# Uranium Investments in Canada

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Canada is the world's second largest producer of uranium, and host to some of its richest uranium deposits. Active exploration is underway in many parts of the country, including northern Saskatchewan, Labrador, Nova Scotia, Québec, Ontario and in the far north in Nunavut. While Canadian politicians have talked about liberalizing limits on foreign investment in the sector, the reality is that official policy still prohibits majority foreign ownership of a producing uranium mine in Canada for many investors. Investors seeking to participate in the growth of Canada's uranium mining sector need to understand the regulatory – as well as the political – environment.

## 1. Applicable Laws

1987 "Non-Resident Ownership Policy in the Uranium Mining Sector" ("NROP") (Minister of Natural Resources):

- Written policy (not law, but enforced through the *Investment Canada Act*), that requires a minimum of 51% Canadian resident ownership in individual uranium mining properties in Canada (at the first stage of production – does not apply to exploration).
- Does not apply to uranium mines located outside Canada (even if owned by a company based in Canada).
- Canada has signed the *Canada and European Union Comprehensive Economic and Trade Agreement* ("CETA") with the European Union, and completed the legal review of CETA texts in February 2016. At the time of writing, the CETA is subject to ratification, which is expected take several years. If CETA is ratified, Canada would allow investors from the EU signatory states to apply for an exemption from the 49% foreign equity limit on foreign ownership of uranium mines, without having to first seek a Canadian partner (subject to approval of the Governor in Council)(but they remain subject to *Competition Act* and *Investment Canada Act* review, if applicable).
- In February 2016, Canada also signed the *Trans-Pacific Partnership* ("TPP") Agreement with Pacific Rim trading partners, which is subject to legal review of the text and ratification by the twelve signatory countries. The current TPP text also allows foreign investors to apply for an exemption from the NROP on the same terms as the CETA. If and when the TPP Agreement is ratified, investors from the TPP countries will be able to apply for an exemption from the NROP, subject to approval of the Governor in Council, without first seeking a Canadian partner.
- However, TPP investors will still be required to undergo the Ministerial review process (and possibly a national security review) under the *Investment Canada Act* for high-value acquisitions of control of Canadian businesses (described below), as well as *Competition Act* approval.

Investments in, and acquisitions of control of, uranium mining, production and exploration businesses in Canada may be subject to review and/or approval under two federal statutes:

  - the *Competition Act*; and
  - the *Investment Canada Act*.

- Canada's policy limiting foreign ownership of producing uranium mines in Canada is implemented through the *Investment Canada Act*. The *Competition Act* review, if applicable, is "blind" to the nationality of the investors, and considers only the impact of the transaction on global uranium markets.
- An Agreement in principle with China was announced in February 2012 under the existing nuclear cooperation agreement, to facilitate exports of Canadian uranium to China for civilian purposes. China is the fastest-growing consumer of uranium in the world.

## 2. *Competition Act*

Where each of the following thresholds is exceeded, a proposed investment in a Canadian uranium business (acquisition of assets, shares and other equity interests or amalgamations) requires pre-merger notification and either approval or expiry of a statutory waiting period before the transaction may be implemented:

- **Size-of-parties threshold** – parties (on a combined basis, together with their affiliates) must have more than C$400M in assets in Canada or more than C$400M in annual gross revenues from sales in, from or into Canada.
- **Size-of-target threshold** – target (together with its subsidiaries) must have more than C$87M in assets in Canada or more than C$87M in annual gross revenues from sales in or from Canada generated from its assets in Canada (2016 threshold). This calculation is based on either the book value of assets in Canada of the target (or in the case of asset acquisitions, of the assets in Canada being acquired), or the gross revenues from sales "in or from" Canada generated by those assets, calculated in accordance with the *Notifiable Transactions Regulations* under the *Competition Act*.
- **Shareholding thresholds** (if applicable) – 20% and 50% if the target shares are publicly traded; 35% and 50% for shares in private companies and interests in unincorporated business combinations (e.g., partnerships and trusts).
- **Amalgamations, or "triangular mergers"** (if applicable) – continuing corporation (together with its subsidiaries) must have more than C$87M in assets in Canada or C$87M in annual gross revenues from sales in or from Canada generated from its assets in Canada (and each of at least two (2) parties must have greater than C$87M each in assets in Canada or sales "in from or into" Canada) (2016 thresholds).

Even if the proposed investment does not trigger pre-merger notification, the Canadian Competition Bureau retains the jurisdiction to review and challenge all "mergers" within one (1) year of their completion on the grounds that the transaction will prevent or lessen competition substantially.

- A "merger" is defined as the acquisition or establishment of control over or a significant interest in the whole or a part of a business.
  - The Competition Bureau has indicated that the acquisition of as little as 10% of the voting interests of a business and/or a seat on the Board could constitute a "significant interest".
  - Even minority investments are, therefore, potentially subject to review under the *Competition Act*, even if they may not need to be notified.

## 3. *Investment Canada Act*

Three different review and approval regimes under the *Investment Canada Act* may potentially apply – simultaneously – to acquisitions of control of a Canadian uranium business or of a business that owns an interest in a Canadian uranium business:

- Notification,
- Economic review under the "net benefit" to Canada test, and
- National security review.

A notification is a form-based filing that is often made after closing. It is required when a non-Canadian investor acquires control of a Canadian business or commences a new Canadian business. No governmental approval is required for notifications.

An economic review under the "net benefit" to Canada test is required instead of a mere notification when a non-Canadian investor acquires control of a Canadian business, and certain thresholds are exceeded. Reviewable direct investments in Canadian businesses require Ministerial approval before closing (and indirect investments, where control is acquired via the acquisition of an offshore parent, must apply for review within 30 days after closing).

### Net Benefit Review

- A **direct** "acquisition of control" of a "Canadian business" – i.e., the acquisition of substantially all of the assets of an entity in Canada that carries on the Canadian business (or the acquisition of a majority of voting interests of such an entity; or – in in the case of corporations – more than one-third of voting interests in some cases) by a "non-Canadian" who is a "WTO investor" (or from a non-Canadian WTO vendor) requires submission of an application for review and receipt of a positive "net benefit to Canada" ruling prior to closing, if the enterprise value of the Canadian business for the preceding fiscal year exceeds C$600M, unless the Canadian business carries on any "cultural" activities (as of 2016; updated annually). The enterprise value threshold will rise in 2017 to C$800M and in 2019 to C$1B. The calculation of "enterprise value" depends on the structure of the acquisition (all terms within brackets are defined in the applicable regulations):
  - Acquisitions of shares of Publicly-Traded Entities: Enterprise value = (marketing capitalization) + (total liabilities) (excluding operating liabilities)) – (cash and cash equivalents).
  - Acquisitions of shares of Non-Publicly traded Businesses: Enterprise value = (acquisition value) + (total liabilities (excluding operating liabilities)) – (cash and cash equivalents).
  - Acquisition of Assets: enterprise value = (acquisition value) + (assumed liabilities) – (cash and cash equivalents).
  - For state-owned enterprises ("SOE") who are WTO investors the threshold for 2016 is C$375M (based on the book value of the assets of the Canadian business).
  - Threshold reduced to C$5M (based on the book value of the assets for the fiscal year immediately preceding implementation of the transaction) where neither the investor nor the vendor is controlled by persons from WTO member countries excluding Canada (e.g., Kazakhstan acquisition of Canadian-controlled company), or for "cultural" businesses.
- "Assets of the Canadian business" includes assets located outside of Canada, if controlled by the Canadian business.
- **Indirect** acquisitions of control by or from WTO investors (foreign-foreign transactions) are exempt from review (unless the Canadian business is engaged in "cultural" activities, in which case the review threshold is C$50M). The threshold for **indirect** acquisitions of control of any Canadian business where neither the buyer nor the vendor is a WTO investor is also C$50M (based on the book value of the assets).

- **NOTE**: even if an investment does not require "net benefit" review, it could be prohibited or subject to conditions under the national security review mechanism (see below).
- "Net benefit" review or notification only applies to "acquisitions of control" of "Canadian businesses":
  - Acquisition of a majority of the voting interests of an entity is deemed to be an acquisition of control.
  - Acquisition of less than a majority of the voting interests of an entity that is not a corporation is deemed not to be an acquisition of control.
  - Acquisition of one-third or more of the voting shares of a corporation is presumed to be an acquisition of control unless it can be shown that the corporation will not be controlled in fact by the acquiring party through ownership of voting shares.
  - Acquisition of less than one-third of the voting shares of a corporation is deemed not to be an acquisition of control.
- Minority investments in Canadian uranium businesses of between one-third and one-half could, therefore, trigger a net benefit review or notification (and/or a national security review) but not be prohibited under Canada's uranium foreign ownership policy (see below).
- For net benefit review, a "Canadian business" is a business carried on in Canada that has:
  - a place of business in Canada,
  - an individual or individuals in Canada who are employed or self-employed in connection with the business, and
  - assets in Canada used in carrying on the business.
- Given the sensitivities, consultation with the Minister of Natural Resources is advised in advance of any investment in Canada's uranium mining sector.
- Where a direct acquisition of control triggers a net benefit review, parties are prohibited from closing until the federal Minister of Innovation, Science and Economic Development (formerly the Minister of Industry)(the "Minister of Innovation") issues a favourable ruling to the purchaser (binding commitments are usually required).
- Where an indirect acquisition of control triggers a net benefit review, the parties may close the transaction but must file an application for review within 30 days after closing, and must subsequently receive a positive ruling from the Minister of Innovation (failing which the transaction would be required to be unwound – again, binding commitments will likely be required).
- Ministerial determinations of "net benefit to Canada" are generally based on the purchaser's stated plans for future operation of the Canadian business (as conveyed to the government in the application for review) and on any legally binding undertakings the purchaser provides to the Minister of Innovation regarding future conduct of the business (e.g., commitments to ensure Canadian participation in senior management and the board, to make certain annual capital and R&D expenditures, to maintain production and employment, to ensure a certain level of resource processing occurs in Canada, etc.).

## SOE Investment Guidelines

- Relevant to a "net benefit" assessment are the government's guidelines on investments by SOEs.
- "SOE" is defined as an enterprise that is controlled or influenced directly or indirectly by a foreign government. Influence is not defined.
- In determining whether a reviewable acquisition of control of a Canadian business by an SOE is of "net benefit to Canada", the government will consider the corporate governance and commercial orientation of the SOE, the importance of the Canadian business in the sector, and the role of the SOE.
- Corporate Governance

- Whether the SOE adheres to Canadian standards of corporate governance (e.g., transparency and disclosure, independent members of the board of directors, independent audit committees, equitable treatment of shareholders).
- How and the extent to which the investor is owned or controlled by the state.

- Commercial Orientation
  - Whether the target Canadian business will continue to have the ability to operate on a commercial basis regarding:
    - Where to export and process.
    - Participation of Canadians in management and operations.
    - Support of innovation, research and development.
    - Capital expenditures to maintain the global competitiveness of the business.
- Specific undertakings suggested by the Guidelines for SOE investors include:
  - Appointment of Canadians as independent directors on the board of directors.
  - Employment of Canadians in senior management positions.
  - Incorporation of the business in Canada.
  - Listing of shares (target or parent) on a Canadian or other stock exchange.

## 4. National Security Review

- Investments in Canadian uranium businesses can also be subjected to national security review under the *Investment Canada Act*, regardless of whether the investment requires a notification or net benefit review under that Act.
- National security regime applies to proposed or implemented investments by non-Canadians to:
  - establish a new Canadian business,
  - acquire control of a Canadian business, or
  - acquire "in whole or in part" – i.e., minority investments or establish an entity carrying on all or any part of its operations in Canada if the entity has:
    - a place of operations in Canada,
    - individual(s) 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.
  - **NOTE:** the national security regime applies to investments even if they would not qualify as a "business" for net benefit purposes, and even if control is not acquired.

### Process

- Unlike the economic review provisions, there are no financial thresholds for national security review.
  - All covered investments, regardless of the value of the Canadian business, are potentially reviewable.
  - Separate, but related, process to "net benefit to Canada" review:
    - A transaction that does not meet the threshold for "net benefit" review or is not otherwise subject to the Act may still be subject to national security review for up to 45 days after closing.
    - Any national security determination may be considered in a net benefit review.

- Where the federal government determines that an investment would be injurious to national security, it may:
  - prohibit the investment,
  - authorize the investment subject to written undertakings (terms and conditions), or
  - require the divestiture of all or part of the Canadian business.
- Changes to the *Investment Canada Act*'s national security regulations (effective March 13, 2015) extended various national security timelines, allowing the government more time to decide whether to initiate a national security review, and more time to complete national security reviews. If the maximum periods under the regulations are fully utilized, a national security review could take 200 days (extendable upon consent) after an *Investment Canada Act* notification or application for review is filed, or if no such filing is required, then after the transaction closes. If a net benefit review is also conducted, it will not conclude until 30 days following conclusion of the national security review (or longer with the consent of the investor).

## Implications

- "National security" is undefined, but could apply to uranium mining (and likely already has been so applied – see below).
- Government would assess risks relating to both the target industry (vulnerability) and the investor (threat).
- No formal pre-clearance procedure exists – the Minister of Innovation has 45 days after the certified date (if an application for review or a notification under the "net benefit" provisions is filed) or, in the case of investments not required to file a notification of application for review, after the date of implementation of the investment to: issue an order for national security review; or give notice that an order for national security review may possibly be issued.
- For investments not otherwise subject to the *Investment Canada Act* (e.g., acquisition of less than a 33% shareholding of a uranium mining company), the Minister of Innovation has 45 days after closing to issue notice of a national security review. In practice, advance consultations with Natural Resources Canada, prior to filing, are advised in respect of all investments in uranium in Canada (see below).
- National security regime reportedly has already been applied to uranium investments:
  - In 2008, George Forrest International Afrique SPRL ("GFI"), based in the Democratic Republic of Congo, agreed to acquire Forsys Metals Corp., a Canadian company with uranium mining interests in Namibia.
  - A Forsys news release in the summer of 2009 indicated that GFI received a notice under the *Investment Canada Act* prohibiting GFI from implementing the investment pending further notice from Industry Canada.
    - Forsys management information circular to shareholders indicated that the transaction was below the "net benefit" review threshold (requiring only a post-closing notification) which, if accurate, means the only reasonable conclusion is that the notice was issued to GFI pursuant to the national security review regime.
  - Shortly thereafter Forsys announced that it was terminating the transaction.

## The NROP Policy (applies only to uranium mines in Canada)

1987 "Non-Resident Ownership Policy in the Uranium Mining Sector" (Minister of Natural Resources):

- Minimum 51% Canadian resident ownership required in individual uranium mining properties (at the first stage of production).
- Resident ownership for individual production projects of less than 51% may be permitted if Canadian control in fact can be established

- Exemptions may be granted only if Canadian partners in mining development cannot be found.
- Policy does not apply to foreign participation in uranium exploration in Canada, where no foreign ownership restrictions exist (but must comply when produce).
- Trading partners covered by the CETA and TPP trade agreements may apply for exemption from the requirement to seek a Canadian partner, if and when those agreements come into force.

## Implications under the *Investment Canada Act*

- A positive "net benefit to Canada" ruling will not be issued unless it can be established that the business is controlled in fact by Canadians or a Ministerial exemption is granted on the grounds that Canadian partners cannot be found.
- Where there is:
  - a direct "acquisition of control" of a producing Canadian uranium mine that does not exceed the threshold to trigger a net benefit review, or
  - an indirect "acquisition of control" of a producing Canadian uranium mine by or from a WTO investor that would not be subject to net benefit review, or
  - an investment in a producing Canadian uranium mine that does not amount to an "acquisition of control" and thus is not subject to net benefit review (or notification)

  in each case by a non-Canadian investor, the transaction may be prohibited under the national security review mechanism if it would otherwise contravene the uranium mining foreign ownership policy, but in all cases advance consultations with Natural Resources Canada would be required in order to know for sure whether the Policy would apply in that case.

## Liberalization

- In 2008, the Canadian Competition Policy Review Panel (Wilson Report) recommended liberalizing the non-resident ownership policy, "subject to Canada securing commensurate market access benefits allowing for Canadian participation in the development of uranium resources outside Canada or access to uranium processing technologies used for the production of nuclear fuel for nuclear power plants".
- While the non-resident ownership policy threshold was raised from 33% to 49%, no Policy to liberalize the NROP has been implemented yet.
- When and if trade agreements with Europe (CETA) and Pacific Rim trading partners (TPP) are ratified, investors from those states will be entitled to apply for an exemption from the NROP requirement to seek a Canadian majority partner at the first stage of uranium production in Canada.


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