THE CANADIAN BAR ASSOCIATION
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March 30, 2023

Via email: INDU@parl.gc.ca

Joël Lightbound, M.P.
Chair, Standing Committee on Industry and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Joël Lightbound:

Re: Bill C-34 — *National Security Review of Investments Modernization Act*

I am writing on behalf of the Competition Law and Foreign Investment Review Section of the Canadian Bar Association (CBA Section) to comment on proposed amendments to the *Investment Canada Act* (ICA) in Bill C-34, the *National Security Review of Investments Modernization Act.*

The CBA Section comprises lawyers who practise or are interested in law and policy related to the regulation of competition and foreign investment. We have an extensive track record of contributing to policy development in these areas and have prepared submissions and appeared before the Industry and Technology Committee on numerous *Competition Act* and *Investment Canada Act* matters.

We support the objectives of Bill C-34 to ensure that national security concerns arising from foreign investments are addressed effectively, while maintaining a regulatory regime that allows Canada to realize the significant benefits that can arise from foreign investment.

We offer brief general comments on Bill C-34 as a whole and then make specific recommendations on i) the prescribed business activities pre-notification regime, ii) approvals by the Minister with conditions, iii) the proposed interim measures powers, and iv) judicial review of ICA decisions.

General Comments

In announcing Bill C-34, the Government acknowledged the importance of foreign investment for Canada's economic success, noting "[f]oreign direct investment supports new technologies,

employment, high paying jobs, and access to markets for Canadian companies to grow." [1] The CBA Section agrees with this statement and recognizes the legitimacy and importance of effective national security regulation of foreign investment in protecting Canada's national security interests.

Policy changes in recent years have intensified national security enforcement in sensitive sectors and for certain types of investors. The additional complexity and scrutiny imposes costs on investors more broadly and requires that the reviewing government agencies have adequate resources to implement the regulatory regime effectively and efficiently.

We encourage the Government to ensure that the amendments proposed in Bill C-34 (and regulations and guidelines accompanying the new mandatory pre-closing regime) are clear and do not impose unnecessary requirements and burdens. The twin objectives of encouraging foreign investment and protecting Canada's national security interests require a carefully balanced approach.

The CBA Section encourages the Industry and Technology Committee to examine Bill C-34 in detail, including our concerns below, to improve the clarity and efficiency of the proposed amendments and more effectively achieve the Government's objectives.

Prescribed business activities pre-notification regime

The Government has indicated that the new pre-closing notification regime for transactions involving Canadian businesses that carry on prescribed business activities will not come into effect until accompanying regulations defining crucial terms such as "prescribed business activities" are finalized.

The CBA Section supports this approach and encourages the Government to communicate the likely timelines for these key events well in advance, to enable investors and their advisors to factor the potential changes in the regulatory process into their transaction planning.

a. Removing uncertainty in key definitions

The Government has indicated that there will likely be close alignment between the definition of "prescribed business activity" in the new regulations and the existing lists of risk factors in the *Guidelines on the National Security Review of Investments*. [2]

Several areas listed in the current Guidelines are described in broad terms. It will be important to establish clear and more precise definitions that allow investors, and the IRD, to readily identify which business activities will trigger the pre-closing filing regime.

The terms "material, non-public technical information or material assets," which are essential components of the criteria for identifying whether a pre-closing filing is required, are ambiguous. Section 2(2) of Bill C-34 indicates that the Government may define them via subsequent regulations.

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1 Investment Review Division (IRD), Technical Briefing on Bill C-34 shared by the Investment Review Division with CBA Section members during a presentation on December 8, 2022 (Technical Briefing). Backgrounder document is available at: Backgrounder on Bill C-34.

2 IRD, *Guidelines on the National Security Review of Investments*, March 24, 2021 (Guidelines), available at: Guidelines on National Security Review Investments.

Recommendation

1. The CBA Section recommends that these terms be defined in the legislation to avoid significant uncertainty for Canadian businesses, foreign investors and the IRD. 3 If these terms are not defined in the legislation, then section 2(2) should be amended to require the Governor in Council to make regulations defining those terms by deleting the word "may" and inserting the word "shall", along with a time limit.

b. Removing uncertainty regarding indirect non-controlling investments

The proposed new pre-closing filing obligation would capture a broad range of transactions, including many indirect transactions with a limited nexus to Canada. In particular, a pre-closing notification will be required for transactions involving the acquisition of a non-controlling interest in any non-Canadian entity where the non-Canadian entity is involved in prescribed business activities and has either a Canadian subsidiary, or a Canadian branch location (regardless of the significance of those Canadian operations).

We are concerned that the amendments will inadvertently capture a significant number of transactions for pre-closing filing where the operations are *de minimis* and national security concerns are unlikely to arise. For example, the nexus to Canada may only be a Canadian holding company with one employee, which otherwise has no Canadian operations.

In its Technical Briefing, the Government characterized indirect acquisitions of non-controlling interests in non-Canadian entities as arising only rarely. This is inconsistent with the experience of CBA Section members. In practice, indirect non-controlling investment transactions occur frequently.

Recommendation

2. In light of their limited nexus to Canada, the CBA Section recommends adding a de minimis exception to the new notification regime established by section 2 of Bill C-34 which would apply to acquisitions of non-controlling interests in Canadian businesses that have less than a specified level of revenues and/or assets in Canada (e.g. $5 million).

c. Removing uncertainty on internal reorganizations

There is uncertainty about the application of the new pre-closing filing obligation to internal reorganization transactions. Internal reorganizations currently are exempt from mandatory post-closing notification under section 10(1)(e) of the ICA, although they theoretically can be examined in relation to national security issues under Part IV. 1 of the ICA.

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[3] The term "material, non-public technical information" is defined in the United States national security regime administered by CFIUS (as amended in 2020 by the *Foreign Investment Risk Review Modernization Act*). In that regime, this term is defined narrowly to include information that: "(a) provides knowledge, know-how, or understanding, in each case not available in the public domain, of the design, location, or operation of covered investment critical infrastructure, including vulnerability information such as that related to physical security or cybersecurity; or (b) is not available in the public domain and is necessary to design, fabricate, develop, test, produce, or manufacture a critical technology, including processes, techniques, or methods; and (c) excludes financial information regarding the performance of an entity." See, United States, Part 800 - Regulations Pertaining To Certain Investments In The United States By Foreign Persons, § 800.232.

In our view, purely internal corporate reorganizations should not be subject to the new mandatory pre-closing filing regime on the basis that a reorganization that does not involve any change in control over the Canadian business is unlikely to raise any national security concerns.

Recommendation

3. The CBA Section recommends that section 2(1) of Bill C-34 (corresponding with proposed section 11(1)(c) of the ICA) be amended to clarify that pre-closing notifications are not required for internal reorganizations where the ultimate direct or indirect control in fact of the Canadian business, through the ownership of voting interests, remains unchanged (similar to the current approach in section 10(1)(e)).

d. Transitional provisions

Bill C-34 does not address how the new pre-closing filing obligation will apply to transactions in progress when the amendments come into force. This important practical question should be dealt with in the amendments.

Recommendation

4. The CBA Section recommends that Bill C-34 be amended to indicate that the prescribed business notification requirements will come into force 90 days after Bill C-34 receives Royal Assent. This will ensure that transactions in progress on the basis of timelines that did not contemplate this filing and review regime are not disrupted.

e. Ensuring adequate resources to administer a pre-closing regime

The time sensitivity of investment transactions makes it imperative for the Government to advise investors expeditiously whether filings have been certified as complete or determined to be incomplete, since this affects the operation of all the timelines associated with the various phases of the national security review process. The IRD is currently not able to communicate certification decisions promptly. This shortage of resources will become more problematic for transactions that would be subject to the suspensory effect of the new pre-closing regime. We are concerned that the to-be-prescribed time period for the IRD to notify investors whether their notification is complete (replacing the current "forthwith" requirement) may be inconsistent with the commercial reality and pace of business transactions.

Recommendation

5. The CBA Section recommends that a prescribed period of three business days should be adopted for the initial review and screening of pre-closing notifications for completeness, and that section 4(2) of Bill C-34 be amended to codify this standard.

The proposed prescribed business activity regime will likely result in a material increase in the number of pre-closing filings received by the IRD. The Government has not disclosed the estimated increase in number of filings, but has acknowledged that additional review capacity may be required.

We emphasize the importance of giving the IRD – and the other agencies assisting with national security reviews – sufficient resources to handle the increased filing volume imposed by the implementation of a pre-closing regime with suspensory effects on commercial transactions. The effective and timely functioning of this administrative regime is essential to maintain Canada's objective of openness to foreign investment and enabling expeditious clearance decisions in the large proportion of cases where national security concerns do not exist.

Recommendation

6. The CBA Section recommends that the new pre-closing filing regime in Bill C-34 not come into force until the Government puts appropriate financial resources and trained personnel in place to handle the projected volume of pre-closing filings on a timely basis.

Approvals by the Minister with conditions

The proposed amendments would empower the Minister to negotiate and accept mitigation proposed by an investor (new section 25.31) – effectively an approval subject to conditions – without needing to request that Cabinet deliberate and make an order pursuant to section 25.4 of the ICA.

The CBA Section welcomes this amendment in principle, in the expectation that it will save time and resources for parties to foreign investment transactions and for the Government in cases where a satisfactory resolution can be negotiated and then implemented in an enforceable manner.

In the Technical Briefing in December 2022, the IRD advised that the recently announced policy of making public outcomes of national security determinations by the Governor in Council will not apply to mitigation measures negotiated with the Minister.

Recommendation

7. The CBA Section recommends periodic publication of generalized or aggregated guidance for business indicating the types of mitigation accepted by the Minister to address various types of national security concerns. This information would be helpful to the business community and consistent with the Government's stated aim to increase transparency in the administration of the ICA without compromising national security.

Interim measures

The new interim measures powers proposed in Bill C-34 (new subsection 25.3(1.1)) will be available to the Minister for any investment in which a national security review is ongoing, regardless if the transaction has closed.

While national security harms could theoretically arise in a pre-closing environment through integration planning activities, we consider that such a risk would be unusual. The interim measures powers are expansive and would allow the Minister to force all forms of transaction planning activity to stop, including activities that are legitimate and normal for merging parties to undertake on a post-signing, pre-closing basis.

The authority to issue interim orders (injunctions) that interfere with ordinary commercial activity is normally entrusted to superior court judges. Where these extraordinary powers are vested in a public official, they should be time-limited and subject to effective judicial review in order to comply with the rule of law. These concerns are particularly serious when injunctive orders can be issued *ex parte*, as contemplated in Bill C-34.

Recommendation

8. The CBA Section recommends that section 15 of Bill C-34 be amended to establish a short timeframe for initial interim orders made by the Minister pursuant to new section 25(1.), after which the Minister would be required to apply for a court order, with notice to the

affected parties, for an extension of any interim conditions that are imposed on a transaction.

This would align with the approach taken in the *Competition Act*.[4] If the Commissioner of Competition obtains an *ex parte* temporary order from the Competition Tribunal to prohibit steps to complete a merger transaction, the maximum duration of the order is 10 days. If the Commissioner wants 30-day extensions of the injunction, the Commissioner must give notice to the parties to the transaction and they have an opportunity to address whether the extension is granted in a hearing before the Tribunal.

Judicial Review of ICA Decisions

The rule of law requires that parties affected by Government decisions be able to obtain effective judicial review of such decisions. The proposed amendments that would add new sections 25.7 and 25.8 to the ICA will increase the Government's ability to assert national security privilege in the context of the judicial review of a national security order and raise serious concerns regarding the ability of investors to effectively exercise the right to seek judicial review of Government decisions.

The opportunity for judicial review is expressly confirmed in the national security provisions in Part IV.1 of the ICA. However, the ICA is silent on the evidentiary record available for use in these proceedings. As a matter of practice, the Government has aggressively asserted the national security and cabinet privilege provisions of the *Canada Evidence Act*[5] to try to block almost all disclosure of the basis for national security orders under the ICA.[6]

In our view, investors must have a meaningful opportunity to understand the case against them to ensure that national security powers are exercised in accordance with the rule of law.

The proposed amendments would allow the Government to put evidence that is potentially injurious from a national security perspective before a judge, in the absence of non-Government parties, including the investor that applied for judicial review. This change appears to be designed to simplify the Government's ability to invoke national security privilege, by forgoing the separate proceeding that would otherwise be required under section 38.04 of the *Canada Evidence Act*.

This change would further expand the Government's extensive ability to assert national security privilege over the underlying decision-making in national security cases, potentially undermining the right of judicial review. It is understandable that the Government may wish to assert this privilege in relation to the public-at-large, and sealing orders and in-camera proceedings can be used to prevent the evidence from becoming public in appropriate cases. However, investors or their representatives need access to relevant material – including about themselves and the Canadian business as well as the basis on which the Minister or Cabinet made a negative decision – to make the right to judicial review effective.

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4 *Competition Act*, s.100.

5 *Canada Evidence Act* (RSC, 1985, c. C-5), ss. 38 and 39

6 Matters relating to the ability of investors to obtain effective judicial review of national security decision have been the focus of recent litigation brought by China Mobile Communications Group. While proceedings are ongoing, the Government asserted Cabinet privilege pursuant to section 39 of the *Canada Evidence Act* over the vast majority of the evidentiary record, which claim was upheld by the Federal Court at first instance. See: *China Mobile Communications Group Co., Ltd. v. Canada (Attorney General)*, 2022 FC 125.

Recommendation

9. The CBA Section recommends amending Bill C-34 to include procedures that will facilitate effective judicial reviews while recognizing the limited types of information where disclosure of the information to the investor could itself give rise to national security concerns (e.g., confidential informant sources, communications with allied national security authorities in other jurisdictions).

One option that is worthy of consideration is an "amicus" regime where an independent counsel would have the opportunity to test the Government's evidence and conclusions on national security matters. Lawyers pre-cleared by the Government could receive sensitive information and communicate with the investor, while not disclosing specific information subject to legitimate national security risks. We expect this would improve the quality of Government decision-making, increase public confidence in the national security decision-making process, and help investors understand when national security concerns have been validly assessed in respect of a transaction. [7]

This type of amicus proposal would be an adaptation of the security-cleared counsel model already operating under the *Immigration and Refugee Protection Act*, [8] which is used to address similar concerns in Canadian immigration proceedings. Special advocates review sensitive information and evidence given to a judge, and can cross-examine Government officials and make submissions on the sensitive information or evidence and the weight it should be afforded by the judge considering the case. Safeguards to protect the sensitive information once disclosed to the special advocate include prohibiting the special advocate from engaging in any communications with the subject of the action unless authorized by the judge. Recent commentary on the IRPA special advocate regime suggests it has improved the judicial review process for applicants while maintaining the confidentiality of sensitive information, although the study also acknowledges that the administration of the regime also depends on procedural norms developed independently by the Federal Court. [9]

Next Steps

Thank you for the opportunity to comment on Bill C-34. We would welcome an opportunity appear before the Industry and Technology Committee to discuss our comments and recommendations.

Yours truly,

(original letter signed by Marc-André O'Rourke for Sandy Walker)

Sandy Walker
Chair, CBA Competition Law and Foreign Investment Review Section

cc: Simon Kennedy, Deputy Minister, Innovation, Science and Economic Development Canada

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7 Joshua Krane, Stephen Wortley, Connor Campbell, "A Friend in High Places: A Proposal to Add a National Security Amicus to Canada's Investment Review Regime", C.D. Howe Institute, February 17, 2022.

8 *Immigration and Refugee Protection Act* (SC 2001, c.27), ss. 77(2) and 83 to 85.5 (IRPA).

9 Graham Hudson and Daniel Alati. 2018. "Behind Closed Doors: Secret Law and the Special Advocate System in Canada." Queen's Law Journal, 44(1); 2018: 1-68.