



# PERSPECTIVE

## **Canadian National Security Review: Broad Application in the Uranium Sector?**

August 27, 2009

While the public disclosure is incomplete, it appears that an intervention by the Canadian Minister of Industry under the new national security review provisions of the *Investment Canada Act* ("ICA") played a role in the termination on August 24, 2009 of a proposed acquisition of Forsys Metals Corp. by George Forrest International Afrique S.P.R.L. ("GFI"). Whatever the precise details, this development illustrates the potentially very broad scope of the ICA national security review process and the need to take its potential application into consideration for transactions with even relatively limited links to Canada.

### **The Proposed Transaction**

Forsys is a publicly-traded mineral exploration company incorporated and listed in Canada. Its projects, including a uranium deposit which Forsys describes as being close to production, are located in Namibia, Africa. Forsys does not appear to have any mineral properties or projects in Canada.

GFI is a member of the Forrest Group, a private industrial conglomerate with operations in Africa, Europe and the Middle East, including civil engineering, mining, manufacturing and construction businesses.

GFI's proposed acquisition of Forsys was announced on November 14, 2008. Forsys' financial statements indicate that the book value of its assets is well below the current \$312 million threshold for general net benefit reviews applicable to most acquisitions of Canadian businesses under the ICA. Forsys' January 28, 2009 management information circular also stated that the proposed transaction was not subject to any approval requirement under the ICA and that only a post-closing notice would be filed.

While the parties' initial press release stated that the proposed transaction was expected to close in February 2009, closing was delayed several times to provide GFI with more time to obtain funding. Some recent media coverage reported rumours that GFI might be obtaining funding from a variety of sources, including possibly the government of Iran.

During the period in which GFI was seeking funding, on March 12, the Government of Canada passed legislation amending the ICA to, among other things, introduce a new national security review process. (See "[Amendments to the Investment Canada Act: What Do They Mean For You?](#)" for more detail on these amendments.)

## ICA Notice

On August 19, Forsys issued a cryptic press release indicating that it had been provided with a copy of "an unsolicited letter GFI received last night from Industry Canada... [stating] that GFI is prohibited from implementing the investment pending further notice from Industry Canada". Six days later, Forsys announced the termination of the proposed transaction and stated that "we remain unclear as to the specific concerns Industry Canada has about GFI's proposed investment".

If the proposed transaction was below the general ICA net benefit review threshold, as Forsys previously indicated, the only explanation is that the Minister of Industry invoked the ICA national security review process and issued a letter advising GFI that an order for a national security review of the proposed transaction may be made. A transaction may be subject to a national security review even if it is not subject to a general net benefit review under the ICA. The ICA also provides that a notice of a potential national security review should refer to the relevant provisions of the ICA so that it would be clear that a national security review, not a general net benefit review, is contemplated.

The effect of a notice of a potential national security review in respect of a proposed transaction is that the transaction cannot be completed until a further communication from the Government either advising that a review will not proceed or, if a full review is completed, that approval has been obtained (potentially subject to conditions). As part of a national security review, the Minister may consult with a wide range of government agencies, such as the Canadian Security Intelligence Service, the Department of National Defence, the Department of Foreign Affairs and International Trade, and the Department of Public Safety and Emergency Preparedness.

Proposed regulations setting out the time periods for national security reviews (and a higher \$600 million "enterprise value" net benefit review threshold) were released on July 11, 2009, but are not yet in force. (See "[Draft Investment Canada Act Regulations Provide More Details of New National Security Review Process and General Review Threshold](#)" for more detail.)

Neither the parties nor Industry Canada have confirmed that the national security review process was invoked, or publicly commented on the basis for Industry Canada's concerns. It is possible that the Minister may have intervened to seek assurances that uranium from Forsys' projects is not sold to persons or entities that might pose a threat to Canada's national security. In the event of a national security review, the ICA permits the Minister to require extensive information about the investor's shareholders, officers and directors, and sources of financing, as well as other persons who might be in a position to influence the investor.

## Implications

Whatever the details of this particular case, it is now important to consider potential direct and indirect national security implications for any acquisition of a significant interest in an entity with even part of its operations in Canada if the entity has one or more of (1) a place of operations in Canada, (2) individual(s) in Canada employed or self-employed in connection with such operations, and (3) assets in Canada used in such operations.

While the Canadian Government has no formal process for pre-clearing most transactions for possible national security concerns, in some cases it may be advisable to proactively address possible issues to reduce the risk of a notice from the Minister late in the process that delays or blocks closing.

*If you have any questions regarding the foregoing, please contact [George Addy](#), [John Bodrug](#), [Mark Katz](#), [Richard Elliott](#), [Anita Banicevic](#), [Hillel Rosen](#) or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at 416.863.0900 (Toronto) or 514.841.6400 (Montréal).*

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