies the same provisions to any subsequent appeal of the judicial review.

2.8 DISCLOSURE OF PRIVILEGED INFORMATION (CLAUSE 19)

Clause 19 amends section 36(3.1) to expand the circumstances under which the minister may disclose privileged information to include disclosure to foreign government agencies engaging in national security reviews of foreign investments.

Previously, privileged information could be disclosed only to investigative bodies, or classes of investigative bodies, prescribed by the ICA's regulations.[10]

2.9 PENALTIES FOR FAILURE TO COMPLY WITH THE *INVESTMENT CANADA ACT* (CLAUSES 20 AND 21)

Clause 21 amends section 40(1) to allow the minister to make an application to a superior court, without having first made a compliance demand under section 39 as is generally required, regarding a foreign investor's failure to provide notice under section 12(a) or make an application under section 17 for investments in Canadian businesses carrying out a prescribed business activity. Clause 21 also sets at $500,000 the amount that a court may impose as a penalty against a foreign investor for failure to provide notice under section 12(a) or make an application under section 17 for investments in Canadian businesses carrying out a prescribed business activity. It also increases the penalty for any other contravention of the ICA and its regulations by any person to $25,000 for each day of contravention. In both cases, the maximum penalty may be increased through the ICA's regulations.[11]

2.10 TRANSITIONAL PROVISIONS AND COMING INTO FORCE (CLAUSES 22 AND 23)

Clause 22 introduces transitional provisions which allow reviews under Part IV.1 that are ongoing when the amendments come into force to continue under amended Part IV.1 where the minister has not already taken action under section 25.3(6).

Clause 23 states the amendments will come into force on the date fixed by an order of the Governor in Council.

NOTES

1. Bill C-34, An Act to amend the Investment Canada Act, 44th Parliament, 1st Session.
2. Innovation, Science and Economic Development Canada, *Government of Canada to modernize the Investment Canada Act*.
3. A non-Canadian investor includes a Canadian incorporated entity that is ultimately controlled by one or more non-Canadians. Throughout this document, the term "foreign investment," when discussed in the context of the *Investment Canada Act* (ICA), refers to either the acquisition of control of a Canadian business by non-Canadians or the establishment of a new business in Canada by non-Canadians. The ICA defines a Canadian as a Canadian citizen, a Canadian permanent resident ordinarily residing in Canada, a Canadian government (federal, provincial or local) or a Canadian-controlled entity. See *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).
4. Ibid., s. 28. The ICA contains detailed rules for determining when control of an existing Canadian business has been acquired by a foreign investor. However, in general, an acquisition of control of a Canadian business is presumed to occur if a foreign investor acquires at least one-third of the voting shares of a Canadian corporation carrying on the Canadian business, acquires all or substantially all of a Canadian business's assets, or acquires a majority of the voting shares of a corporation or voting interests of a partnership, trust or joint venture.
5. Ibid., s. 12.
6. *Regulations Amending the National Security Review of Investments Regulations*, SOR/2022-124, 3 June 2022, in *Canada Gazette*, Part II, 22 June 2022.

7. Part IV of the ICA identifies categories of proposed foreign investments that may be subject to net benefit and national security reviews.

8. The “prescribed period” is set by the regulations made pursuant to the ICA.

9. Current regulations under the ICA significantly extend from 45 days to five years the prescribed period in which the minister may provide notice of review under section 25.2 or the Governor in Council may order a review under section 25.3 for investments for which no notice is provided. See *National Security Review of Investments Regulations*, SOR/2009-271, ss. 2 and 4.

10. Ibid., s. 7.

11. The current maximum penalty the court may impose under section 40 for all contraventions is $10,000 per day, with no possibility of increase through regulation.