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The Hon. Sherry Romanado
Standing Committee on Industry, Science and Technology
House of Commons
131 Queen Street
Ottawa, ON K1A 0A6

Dear Madam Chair and Honourable Members:

Investment Canada Act

Thank you for the invitation to testify before the Standing Committee on Industry, Science and Technology.

We regularly provide advice to both foreign investors and Canadian businesses regarding all aspects of the *Investment Canada Act*. We are also the co-authors of *Investment Canada Act: Commentary and Annotation, 2020*, which is published annually by legal publisher LexisNexis. It is in its 8th year of publication and is widely used by lawyers, Canadian businesses and foreign investors considering the application of the ICA to investments in Canada. We make these submissions in our personal capacity and not on behalf of our firm or its clients.

A. Executive Summary

In short, we believe the *Investment Canada Act* and review mechanisms do not require amendment and no blanket policies or amendments should be adopted. The ICA works as framework legislation which provides broad discretion to the Minister to approve, reject or amend foreign investments on a case-by-case basis. We do believe this is a priority area and that it is critical, at this time in particular, that the Investment Review Branch (IRB) be sufficiently staffed and funded to be able to carry out its important mandate.

The challenges faced by businesses and government arising from the COVID-19 crisis are unprecedented. While we appreciate the potential risks associated with foreign takeovers of Canadian businesses critical to Canada's national security, the ICA already contains extensive powers for the Government to conduct in-depth reviews of foreign investments and block or remedy any investment that raises a national security concern for Canadians or the Government. Reviews under the ICA can, and

frequently do, take upwards of 200 days to complete. Lengthy delays can prolong the realization of the many recognized benefits that foreign direct investments can bring to Canadian economy.

Based on our experience and observations over the last several months, a blanket prohibition on investments by certain categories of investor or regarding certain industries is not warranted and a case-by-case approach to reviews under the ICA is appropriate. Adding additional obligations on investors, especially without conferring additional resources to the IRB and its partner agencies and providing for additional transparency measures, could signal to the investment community that investors are likely to face additional red-tape when trying to invest in Canada. Canada now, more than ever, needs foreign direct investment to support a strong economic recovery. It would also be unfortunate if a blanket prohibition on certain types of investment hindered Canada's ability to cooperate internationally to solve pressing international issues, including combatting COVID-19.

B. Context

Based on public information, both the absolute number and proportion of investments in Canadian businesses by non-Canadians that raise national security issues has historically been quite low. According to the annual reports to the Innovation Minister by the Director of the Investment Review Branch, the Canadian Government received notice of more than 3,800 foreign investments in Canadian business over the previous five fiscal years. Of those, only 25 resulted in a formal national security review process with 18 investments either being withdrawn, prohibited, divested or approved subject to mitigation conditions.

Foreign investors concerned about the potential for a national security review when they invest in a new business or acquire control of an existing one will frequently notify the Government in advance to ascertain whether the investment raises a national security concern. The IRB also recommends that investors take this approach.

We have also not observed that foreign investors are avoiding submitting filings under the ICA in connection with their investments. Investors who come to Canada are, in our experience, intent on abiding by their regulatory obligations, which includes filing notifications to the IRB.

C. Proposals for Discussion

1. Consider mandatory filings before closing for investments in industries critical to Canadian national security

Currently, the ICA does not require that investors submit a notification to the IRB before closing unless the investment involves the direct take-over of a Canadian business whose value exceeds the applicable financial threshold. However, it is common practice for investors to notify the Government before closing when the investment has potential national security implications.

For reference, the Committee on Foreign Investment in the United States made changes to its filing rules earlier this year. CFIUS now requires that parties file a mandatory declaration before closing for certain controlling and even non-controlling investments in U.S. businesses that produce, design, test,

manufacture, fabricate or develop critical technology. Mandatory pre-closing filings are also required where a foreign government plans to take a substantial interest in a business involving critical technology, critical infrastructure or sensitive personal data in the U.S. We note that the new CFIUS rules grant special dispensation to investors based in Canada, Australia and the U.K.

In Canada, investors that are contemplating making investments in critical industries typically do submit notifications pre-closing anyway, so it is unclear what benefits a mandatory pre-closing filing would being about.

In our view, the current practice works well. If any changes are considered, they should be only in connection with investments in industries critical to Canadian national security. “Trade agreement investors” as defined in section 14.11(6) of the ICA should be exempted from this requirement similar to the approach taken by CFIUS. The list of critical industries should be sufficiently precise so that investors and Canadian businesses can easily ascertain whether a filing is required before closing or not. Moreover, the Committee should not recommend extending the already lengthy 200-day timeline for national security reviews.

2. Confer Additional Resources on the IRB and Public Safety Canada

The Minister and IRB already have extensive authority to review investments in Canada on national security grounds. Even if this Committee decides not to make any changes to the ICA – the position which we support – it should nevertheless recommend that the Innovation Minister and the Public Safety Minister allocate additional human and financial resources to assist with reviews under the ICA.

We have also observed that when investments are under review, particularly on national security matters, the timelines are quite long. This is especially problematic where investors plan to establish new businesses in Canada that create jobs, conduct new research, and develop products and services for the benefit of the Canadian economy.

Through our dealings with the IRB, we have observed that the agency is operating under significant resource constraints. The IRB has been without a full-time Director General for some time. The Operations Directorate has limited staff who are now working from home. Having additional staff to process the information received from investors and third parties will allow investors and Canadian businesses to work toward resolving any potential national security concerns more quickly.

3. Greater Transparency

We also encourage this Committee to take steps to improve transparency during the review process. In our experience, investors are often left wondering why their investments get caught up in a national security process. During that process, investors are told very little about the concerns and the steps that might be needed to address them.

While the IRB will typically send investors a summary of the Government’s concerns when the Governor-in-Council issues a national security review order under section 25.3 of the ICA, the ICA does not impose

a legal obligation to communicate the reasons for these orders. The summaries typically do not provide enough specificity regarding the Minister's concerns, which often leaves investors guessing.

The Government, investors and the Canadian businesses they are investing in have a shared interest in understanding the specific national security concerns in issue. This will allow all parties to work together to develop solutions to allow the economy to realize the benefits of the investment while alleviating the security risk, or will provide an indication to the parties that the investment will not be permitted under any circumstance.

A robust national security review framework is in the interests of all Canadians. But that framework must be applied in a principled and transparent way. Investors should have the ability to meaningfully respond to concerns that have been raised and that process should be built into the law and regulations.

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We thank you for the opportunity to address this Committee on this very important topic related to Canada's economic future.

Yours very truly,

Brian A. Facey & Joshua A. Krane