



Blakes



Investment Canada Act:
A New Era for Foreign
Investment Reviews

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Blakes Means Business

About Blakes

As one of Canada's top business law firms, Blake, Cassels & Graydon LLP (Blakes) provides exceptional legal services to leading businesses in Canada and around the world. We focus on building long-term relationships with clients. We do this by providing unparalleled client service and the highest standard of legal advice, always informed by the business context.

Overview of the Investment Canada Act

The *Investment Canada Act* (ICA) applies to all investments in Canadian businesses by non-Canadians.

A foreign investor acquiring control of a Canadian business or establishing a new Canadian business is required to submit a filing. For most investments, the non-Canadian investor is only required to submit a simple notification form. The notification may be submitted before or up to 30 days after the investment has been implemented.

Some investments are subject to a suspensory pre-closing review to determine whether the investment is likely to be of “net benefit” to Canada where the relevant financial threshold is met.

For 2024, the relevant thresholds for a pre-closing review of a direct acquisition of control of a Canadian business are as follows:

- **Trade Agreement Investors:** A C\$1.989-billion enterprise value of the Canadian business for investments by investors from the following countries with which Canada has a free trade agreement: United States, United Kingdom, European Union member countries, Australia, Brunei, Chile, Colombia, Honduras, Japan, Malaysia, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, Vietnam
- **World Trade Organization (WTO) Investors:** A C\$1.326-billion enterprise value of the Canadian business for investments by investors from WTO member countries
- **State-Owned Enterprises:** A C\$528-million asset value of the Canadian business for investments by state-owned enterprises

In addition, the ICA includes special rules and significantly lower thresholds of C\$5-million or C\$50-million in asset value for investments in cultural businesses (for example, video game developers, bookstores or book publishers, and film or movie production companies).



Amendments to National Security Review

In addition to the mandatory filing obligation for certain foreign investments, all investments in a Canadian business by non-Canadians may be subject to a national security review.

Recently, the focus of the ICA has been evolving, shifting from a focus on the pre-closing review of investments to determine whether they were of net benefit to Canada to whether the investment would be injurious to Canada's national security. While the number of investments subject to a net benefit review has remained below 10 in each of the past five years, the number of investments subject to extended national security screening and review has continued to increase from nine investments in the government's 2018–2019 fiscal year to 32 in the 2022–2023 fiscal year.

With this shift to a national security focus, two important developments have broadened the filing regime under the ICA.

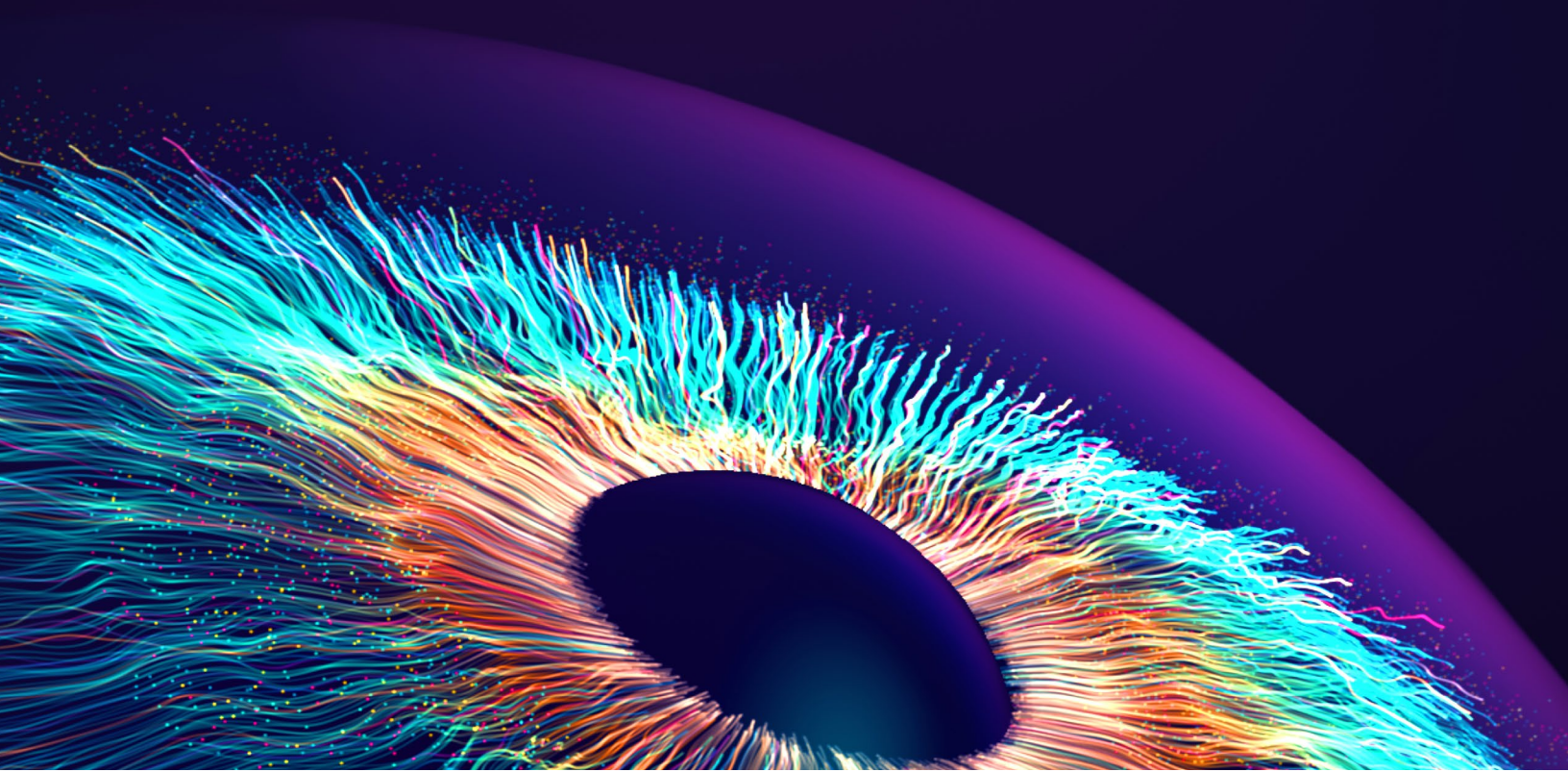
First, in 2022, a voluntary filing regime was introduced, enabling investors to notify the Canadian government of minority investments or investments in entities with assets in Canada that are not subject to a mandatory filing obligation. If a voluntary filing is not submitted, the government has five years from the date the investment is implemented to commence a national security review instead of 45 days when a filing is made.

Second, recent amendments to the ICA will introduce a new mandatory pre-closing filing requirement for investments in sensitive sectors. These amendments received royal assent on March 22, 2024. Once in force, there will be a mandatory and suspensory pre-closing filing obligation for all investments in certain prescribed sectors, including minority investments, where certain other criteria are met (for example, where the investor could have access to or direct the use of material non-public technical information and have the power to appoint or nominate a member of the board or senior management). Investments subject to this new mandatory filing requirement will be subject to a minimum 45-day waiting period. The prescribed business sectors have not yet been defined but are likely to include the sectors identified in the [*Guidelines on the National Security Review of Investments*](#).

Sectors Identified in the Guidelines on the National Security Review of Investments

- Advanced materials and manufacturing
- Advanced ocean technologies
- Advanced sensing and surveillance
- Advanced weapons
- Aerospace
- Artificial intelligence (AI)
- Biotechnology
- Critical minerals
- Energy generation, storage and transmission
- Medical technology
- Neurotechnology and human-machine integration
- Next-generation computing and digital infrastructure
- Personal data (including personally identifiable health, genetic, biometric, financial or other personal data)
- Position, navigation and timing (PNT)
- Quantum science
- Robotics and autonomous systems
- Space technology

Once implemented, this new filing regime will have important implications for deal timing, regulatory risk allocation and strategy for investments by non-Canadian investors in these sectors, regardless of nationality and whether the investment is an acquisition of control or a minority investment. Transactions not completed before the amendments come into force and not already notified under the ICA will be subject to the new filing obligations.



Expanded Enforcement Tools

The recent amendments increase the potential penalties that a court can order for non-compliance to up to C\$25,000 per day (from C\$10,000). The amendments also provide the Minister of Innovation, Science and Industry (Minister of Innovation) the authority to extend timelines of a national security review, impose interim conditions for an investment during a national security review, accept undertakings to mitigate national security risk, and share information and consult with foreign governments in connection with the national security review of investments. Notably, if deemed to be in the public interest, the amendments empower the government to conduct a net benefit review on any investment by a state-owned enterprise that is not a trade agreement investor, regardless of whether it exceeds the relevant threshold for such a review.

Many of these amendments will come into effect in September 2024. However, the new pre-closing filing obligations for investments in certain prescribed business sectors are not expected to take effect until 2025. This is because the government will need to introduce enabling regulations identifying the prescribed business sectors.

Key Takeaways

- Businesses should be aware of these upcoming ICA amendments, which will broaden obligations under the ICA, and keep them in mind during transaction planning discussions to ensure contractual mechanisms provide sufficient time and flexibility to satisfy the new filing requirements and increased number of pre-closing reviews.
- Foreign investors considering investments in the prescribed business sectors should be aware of the heightened scrutiny their investments may face and consider the economic and political climate when undertaking an investment.



Trends in National Security

The initial purpose of the ICA was to allow for the review of significant investments in Canada by non-Canadians to ensure that such investments would contribute to the country's economic growth and employment opportunities and be of net benefit to Canada. However, in recent years, the focus of the ICA has been evolving to focus on whether an investment would be injurious to Canada's national security. These changes, coupled with a broadening political skepticism of foreign investments, are changing how businesses must assess the ICA.

Statistics on Extended and Full National Security Reviews

The statistics provided in the government's most recent Annual Report summarizing the administration of the ICA for the 2022–2023 fiscal year highlight the ICA's continuing evolution from a regime focused on Canada's economy to one focused on national security.

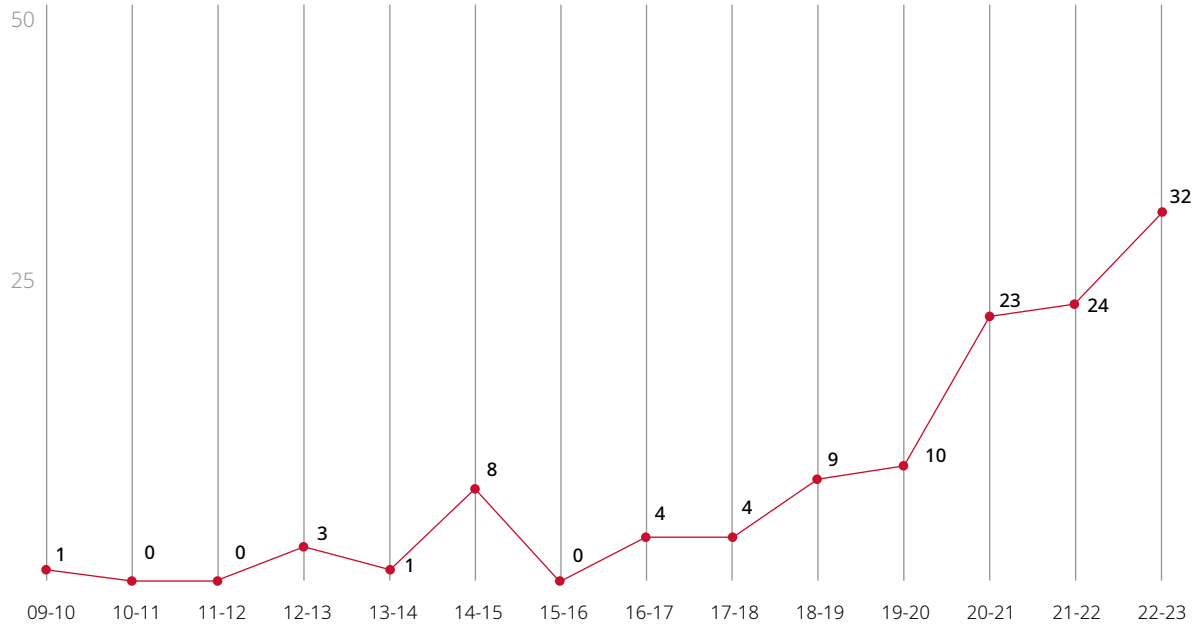
- There were 1,010 investment filings, a 19.5% decrease from the record-breaking 1,255 filings in 2021/22.
- Only five applications for net benefit review were submitted, the second-lowest number after 2020/21 when only three were submitted.
 - The remaining 1,005 filings were notifications, 762 of which were for investments in existing Canadian businesses and 243 for the establishment of a new Canadian business.
- There was a record number of extended national security screens (32) and full national security reviews (22). For the first time, an investment by a U.S.-based investor was subject to a full national security review.
- No transactions were blocked in 2022/23, but three investments in critical minerals by Chinese investors were subject to divestiture orders, and eight investments were withdrawn after a full national security review was ordered.

Since the national security review regime was enacted in 2009, 119 investments have been subject to an extended national security screen, and 74 investments have been subject to a full national security review. Most in-depth national security reviews have occurred in the past three years.

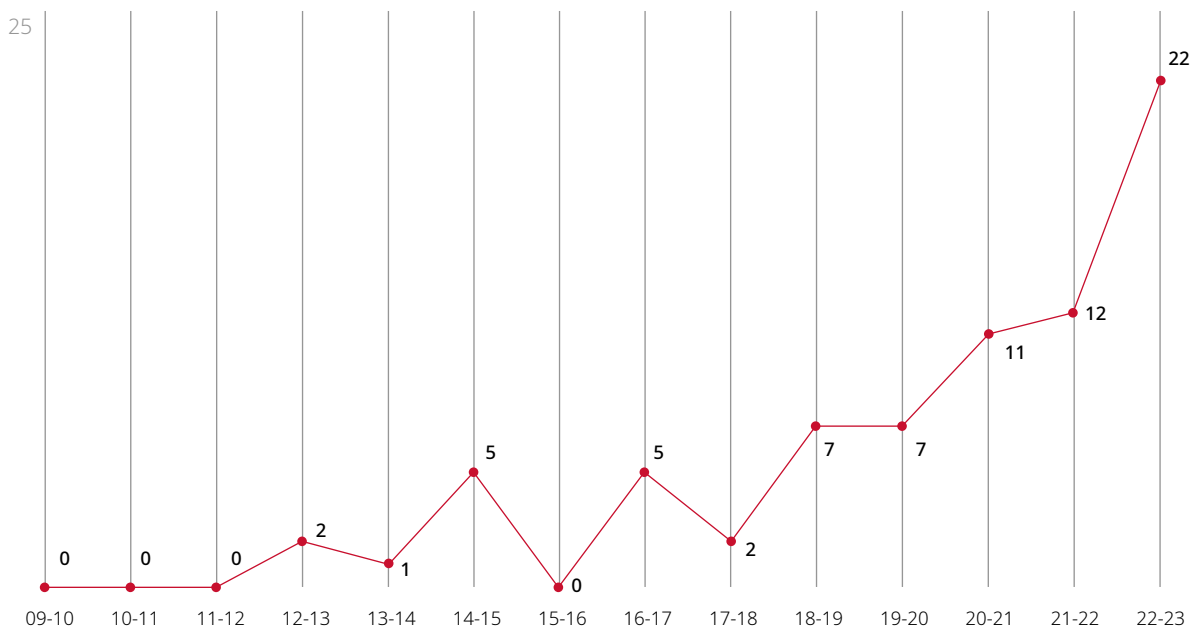


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Section 25.2 – Extended National Security Screen (2009–2023)

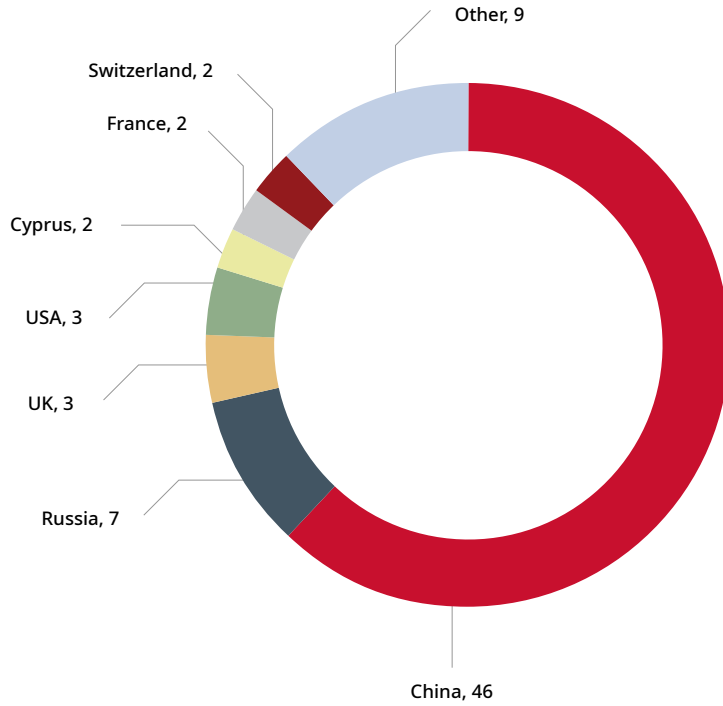


Section 25.3 – Full National Security Review (2009–2023)

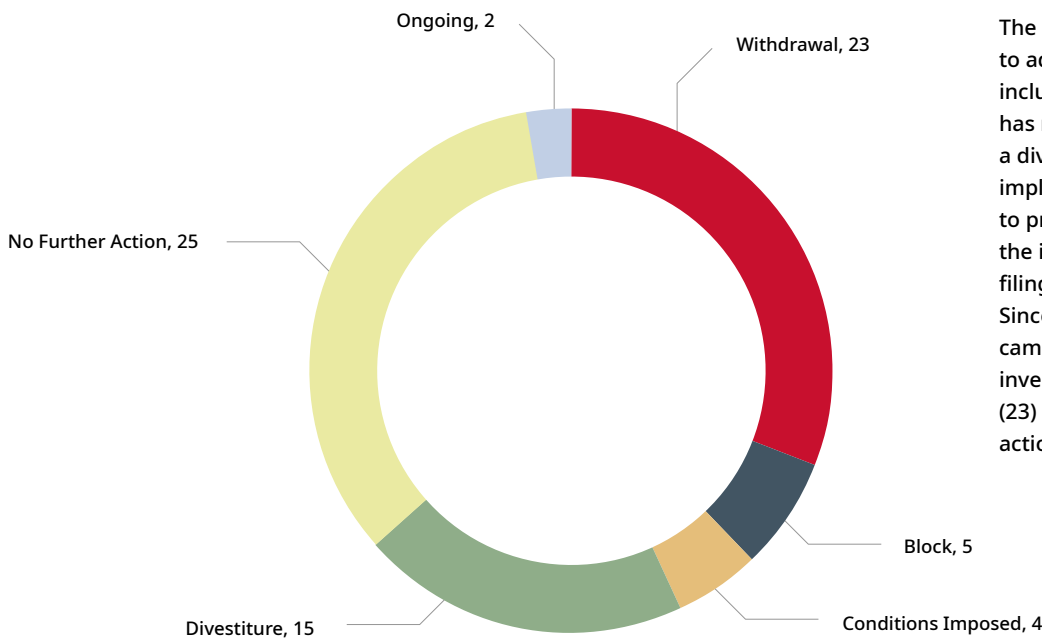


Full National Security Reviews by Country of Investor Control (2009–2023)

Investments by Chinese investors have been a significant focus of the national security review process under the ICA. They account for the majority of full national security reviews in 2022/23 (16 of 22) and since the national security regime was first introduced in 2009 (46 of 74):



Outcome of National Security Reviews (2009–2023)



The ICA provides a range of remedies to address national security concerns, including blocking an investment that has not been implemented, requiring a divestiture if the investment has been implemented or permitting the investment to proceed with conditions. Furthermore, the investor may voluntarily withdraw their filing and not proceed with the investment. Since the national security review regime came into effect in 2009, the majority of investments have either been withdrawn (23) or allowed to proceed with no further action (25):

Notably, this enhanced scrutiny on national security grounds applies to not only investments in existing Canadian businesses but also the establishment of a new Canadian business. Indeed, seven of the 22 full national security reviews in 2022/23 were related to establishing a new Canadian business. More recently, on May 24, 2024, the Canadian government announced that it had ordered two Chinese companies — a drone-detection company and a company specializing in wireless security products — to cease operations in Canada.

Statistics on Minority Investments

Minority investments have also attracted scrutiny. In 2022/23, four minority investments were subject to a full national security review — one in which the investor withdrew their filing and did not complete the investment and three in the critical minerals sector in which the investor was ordered to divest their investment.

Key Takeaways

- Foreign investors and Canadian businesses going through a sales process should be aware of the increased national security scrutiny of all foreign investments.
- Recent reviews for U.S.-based investors have shown that foreign investors from all countries should consider the political realities of investing in a Canadian business and prepare for the timing and flexibility required by a potential national security review.
- Foreign investors should proactively engage the Canadian government for investments that could raise national security risks.





Recent Policy Statements on Foreign Investments

The government's release of numerous policies specifically targeted at areas of potential national security concerns demonstrates the continuing shift towards a national security focus for investment reviews under the ICA. Policy statements regarding foreign investments by Russian investors and in critical minerals and the interactive digital media (IDM) sector evidence a heightened focus on national security generally and in certain industrial sectors.

Net Benefit Review of Investments in Critical Minerals

On July 4, 2024, the Minister of Innovation released a statement regarding the government's approach to the net benefit review of investments in important Canadian mining companies engaged in critical minerals operations. The statement, reflecting the strategic importance of Canada's critical minerals sector, notes that investments in large Canadian-headquartered firms engaged in critical minerals operations will be found to be of net benefit to Canada only in the most exceptional circumstances.

State-Owned Enterprises and Critical Minerals

The Minister of Innovation advised in October 2022 that investments in critical minerals by foreign state-owned enterprises will be found to be of net benefit only on an exceptional basis. Such investments will also support a finding that there are reasonable grounds to believe the investment could be injurious to national security.

Shortly after releasing this policy on November 2, 2022, the government ordered three divestitures of Chinese investment in the lithium sector:

- Sinomine (Hong Kong) Rare Metals Resources Co., Limited was required to divest itself of its investment in Power Metals Corp.
- Chengze Lithium International Limited was required to divest itself of its investment in Lithium Chile Inc.
- Zangge Mining Investment (Chengdu) Co., Ltd. was required to divest itself of its investment in Ultra Lithium Inc.

Interactive Digital Media Sector

On March 1, 2024, the Minister of Innovation and the Minister of Canadian Heritage issued two policies with respect to foreign investment in the IDM sector. The policies indicate that foreign investments in IDM will face heightened scrutiny based on its potential to propagate disinformation and manipulate information. Foreign investments in IDM may be subject to national security reviews, discretionary net benefit reviews and extended undertakings.

The Minister of Innovation's policy lists the following considerations when assessing if a transaction in the IDM sector could be injurious to national security:

- The reach and audience of the product's content
- Online elements, such as in-game chat logs, purchases or microphone/camera access
- The investor's ties to a foreign government
- The potential to use the Canadian business to propagate disinformation or censor information
- The board of directors of the business
- The degree of influence over the Canadian business and its content

In the context of a net benefit review for cultural businesses in IDM, the Minister of Canadian Heritage's policy indicates that a large number of discretionary reviews may be initiated. The policy outlines the following considerations when conducting a net benefit review of investments in the IDM sector:

- The degree of influence in the operational and strategic control of the business
- Whether the business owns or creates intellectual property
- Competition in the sector and the effect of concentration of foreign ownership
- Corporate governance and reporting practices
- Whether the business will continue to operate on a commercial basis

The policy also provides that investments in the IDM sector will require stringent undertakings to address creative independence of the business, corporate governance and transparency, and ongoing reporting, auditing and inspection rights.

Ukraine Crisis

Due to the elevated national security and economic risks to Canada resulting from the conflict in Ukraine, the Minister of Innovation announced in March 2022 that, until further notice, direct and indirect acquisitions of control of Canadian businesses by Russian investors will be found to be of net benefit to Canada only on an exceptional basis. Further, an investment with direct or indirect ties to the Russian state will support a finding that there are reasonable grounds to believe that the investment could be injurious to Canada's national security.

Key Takeaways

- Foreign investors from certain countries should consider the political climate when making investment decisions and prepare for prolonged national security reviews.
- Foreign investors should be prepared to provide long-term commitments related to maintaining Canadian intellectual property in Canada and ongoing reporting and compliance obligations when investing in the IDM sector.
- Foreign investors should proactively engage with the Canadian government on foreign investments in the IDM or critical minerals sectors.

Key Contacts



Navin Joneja
Group Co-Chair, Partner
navin.joneja@blakes.com
+1-416-863-2352



Randall Hofley
Partner
randall.hofley@blakes.com
+1-416-863-2387 (Toronto)
+ 1-613-788-2211 (Ottawa)



Julie Soloway
Group Co-Chair, Partner
julie.soloway@blakes.com
+1-416-863-3327



Kevin MacDonald
Partner
kevin.macdonald@blakes.com
+1-416-863-4023



Jonathan Bitran
Partner
jonathan.bitran@blakes.com
+1-416-863-3289



Elder Marques
Partner
elder.marques@blakes.com
+1-416-863-3850 (Toronto)
+1-613-788-2238 (Ottawa)



Cassandra Brown
Partner
cassandra.brown@blakes.com
+1-416-863-2295



Julia Potter
Partner
julia.potter@blakes.com
+1-416-863-4349



Brian A. Facey
Chair, Strategic Business Initiatives
brian.facey@blakes.com
+1-416-863-4262



Micah Wood
Partner
micah.wood@blakes.com
+1-416-863-4164

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