Legislative Summary **LS-515E**

BILL C-59: AN ACT TO AMEND THE INVESTMENT CANADA ACT

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LEGISLATIVE HISTORY OF BILL C-59

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	20 June 2005	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-59: AN ACT TO AMEND THE INVESTMENT CANADA ACT*

The *Investment Canada Act* (ICA)(1) allows the Canadian government to review foreign acquisitions of Canadian companies. Foreign investment reviews are based on economic criteria, and are conducted only for investments above a certain monetary threshold.

Bill C-59, An Act to amend the Investment Canada Act, was introduced in the House of Commons by the Honourable David L. Emerson, Minister of Industry, on 20 June 2005. Bill C-59 amends the ICA to allow the government to conduct an investment review on national security grounds, regardless of the size of the transaction. Increased foreign interest in Canadian resource companies, together with security concerns in the post 9/11 world, are believed to have motivated the tabling of this legislation.

BACKGROUND

The stated purposes of the ICA are to encourage investment in Canada "that contributes to economic growth and employment opportunities" and to provide for a review of investments in Canadian companies in order to ensure such benefit to Canada.(2)

Under provisions of the ICA, foreign investors(3) that acquire Canadian businesses above specified monetary thresholds (currently $250 million for most transactions) must submit

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* Notice: 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.

(1) *Investment Canada Act*, R.S. 1985, c. 28 (1st Supp.).

(2) ICA, s. 2.

(3) A foreign investor is a person who is not a Canadian citizen or a permanent resident of Canada, or a corporation that is controlled or deemed to be controlled by non-Canadians.

the transaction to a review by the Minister of Industry.[4] Foreign acquisitions below the specified thresholds must be disclosed to Industry Canada, but are not reviewed.

The Minister will approve a foreign acquisition if he or she believes that the acquisition will prove to be of "net benefit to Canada." Industry Canada may consider the following statutory criteria when determining whether an investment will benefit Canada:

- the effect on economic activity, including employment, resource processing, the utilization of parts and services produced in Canada, and exports from Canada;
- the degree and significance of participation by Canadians in the business and in any industry in Canada;
- the effect on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada;
- the effect on competition within any industry in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution of the investment to Canada's ability to compete in world markets.[5]

In reaching a decision, the Minister of Industry weighs the possible positive and negative economic effects, and either approves the investment, or makes an order that the investment not be implemented. If the transaction has already been completed, the Minister can order that the foreign company divest itself of the Canadian company. Foreign investors are sometimes required to make undertakings before the Minister will approve the transaction. Foreign investors may undertake, for example, to keep a factory open, or employ a specified number of Canadians. The ICA contains a mechanism that ensures accountability for breach of undertakings.

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(4) Foreign acquisitions and investments in industries considered important to Canada's identity and heritage (as described in Schedule IV of the *Investment Canada Regulations*) are reviewed by the Minister of Canadian Heritage. Investment in sectors considered "sensitive," e.g., uranium production, financial services and transportation services, is also subject to special rules, and the threshold for review is lower.

(5) ICA, s. 20. These factors can also be found in the North American Free Trade Agreement and in certain provisions of the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs), both of which are agreements under the World Trade Organization (WTO).

The review is based on economic criteria, and generally does not address social, environmental or other possible concerns. The economic criteria are, moreover, written into the statute, meaning the Minister currently has little discretion to review investments on any other grounds, as doing so would exceed the Minister's statutory authority. Bill C-59 changes the ICA to allow for a review of investments on national security grounds.

DESCRIPTION AND ANALYSIS

A. Changes to the Purposes and Definitions Sections of the *Investment Canada Act*

Clause 1 of Bill C-59 changes the purposes section of the ICA to include the protection of Canada's national security. Clause 2 changes the definition of "Canadian" to include the new section 26(2.11) determination of whether an entity is Canadian-controlled for the purposes of a national security review.

B. Exemptions

Part II of the Act provides for a series of exemptions from review. Under section 10(1) of the ICA, the provision of venture capital and the trading of securities, for example, are activities that are not subject to ICA review.

Clause 3 of Bill C-59 replaces section 10(2) of the Act with new sections 10(1.1) and 10(2), to create a separate list of exemptions that apply to national security reviews of investment. The categories of transactions not subject to national security reviews are considerably narrower than for economic reviews. Acquisitions of Crown corporations, and transactions involving financial institutions, which are in any case reviewable under the *Bank Act*, and companion legislation regulating federal financial institutions, are exempt from national security reviews.

C. National Security Reviews

Clause 4 of Bill C-59 adds the substantive provisions on national security reviews. A new Part IV.1 of the ICA, "Investments Injurious to National Security," is created. Under section 25.1, national security reviews will be required for investments by a non-Canadian that establish a new Canadian business, acquire control over a Canadian business, or establish or acquire control over a business that has operations in Canada, or employees or assets in Canada.

New section 25.2(1) states that if the Minister has reasonable grounds to believe that the investment might be injurious to Canada's national security, he or she may send a notice to the foreign corporation stating that the investment may be subject to review. The foreign corporation cannot then proceed with the investment until it receives a further notice that the investment has been authorized, or that no further review is required.

Under section 25.3(4) and (5), the foreign corporation is allowed to make representations to the Minister on why the investment should be approved, and the Minister may require any information from the foreign corporation needed to conduct the review.

If the Minister decides that the investment is likely to be injurious to national security, or if there is not enough information on which to base a decision, then the matter is referred to the Governor in Council (Cabinet), together with a report detailing the Minister's findings and recommendations. If the Minister decides that the investment will not be injurious to national security, then he or she must send a notice indicating no further action will be taken. The decision must be taken within a time frame prescribed by regulation.

In the event the matter is referred to the Governor in Council, under the new section 25.4, Cabinet may make any orders it considers advisable to protect national security, including prohibiting the acquisition, making the investment conditional upon the foreign company's providing undertakings, or requiring the foreign company to divest itself of the target Canadian company. Cabinet must make the order within a prescribed period.

New section 25.5 is added to allow Industry Canada to monitor whether a foreign company is living up to its undertakings, by requiring it to supply information on request.

Finally, section 25.6 states that a decision by the Minister or Cabinet is not appealable to any Canadian court, although any decision would still be subject to judicial review by the Federal Court.

D. Canadian Status and Control Rules

Section 26(1) of the ICA allows the Minister to make a determination as to whether the company that is making an acquisition is a Canadian company, and therefore exempt from the provisions of the Act. Although the Minister makes such a determination, under section 26(3) there is a presumption that, if the majority of voting shares are held by Canadians, the principal place of business is Canada, and the directors and managers of the company are (with a few exceptions) Canadian, the company shall be deemed to be Canadian. This clause removes some of the discretion the Minister of Industry has in determining Canadian control.

Clause 5 of Bill C-59 introduces parallel provisions that allow the Minister to make a determination as to whether a company is a Canadian entity for the national security provisions of the Act. However, the bill goes on to exempt national security reviews from the deeming provisions of section 26(3). In the case of a national security review, therefore, the Minister is unfettered by the presumptions that accompany economic reviews under the Act.

Section 28 of the ICA lists criteria that allow the Minister to make a determination as to whether a foreign company has in fact acquired a controlling interest in a Canadian company. Clause 6 of Bill C-59 amends the Act to provide similar criteria to the Minister when determining whether a transaction will be subject to a national security review.

E. Information on Undertakings

Section 36 of the ICA relates to the disclosure of privileged information. Under section 36(1), all information obtained by Industry Canada in the course of the administration of the Act is confidential, and cannot be disclosed to a third party.

While Industry Canada is generally not permitted to disclose information related to foreign investments, section 36(3) of the Act contains a number of exceptions to the blanket prohibition.[(6)] One of the exceptions states that Industry Canada may disclose any written undertaking relating to an investment given by a corporation. Moreover, Industry Canada is not prohibited from disclosing any formal demand[(7)] that it makes to a corporation, requiring that it remedy a breach of its undertakings.

Clause 7 of Bill C-59 makes information supplied for a national security review privileged. A new section 3.1 states that the privileged information does not extend to lawful investigations by a prescribed investigative body. An amendment to section 36(4)(*e*)(iii) of the Act means that the Minister cannot be forced to disclose to a third party any formal demand to remedy a breach of an undertaking, as would be the case for an economic review.

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(6) Industry Canada may divulge information that is already publicly available, information for legal proceedings, and information of which the disclosure has been authorized by the foreign corporation.

(7) *Investment Canada Act*, s. 39.

F. Changes to the Enforcement Provisions of the Act

Clause 8 of Bill C-59 makes changes to the enforcement provisions of the ICA. The amendment to section 39(1)(*b*) and the addition of section 39(1)(*d.1*), (*d.2*) and (*d.3*) allow the Minister to make a formal demand that orders made by the Minister or Cabinet be complied with.

An additional section, 39(1.1), has been added to expand the scope of ministerial demands under the Act. A charge of contravention of ministerial orders to provide information, or of any order made by Cabinet, may be levelled against any "person or entity," and not just a "non-Canadian" as provided for in section 39(1). The demand to comply with an order must include details of the legal ramifications of non-compliance with the Act.

Clause 9 updates the ICA to allow the Minister of Industry to seek an order from a superior court that a company comply with any undertaking it may have made under the national security review. New section 40(2.1) broadens the court's ability to enforce national security reviews, since it can order any person or entity, rather than just a non-Canadian, to comply with its orders. The court can levy fines of up to $10,000 per day if the person or entity is in contravention of the Act, and can find the person or entity in contempt of court. All fines are debts due to Her Majesty in right of Canada.

COMMENTARY

Bill C-59 gives Cabinet, on the recommendation of the Minister, the power to prevent foreign investments in Canadian companies from proceeding, on national security grounds. Unlike the economic review, the national security review has no monetary threshold, meaning all acquisitions are theoretically subject to review. In addition, the bill does not define "injurious to national security," and does not list factors to be considered in conducting the review.

Critics of the Bill have maintained that the national security review will lack transparency, arguing that the absence of defined criteria for what constitutes a threat to national security, and the involvement of Cabinet in the decision-making process, will inevitably politicize foreign investment in Canadian companies.[8] Critics further claim that Bill C-59 is a

(8) See for example, Jesse Tracey and Cliff Sosnow, "Proposed Amendments to the Investment Canada Act," *Blake's Bulletin on International Trade*, July 2005, available on-line at http://www.blakes.com/english/publications/InternationalTrade/July2005/InvestmentCanadaAct.asp.

xenophobic response to recent Chinese interest in securing a supply of Canadian natural resources, and has little to do with Canada's national security. Instead, these critics maintain, the bill will provide Canadian politicians with a mechanism to stop investments that they find politically unpalatable, such as the takeover of Noranda by the Chinese state-owned Minmetals.(9)

In response, the Minister of Industry stated that the bill will be used to screen foreign investments in diverse fields such as satellite and encryption technology, and is not aimed specifically at the oil patch or resource sectors.(10) The Minister has also rejected allegations concerning the politicization of the investment approval process, stating that "we expect the national security provision to be invoked rarely … only one investment has been rejected by the U.S. since it introduced similar legislation in 1988."(11)

Observers in the United States have suggested that the U.S. government should put diplomatic pressure on Canada to block Chinese investments in the Canadian energy sector.(12) The United States government has stated, however, that it is not concerned about a Chinese takeover of oil sands projects.(13)

Bill C-59 has received some positive feedback in the media, with commentators believing that the national security reviews are a long-overdue addition to the ICA.(14)

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(9) Jeffrey Thomas, "Bill C-59: Foreign investment will become unpredictable and politicized if Ottawa caves in to vague national interest concerns," *National Post* [Toronto], 19 July 2005, p. FP 19.

(10) "National security bill not aimed at energy takeovers: Emerson," *The Globe & Mail* [Toronto], 15 July 2005, p. B1.

(11) "Our investment climate is stable," *Vancouver Sun*, 23 August 2005, p. A11.

(12) "US officials sound alarm on China Unocal Bid," *The Globe & Mail* [Toronto], 14 July 2005, p. B1.

(13) "U.S. Treasury Secretary says he's 'not concerned' over China's interest in Alberta's rich oil sands," *The Globe & Mail* [Toronto], 9 July 2005, p. B7.

(14) "Loophole closed at last," *The Toronto Star*, 21 June 2005, p. A14.