

# Canadian government temporarily extends national security review timelines

AUGUST 10, 2020 4 MIN READ

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On July 31, 2020, the Minister of Innovation, Science and Industry (Minister) issued a Ministerial Order [PDF] (the Order) pursuant to the *Time Limits and Other Periods Act (COVID-19)* (the Act) lengthening certain review periods of the national security review timelines under the *Investment Canada Act* (the ICA) and established by the *National Security Review Of Investments Regulations*.

## Background

The ICA provides for a general review regime and a discretionary national security review regime. The Order applies only to the national security review regime.

There are three stages of review under the ICA's national security regime and the review may be concluded upon the completion of any of the stages if it is determined that the investment does not raise national security concerns.

- **First stage:** During the first stage, the government determines whether it has "reasonable grounds to believe that an investment by a non-Canadian *could* be injurious to national security" (emphasis added), and, therefore, whether to send the investor a notice that a Cabinet-level national security review of the investment *may* be ordered (a Notice).
- **Second stage:** Once a Notice is sent, the federal Cabinet has another period of time to determine whether to issue an order for a Cabinet national security review (a Cabinet Review Order).
- **Third stage:** Once a Cabinet Review Order is made, an in-depth lengthy national security review is initiated. A full national security review can be expected to take at least the 200-day maximum provided in the ICA. In practice it typically takes much longer as the investor really has no choice but to consent to extensions or abandon the transaction.

## Effect of the Order

Under the Order, the time periods relating to the first and second stages of the national security review regime have been extended:

1. The period of first stage review for **foreign investments requiring an application for**

- review or notification of investment under the general provisions of the ICA** is extended by 15 days, for a total of up to 60 days after the certification of the applicable filing. An application for review or notice of investment is required for foreign investments conferring control of a Canadian business, or establishment of a new Canadian business.
2. The period of first stage review for **foreign investments that do not require an application or notification** (e.g., investments in Canada by non-Canadians that do not confer control) is extended by 135 days, for a total of up to 180 days after the date of implementation.
  3. The **period of second stage review** (i.e., following the issuance of a Notice) is lengthened by 45 days, for a total of up to 90 days following the date of the Notice.
- Importantly, the Act provides that any suspensions or extensions ordered by the Minister cannot run past December 31, 2020.

The Government of Canada has provided a useful diagram illustrating the extensions [here](#).

The Order was published on August 4, 2020, but is effective as of July 31, 2020. These extensions apply to reviews that were ongoing as of July 31, 2020, and any reviews commenced subsequent to July 31, 2020. Any review periods that expired before July 31, 2020 are not captured by the Order. While the Minister could have made the Order retroactive, no such retroactivity is included in the Order. For example, the extensions set out in the Order do not apply to an investment that was notified more than 45 days prior to July 31, 2020 if no action was taken under the national security review provisions of the ICA during that 45-day period.

The Order provides welcome clarity on whether the new extension powers, first proposed in May, 2020, would be used to extend the ICA national security review timelines and, if so, in what manner. For the vast majority of foreign investments in Canada that require notification or review under the general provisions of the ICA, the Order results in only a modest extension of the time period that must run before certainty regarding the application of the discretionary national security review process can be obtained. This appropriately reflects that the vast majority of such investments do not raise national security concerns in Canada, with less than 1% of all notified and reviewed investments subject to a Cabinet Review Order in 2018-19.

The most significant impact of the Order is on foreign investments in Canada where neither a notification nor an application is required to be filed under the ICA. This category of investments includes investments that do not confer control over a Canadian business. For example, the acquisition of less than one-third of the voting shares of an entity is generally deemed under the ICA not to confer control, with control in fact only a relevant factor for investments by state-owned enterprises (SOEs) and investments in the Canadian cultural sector. For such investments, certainty on whether a national security review may be undertaken has been extended from the usual 45 days, to up to six months following closing (though as a practical matter the extension period cannot run past December 31, 2020).

This broadening of the review timeframe is consistent with prior statements from the Minister emphasizing that enhanced scrutiny is being applied to all foreign investments, regardless of size, in sectors critical to Canada's COVID-19 response, as well as to all investments in Canada by SOEs. The extended window provided for under the Order gives the Canadian government additional time to identify those investments that are not required to be brought to its attention.