Federal Court  Cour fédérale

**Date: 20211207**

**Docket: T-1377-21**

**Citation: 2021 FC 1277**

**Ottawa, Ontario, December 7, 2021**

**PRESENT: THE CHIEF JUSTICE**

**BETWEEN:**

**CHINA MOBILE COMMUNICATIONS GROUP CO., LTD., CHINA MOBILE INTERNATIONAL (CANADA) INC., AND CHINA MOBILE INTERNATIONAL (UK) LIMITED**

**Applicants**

**and**

**CANADA (ATTORNEY GENERAL), MINISTER OF INNOVATION, SCIENCE AND INDUSTRY, AND GOVERNOR GENERAL IN COUNCIL**

**Respondents**

# PUBLIC ORDER AND REASONS

**(Confidential Order and Reasons issued December 3, 2021)**

## I. Introduction

[1] On this Motion, the Applicants seek to stay an Order of the Governor in Council dated August 6, 2021 [the **Remedial Order**] pending the resolution of their underlying Application for judicial review in relation to that Order [the **JR Application**].

[2] To obtain the stay they seek, the Applicants must demonstrate three things: (i) there is a serious issue to be tried; (ii) they will suffer irreparable harm if the stay is not granted; and (iii) they will suffer greater harm if the stay is not granted than the Respondents will suffer if the stay is granted: *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334 [***RJR***]. Given that the Respondents are acting in the interests of the public, the relevant harm on their side of the scales is the harm the general public will suffer if the stay is granted: *RJR*, above, at 342. This balancing exercise is also known as an assessment of *the balance of convenience*.

[3] For the reasons set forth below, I consider that the Applicants have raised a serious issue to be tried. I also find that that they have demonstrated that they will suffer some irreparable harm if the stay they seek is not granted. However, I have concluded that the Applicants have not established that the balance of convenience lies in their favour. Accordingly, they have not satisfied the test to obtain a stay of the Remedial Order. This Motion will therefore be dismissed.

## II. The Parties

[4] The Applicant China Mobile Communications Group Co., Ltd. [**CMCG**] is a Chinese state-owned company that provides mobile communication services, including voice, data, text messaging, roaming and network services, to customers throughout China.

[5] The Applicant China Mobile International (UK) Limited [**CMI UK**] is mainly responsible for the operation of CMCG's international business. CMI UK is a wholly-owned subsidiary of China Mobile International Limited [**CML**], which in turn is a wholly-owned indirect subsidiary of CMCG.

[6] The Applicant China Mobile International (Canada) Inc. [**CMI Canada** or the **Investor**] is the Canadian business that was the subject of the review described below under the *Investment Canada Act*, RSC 1985, c 28 (1st Supp) [**ICA**]. It is a wholly-owned subsidiary of CMI UK. CMI Canada provides data and business support services to CML, as well as mobile communication services, including pre-paid call plans. It sells voice services, voice over IP services, internet services, long distance services and wireless services, with a principal focus on customers with a connection to both China and Canada. Those services are provided primarily pursuant to an agreement with Telus Communications Inc. [**Telus**] and in CMI Canada's capacity of a reseller of Telus' products. In addition, CMI Canada's operations rely on a framework of agreements with certain other Canadian telecommunications companies.

[7] The Respondent Minister of Innovation, Science and Industry [the **Minister**] is responsible for the administration of the ICA and is represented on this Motion by the Attorney General of Canada.

## III. Background

[8] CMI Canada commenced operations in Canada in 2016. As a new Canadian business, it was subject to the notification requirements in Part III of the ICA, summarized below. However, no notification was made under the ICA until after CMI Canada was contacted in late September or early October 2020 by the Director General of the Investment Review Division [**IRD**] of Innovation, Science and Economic Development Canada. Ultimately, CMI Canada filed the required notification on October 13, 2020, approximately four years after it commenced operations in this country.

[9] On January 27, 2021, the Governor in Council [**GiC**] made an Order pursuant to Part IV.1 of the ICA. The provisions in Part IV.1 establish a regime for the review of investments that could be injurious to national security. The Order was issued pursuant to subsection 25.3(1), which specifically provides for the review of investments on that ground.

[10] After two extensions of the prescribed review period, the GiC issued the Remedial Order. Among other things, that Order requires CMCG to either divest itself of its interest in CMI Canada, or wind up CMI Canada within 90 days. That Order was made pursuant to subsection 25.4(1) of the ICA. The national security risks identified in one of the recitals to that Order are:

a) that China Mobile and its subsidiaries and affiliates may be subject to the influence or demands of, or control by, a foreign government;

b) that China Mobile and its subsidiaries and affiliates may disrupt or otherwise compromise Canadian critical telecommunications infrastructure; and

c) that China Mobile and its subsidiaries and affiliates may gain access to highly sensitive telecommunications data and personal information that could be used for non-commercial purposes such as military applications or espionage.

[11] After CMI Canada requested an additional 90 days to wind up its affairs, the Minister extended the deadline for doing so by 30 days, i.e., to December 6, 2021. Following CMI Canada's subsequent request for a further 60 days to comply with the Remedial Order, the Minister extended the deadline to January 5, 2022.

[12] In the meantime, on September 7, 2021, the Applicants filed the JR Application. That Application seeks an Order setting aside the GiC's "decision" that the establishment of CMI Canada's business [the **Investment**] may be injurious to national security [the **Decision**]. In the alternative, it seeks an Order setting aside the Decision and remitting the matter back to the Minister and the GiC for redetermination.

[13] In support of their JR Application, the Applicants maintain that the Minister erred by initiating the review under Part IV.1 of the ICA on the basis of irrelevant considerations unrelated to national security. They further maintain that the Minister and the GiC erred by concluding that the Investment would be injurious to national security, without a sufficient evidentiary basis for reaching that conclusion. Finally, they submit that the GiC erred by making the Decision on the basis of the wrong legal test, namely, that the Investment "may be" injurious to national security rather than that it "would be" injurious to national security, as contemplated by subparagraph 25.3(6)(a)(i) of the ICA.

[14] In the JR Application, and pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [**Rules**], the Applicants requested all of the material relevant to the JR Application that is in the possession of the Minister and the GiC [the **CTR**]. In response, the Respondents sent the Applicants a copy of a letter to the Court signed by the Assistant Clerk of the Privy Council. In brief, that letter explained, pursuant to Rule 318(2), that the material in the CTR consists entirely of confidences of the Queen's Privy Council for Canada and as such cannot be disclosed because of its confidential nature. An accompanying summary of that material states that the information comes within the meaning of paragraphs 39(2)(a), (c) or (d) of the *Canada Evidence Act*, RSC 1985, c C-5 [***CEA***].

[15] Pursuant to subsection 39(1) of the CEA, the disclosure of such information shall be refused without examination or hearing of the information by the Court.

[16] In response to the Respondents' refusal to produce anything in the CTR, the Applicants advised the Respondents and the Court of their intention to challenge the claim for privilege that was made under section 39 of the CEA. Their Motion in this regard will be heard on January 19, 2022.

## IV. Relevant Legislation

[17] The ICA is the primary mechanism for reviewing foreign investments in Canada. The purposes of that legislation are set forth in section 2, which states as follows:

| **Purpose of Act** | **Objet de la loi** |
|---|---|
| **2** Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security. | **2** Étant donné les avantages que retire le Canada d'une augmentation du capital et de l'essor de la technologie et compte tenu de l'importance de préserver la sécurité nationale, la présente loi vise à instituer un mécanisme d'examen des investissements importants effectués au Canada par des non-Canadiens de manière à encourager les investissements au Canada et à contribuer à la croissance de l'économie et à la création d'emplois, de même qu'un mécanisme d'examen des investissements effectués au Canada par des non-Canadiens et susceptibles de porter atteinte à la sécurité nationale. |

[18] Pursuant to Part IV of the ICA, investments by non-Canadians that exceed certain financial thresholds are automatically reviewable. That Part of the ICA is not relevant to this Motion.

[19] Pursuant to Part III of the ICA, other investments are merely "notifiable." Those investments include the establishment of a new Canadian business: ICA, s. 11.

[20] Notification of the establishment of a new Canadian business must be made at any time prior to the implementation of the investment or within thirty days thereafter: ICA, s. 12.

[21] One of the purposes of the notification regime is to provide the Minister with the opportunity to consider whether a notified investment could be injurious to national security. If, after consultation with the Minister of Public Safety and Emergency Preparedness [**MPSEP**], the Minister reaches an affirmative decision in that regard, he may recommend to the GiC that it make an Order for the review of the investment: ICA, s. 25.3(1).

[22] After reviewing the investment and consulting again with the MPSEP, the Minister is required to refer the investment to the GiC, together with a report of the findings and recommendations on review, in two circumstances. Those are (i) where the Minister is satisfied that the investment would be injurious to national security, and (ii) where the Minister is not able to make that determination on the basis of the information available: ICA, s. 25.3(6)(a). If the Minister is satisfied that the investment would not be injurious to national security, the Minister

must send a notice to the investor advising that no further action will be taken with respect to the investment: ICA, s. 25.3(6)(b).

[23] On the referral of an investment under paragraph 25.3(6)(a), the GiC may, by Order and within the prescribed period, take any measures in respect of the investment that it considers advisable to protect national security: ICA, s. 25.4(1).

[24] The full text of the provisions discussed above is provided in Appendix 1 to these reasons.

## V. Analysis

[25] As stated at paragraph 2 above, to be successful on this motion, the Applicants must demonstrate the following three things: (i) there is a serious issue to be tried; (ii) they will suffer irreparable harm if the stay they are seeking is not granted; and (iii) the harm they will suffer if the stay is not granted will be greater than the harm that will be suffered by the general public if the stay is granted. Even if the Applicants establish each of these three elements, the Court retains the discretion to decline to grant the stay: *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 22 [***Google***]; *Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at para 37; *Federal Courts Act*, RSC 1985, c F-7, s. 18.2.

[26] Consistent with the equitable nature of the interlocutory stay remedy, the ultimate focus of the Court's assessment must be on whether granting the injunction would be "just and

equitable in all of the circumstances of the case": *Google* , above, at paras 1, 23, and 25. In making this determination, the Court should adopt a flexible approach and avoid treating the three parts of the test as watertight compartments: *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at para 38; Robert Sharpe, *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Carswell, 2018), at § 2.600.

A. *Serious Issue to be Tried*

[27] The threshold to determine whether there is a serious issue to be tried is low. In brief, the Court must simply be satisfied that the issues raised are neither vexatious nor frivolous: *RJR* at 335.

[28] The Applicants submit that the JR Application raises two serious issues to be tried. First, they maintain that there is a serious question as to whether the Minister and the GiC applied the appropriate statutory test in taking their respective actions in connection with the Remedial Order. Second, they assert that there is a serious question as to whether the Minister and the GiC were influenced by irrelevant considerations, and were therefore biased.

[29] Concerning the first issue, the Applicants rely on the summary of the Minister's findings and recommendations that was included in one of the recitals in the Remedial Order: see paragraph 10 above. They maintain that it suggests that the Minister may have referred the investment to the GiC based solely on concerns about what CMI Canada **may** do. However, pursuant to paragraph 25.3(6)(a) of the ICA, an investment can only be referred to the GiC if the Minister is satisfied that it **would** be injurious to national security, or if the Minister is not able to

make that determination based on the information available. Consequently, the Applicants suggest that an important statutory condition precedent to the exercise of the GiC's powers in issuing the Remedial Order may not have been satisfied.

[30] In response, the Respondents maintain that the Applicants have not raised a serious issue in this regard because one of the recitals in the Remedial Order explicitly stated that the Minister did in fact meet the statutory test set forth in paragraph 25.3(6)(a). That recital stated that, after consideration of all of the information collected and all of the representations made during the course of the review and after consultation with the MPSEP, the Minister was "satisfied that the investment – **by posing the following risks** – would be injurious to national security…" [emphasis added].

[31] Notwithstanding the fact that the Remedial Order states that the Minister was satisfied that the investment **would** be injurious to national security, I consider that the issue raised by the Applicants is serious. This is because each of the "risks" that were then identified in the Remedial Order were articulated in terms of what CMCG and its subsidiaries and affiliates **may** do, because they "**may** be subject to the influence or demands of, or control by, a foreign government" [emphasis added]. Ultimately, the Court may determine that the Minister can be satisfied that an investment **would be** injurious to national security, based on justified concerns about risks that are best described as possibilities, rather than likelihoods. However, at this point in time, I find that this is neither a frivolous nor a vexatious issue.

[32] Accordingly, the Applicants have met the low threshold for demonstrating a serious issue to be tried.

[33] Although this finding provides a sufficient basis upon which to move to the second part of the test for a stay, I will address the second serious issue advanced by the Applicants. This is because it is intimately linked to their submissions with respect to the balance of convenience.

[34] The second serious issue raised by the Applicants is that the Minister and the GiC were influenced by irrelevant considerations, and were therefore biased in their decision-making. They base this allegation on two grounds: (i) their view that there is nothing to explain how the Minister and the GiC could have arrived at the conclusion that the investment **would be** injurious to national security; and (ii) the political climate that prevailed at the time. Relying on this Court's decision in *Adriaanse v Malmo-Levine*, 1998 CanLII 8809, 161 FTR 25 (FC) [***Adriaanse***], at paragraph 25, they maintain that allegations of bias always constitute serious issues.

[35] In response, the Respondents state that the allegation of bias is a bald assertion, entirely speculative and therefore without merit.

[36] I agree. The Applicants' reliance on *Adriaanse* is misplaced, as there was affidavit evidence filed in the underlying application for judicial review to support the allegation of a reasonable apprehension of bias: *Adriaanse*, above, at paras 11–12 and 19. In the absence of **some** evidence that could provide the basis for a finding of a reasonable apprehension of bias in

the JR Application, a bald allegation, without more, will not suffice to meet even the low threshold for establishing a serious issue to be tried. Were it otherwise, applicants would always be able to satisfy that threshold by merely alleging bias. As this Court has underscored in the past, "… not every allegation of bias, which is said to be the basis of [an] underlying application for judicial review, gives rise to a serious issue either for a hearing on the merits or for the purposes of a stay motion": *Couchiching First Nation v Baum*, 2010 FC 322 at para 17.

[37] In brief, in the absence of any evidence that could provide the basis for a finding of a reasonable apprehension of bias in the JR Application, I consider that the bare allegation of bias is not sufficient to constitute a serious issue to be tried.

[38] I will pause to observe that I agree with the Respondents that the evidentiary record does provide some support for the concerns that were identified by the Minister and that were identified in the Remedial Order: see paragraph 10 above. I will address some of that evidence in part C. of these reasons below.

B. *Irreparable Harm*

[39] The term "irreparable" connotes the nature of the harm suffered, rather than the magnitude of that harm. "It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR*, above, at 341.

[40] To satisfy this element of the test, "the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied": *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7 [***US Steel***]. Stated differently, "the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later": *Janssen Inc. v Abbvie Corporation*, 2014 FCA 112 at para 24; *Western Oilfield Equipment Rentals Ltd v M-I L.L.C.*, 2020 FCA 3 at para 11 [***Western Oilfield***]. Absent such evidence, this element of the test will not be met: *US Steel* at para 13.

[41] The Applicants state that they will suffer irreparable harm if CMCG is required to divest its indirect interest in CMI Canada or to wind up CMI Canada prior to the determination of the JR Application. I agree.

[42] The Applicants must comply with the Remedial Order, which requires the above-mentioned divestiture or wind-up, by January 5, 2022. It is common ground between the parties that they will not be in a position to proceed with the JR Application before that time.[1]

[43] The irreparable harms that the Applicants state they will suffer in the absence of a stay of the Remedial Order include the following:

i. The loss of their entire Canadian client base and the costs associated with terminating their customer agreements;

[1] Among other things, the Applicants require a determination on their preliminary motion challenging the Respondents' claim for privilege in respect of the materials that were before the GiC when it issued the Remedial Order. The Respondents represented that they will not be in a position to proceed with that Motion prior to January 19, 2022, when that Motion will be heard.

ii. The loss of CMI Canada's licence for the provision of basic international telecommunications services [**BITS Licence**] ;

iii. The loss of all of its [redacted] Canadian employees;

iv. Reputational damage from allegations concerning national security; and

v. Forgone revenues and costs associated with the winding-up.

[44] The Respondents maintain that the Applicants' claims in this regard are not sufficient for the purposes of this Motion because they are merely bald assertions, unsupported by any evidence. They underscore that in the cases relied upon by the Applicants in support of their claims, the moving party seeking a stay filed evidence to support its claims of financial harm: *Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 2 at paras 25 and 39 [***Kobo***]; *Danone Inc. v Canada (Attorney General)*, 2009 FC 44 at paras 2(c) and 64. See also *Western Oilfield*, above, at paras 10–24.

[45] Despite the absence of any evidence from any officer, executive or employee of the Applicants, there is **some** evidence to support the Applicants' claims of irreparable harm. This is the Remedial Order itself, which requires CMCG to divest its indirect interest in CMI Canada or to wind up CMI Canada. It can be logically inferred that abiding by this requirement will result in at least some of the harms listed at paragraph 43 above, namely, the loss of CMI Canada's entire client base, the loss of all of its employees, forgone revenues that cannot be recovered and the need to incur at least some irretrievable costs associated with compliance with the Remedial Order. These types of harms have long been recognized as cognizable forms of irreparable harm: *TPG Technology Consulting Ltd. v Canada (Public Works and Government Services)*, 2007 FCA 219 at paras 21–23, citing *RJR*, above, at 341. See also *RJR*, above, at 342.

[46] It bears underscoring that it is the nature of the harm, rather than its magnitude, that is important for the purposes of the Court's assessment of this second prong of the tri-partite test for an interlocutory stay. Nevertheless, the fact that there is no evidence before the Court, beyond the Remedial Order itself, regarding the magnitude, extent or other specifics of the various harms identified by the Applicants is something that is relevant for the assessment of the third prong of the test, discussed below.

[47] The Respondents maintain that the types of harms identified by the Applicants ought not to be accepted as cognizable types of irreparable harm because those harms all flow from the fact that CMI Canada has been operating in Canada for several years without complying with its legal obligations under the ICA. The Respondents assert that the Applicants should not be permitted to now benefit from such non-compliance with the law.

[48] I am sympathetic to this position. However, this is an equitable consideration that is more appropriately considered later in the analysis, either in connection with the balance of convenience or in the ultimate assessment of whether granting the stay would be just and equitable in all of the circumstances: see e.g., *David Hunt Farms Ltd. v Canada (Minister of Agriculture)*, [1994] 2 FC 625, [1994] FCJ No 164 (CA) at para 24; *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, 2011 SKCA 120 at para 113(c).

[49] In summary, for the reasons set forth above, I consider that the Applicants have established that they are likely to suffer irreparable harm if the stay they seek is not granted. Accordingly, I will proceed to the assessment of the balance of convenience.

C. *The Balance of Convenience*

[50] This stage of the assessment requires the Court to consider "… which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR*, above, at 342. In the course of its consideration, "the interest of the public must be taken into account" and can be invoked by either party: *RJR*, above, at 348.

[51] Where a public authority is enforcing validly enacted legislation, "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action": *RJR*, above, at 346. Moreover, that harm often will weigh heavily in the balance: *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 52. This includes where the stay sought will effectively suspend the application of the ICA to the party seeking the stay: *US Steel*, above, at para 23.

[52] Where it appears that the harms alleged by the moving and responding parties are roughly balanced, prudence may dictate the preservation of the *status quo*. However, there are certain situations in which this approach would not be appropriate: *RJR*, above, at 347. These include when one party "has already embarked upon the course of conduct of which the [other party] complains": ***Sharpe***, above, at § 2.550.

[53] The Applicants submit that the balance of convenience favours them for four principal reasons:

i. the extent of the irreparable harm they have alleged they will suffer;

ii. the public interest in not diminishing the effectiveness and meaningfulness of the judicial review process;

iii. avoiding the prejudice to the Applicants that would result from the Respondents' various actions that have undermined the Applicants' efforts to expedite these proceedings; and

iv. the Respondents' own actions in connection with this matter reflect that there is no particular urgency associated with the remedies they are seeking to enforce.

[54] I will address each of these submissions below before turning to the harm to the public interest that the Respondents assert will arise if a stay of the Remedial Order is granted.

[55] However, I consider it appropriate to reiterate that the Applicants have not provided any evidence from an officer, executive, employee or expert regarding those harms. In the absence of clear and non-speculative evidence of such harms, the weight that they merit in the overall balance of convenience analysis is significantly less than would otherwise be the case. Nothing turns on this, as I have concluded that the balance of convenience would, in any event, favour the Respondents.

(1) The irreparable harm to the Applicants

[56] The irreparable harms identified by the Applicants are listed at paragraph 43 above.

[57] With respect to the loss of the Applicants' Canadian client base, the Respondents make two observations. First, they state that it can readily be inferred from information provided by CMI Canada that those customers would return to the Applicants, should they prevail in the JR Application and then re-establish operations in Canada. In particular, in response to one of the questions posed by the IRD, CMI Canada stated as follows:

[58] I agree with the Respondents that the foregoing passage suggests that CMI Canada's customers would appear to have an incentive to return to CMI Canada if it restarts operations in Canada at some point in the future. However, it is by no means clear how quickly that would occur. Consequently, I am prepared to give this consideration some weight in assessing the balance of convenience, but not as much as would otherwise be the case (i) in the absence of this incentive, and (ii) if CMI Canada had provided detailed, concrete evidence regarding this irreparable harm.

[59] Turning to the loss of CMI Canada's BITS Licence, the Applicants have provided no evidence regarding the difficulties, delays and uncertainties, if any, that would be associated with reapplying for such a licence, in the event they are successful on the JR Application. In the absence of such evidence, it is very difficult to have a sense of the significance of this particular harm.

[60] Regarding the loss of CMI Canada's [redacted] employees, the Respondents note that the Applicants have not provided any evidence as to their prospects for obtaining employment elsewhere in CMCG's network of affiliated companies, or with respect to the difficulties or costs that would be associated with hiring new employees. I agree with the Respondents that this reduces the weight that this alleged harm might otherwise merit in the present analysis.

[61] With respect to the reputational harm identified by CMI Canada, the Respondents submit that the principal harm to the Applicants has already been suffered as a result of the news reports that have circulated with respect to the issuance of the Remedial Order. However, it is reasonable to infer that the Applicants will suffer other reputational harm due to the implementation of the Remedial Order. In addition to inconveniencing customers, it may well make some of them less inclined to do business with the Applicants in the future. Nevertheless, it is also reasonable to expect that a significant number of CMI Canada's existing customers will return if CMI Canada or another affiliate of CMCG is permitted to operate in Canada following the determination of the JR Application. This is particularly so given the [redacted] referred to in the passage quoted at paragraph 57 above. Accordingly, while I accept that the failure to grant a stay of the Remedial Order will give rise to some reputational harm for the Applicants, I consider that it is

less than what the Applicants have claimed. Stated differently, the weight that this category of harm merits in the balance of convenience analysis is less than what would otherwise be the case, particularly given that the Applicants have not provided any clear and non-speculative evidence to support their claims.

[62] I will now turn to the revenues that the Applicants assert they will lose and be unable to recover if the stay they seek is not granted.

[63] The absence of any evidence from the Applicants makes this category of harm especially difficult to weigh at this stage of the analysis. To begin, if the Applicants choose the divestiture option, rather than the wind-up option, it is not immediately apparent why the future value of CMI Canada's revenues would not be reflected in the divestiture price. In any event, even in the wind-up scenario, the record before the Court suggests that revenues lost by the Applicants may well be much less than they claim.

[64] According to information provided by the Applicants to the IRD in 2020, CMI Canada's total revenue in 2019 was $ [redacted]. However, approximately [redacted]% of that revenue was generated from sales of services to an affiliated holding company. This is broadly consistent with past years, when the majority of CMI Canada's revenue was generated from such services. The same trend was expected in 2020. Consequently, the loss of CMI Canada's revenues will likely be accompanied by a significantly offsetting decline in the expenses of the affiliate mentioned immediately above. Regarding CMI Canada's sales to other customers, they appear to relate largely to the resale of mobile SIM cards and prepaid rate plans. As discussed above, it is

reasonable to expect that some portion of CMI Canada's customers would return to it (or to any other entity that might be established in Canada by the other Applicants), should the Applicants prevail on the JR Application. In the absence of any evidence from the Applicants on these or related issues, they have not met their burden of providing clear and non-speculative evidence regarding the extent of the revenues that they will lose if the stay is not granted and they are ultimately successful on the JR Application. Therefore, I consider it appropriate to significantly discount the weight accorded to this category of harm.

[65] The same is true with respect to the costs associated with terminating contracts and winding up CMI Canada. In the absence of any evidence whatsoever regarding the extent of those costs, it is very difficult to give them more than a small weighting in the balance of convenience assessment.

[66] In summary, I consider it to be appropriate to give some weight to the irreparable harms that the Applicants have identified. However, without clear and non-speculative evidence to support those harms in a detailed and concrete way, it is very difficult to have a good sense of the extent to which those harms will actually be suffered. Accordingly, the weight those alleged harms merit in the overall balancing of convenience analysis is less than it would be if such evidence had been provided. This is so even for the **types** of harms that can logically be inferred, such as the loss of CMI Canada's entire client base, the loss of its employees, foregone revenues that cannot be recovered and the need to incur at least some unrecoverable costs associated with compliance with the Remedial Order.

(2) The public interest considerations advanced by the Applicants

[67] The Applicants submit that the public interest favours a stay of the Remedial Order for three reasons. First, they maintain that the effectiveness of the judicial review process will be diminished if the stay is not granted. This is because they will suffer irreparable harm. In turn, they assert that this will frustrate the will of Parliament, which explicitly preserved the right of judicial review in respect of decisions made under Part IV.1 of the ICA: ICA, s. 25.6.

[68] The short answer to this argument is that it will not assist the Applicants if they are not able to establish that the balance of convenience otherwise favours them. Any irreparable harm that the Applicants are able to establish they will suffer if the requested stay is not granted can only be counted once.

[69] It is well established that the diminished effectiveness of judicial review in the absence of a stay is not an independent basis for granting the stay. This is so even if the failure to grant the stay renders the JR Application moot: *Novopharm Limited v Pfizer Canada Inc.*, 2010 FCA 258 at para 12; *US Steel*, above, at para 17; *Canadian Society of Immigration Consultants v Canada (Citizenship and Immigration)*, 2011 FC 669 at para 31.

[70] Of course, in the present context, my refusal to grant the stay would not render the JR Application moot. Contrary to the jurisprudence relied upon by the Applicants, it is not the case that their failure on this Motion will have a profound adverse impact on the usefulness of the JR Application: *Kobo*, above, at para 48.

[71] The second reason why the Applicants assert that the public interest favours a stay of the Remedial Order is because there is a public interest in determining the important issues that have been raised in the JR Application. I accept that the public interest in having important issues decided before an underlying application for judicial review (or an appeal) becomes significantly less meaningful may in some cases weigh in favour of a stay: *Tervita Corporation v Commissioner of Competition*, 2012 FCA 223 at para 19. However, the weight that consideration will merit, relative to the harm(s) advanced by the opposing party, will be a factor to be determined on the particular facts of each case.

[72] In the present context, that weight is not large. This is in part because the JR Application will continue to have very meaningful potential consequences for the Applicants. Among other things, it may ultimately enable them to re-establish their Canadian business and to reverse much of the harm they now allege will be irreparable. In any event, as described below, the public interest considerations identified by the Respondents merit much greater weight than this particular public interest identified by the Applicants.

[73] The third public interest consideration advanced by the Applicants concerns the bias argument discussed at paragraphs 34–38. In this regard, the Applicants state that it is not in the public interest to subject parties to a proceeding that may be void on account of a reasonable apprehension of bias. However, the jurisprudence upon which they rely is distinguishable. In particular, in *Adriaanse*, there was affidavit evidence filed to support the allegation of a reasonable apprehension of bias: *Adriaanse*, above, at paras 11–12 and 19. No such evidence has been filed here. Therefore, I am not prepared to give this “public interest” consideration any

weight, particularly given that the Respondents have provided evidence to support the harms to the public interest they are alleging in this Motion.

[74] In summary, for the reasons set forth above and below, I find that two of the public interest considerations advanced by the Applicants do not merit significant weight in the balance of convenience analysis, while the third merits weight that is not large, relative to the public interest considerations relied upon by the Respondents.

(3) Avoiding the prejudice to the Applicants that would result from various actions of the Respondents

[75] The Applicants assert that a factor in their favour in assessing the balance of convenience is that they would end up being prejudiced by various actions of the federal government if the stay they are seeking is not granted. In particular, they maintain that their efforts to expedite the hearing of the JR Application have been significantly delayed by the Respondents' assertion of privilege under section 39 of the CEA: see paragraph 14 above. They also assert that the Respondents repeatedly refused to respond to their requests for a stay of the Remedial Order, on consent, pending the determination of the JR Application.

[76] The Respondents did not significantly delay in asserting privilege pursuant to section 39 of the CEA. They did so three weeks after the JR Application was filed. Unless and until that assertion of privilege is found to have been entirely or partially unfounded, any delays associated with it ought not to be weighed against the Respondents in assessing the balance of convenience in this Motion.

[77] The Respondents' silence in the face of repeated requests to consent to a stay of the Remedial Order appears to have lasted approximately six weeks, i.e., from September 29, 2021 to November 9, 2021. At that time, the Respondents advised that the terms of the Remedial Order do not provide the Minister with the authority to extend the timeline for compliance for reasons other than those set forth in the Order. Those reasons are confined to CMCG's inability to divest itself, or wind up, CMI Canada's business, despite acting in good faith. Given the novelty associated with the legal issues raised by the Applicants' requests for a stay of the Remedial Order on consent, some delay in responding to those requests is understandable. However, I agree with the Applicants that a six-week delay was somewhat excessive in the circumstances.

[78] Nevertheless, this delay ultimately did not contribute to delaying the scheduling of either the JR Application or, indeed, the Motion contesting the Respondents' assertion of privilege under section 39 of the CEA. That Motion is in the process of being scheduled to be heard on January 19, 2022 and it is common ground between the parties that the hearing of the JR Application ought not be scheduled until after a determination on the privilege Motion has been made. Consequently, I do not consider that the Respondents' delay should be weighed against them in assessing the balance of convenience.

(4) The alleged absence of any pressing need to implement the Remedial Order

[79] The Applicants submit that the Respondents' conduct reflects that there is no pressing need for the Remedial Order to be implemented prior to a determination of the JR Application. Specifically, the Applicants assert that the Minister took every extension possible over the course

of the review of the Investment and then agreed to grant two extensions under the Remedial Order. In addition, they maintain that CMI Canada has been operating in this country without any issue for years.

[80] In my view, these considerations do not assist the Applicants in the balance of convenience assessment. There is no evidence to suggest that the various extensions to the Minister's review that were taken unilaterally or on consent were not legitimately required for the purposes of the Minister's review. In this regard, I note that the IRD sent three separate requests for information to the Applicants between October 15, 2020 and January 28, 2021, when the Minister advised the Applicants the Remedial Order had been made. A fourth information request was then made on March 23, 2021. After responses were provided on April 13, 2021, the Applicants consented to extend the review period to July 12, 2021. The Applicants were then asked to provide further information, which was submitted on June 17, 2021. The timing of these various exchanges does not suggest that the Respondents were not being diligent in progressing their review of the Investment.

[81] The Remedial Order was issued seven weeks later, on August 6, 2021. Given the nature of the Minister's national security concerns, that seven-week period was not excessive. Stated differently, that period is not so long as to warrant being weighted against the Respondents in assessing the balance of convenience.

[82] Turning to the Minister's partial acquiescence to the Applicants' two requests for an extension of time in which to comply with the Remedial Order, I do not consider that this should count against the Minister in assessing the balance of convenience.

[83] Likewise, in the particular circumstances of this case, the fact that the Applicants may have operated in Canada for several years without any apparent issue is not something that should be counted either against the Respondents or in the Applicants' favour in assessing the balance of convenience. Importantly, those circumstances include the fact that CMI Canada was established in 2015, obtained its BITS licence shortly thereafter, and then began operating in Canada in contravention of the ICA sometime in late 2016. Yet, it did not provide a notification under Part III of that legislation until October 2020, after the IRD began to make inquiries. This will be further discussed below.

[84] I pause to observe that given the nature of the Minister's national security concerns, it would be difficult to establish that CMI Canada has in fact been operating in Canada "without any issue" since it began operations in this country.

(5) Summary regarding the considerations in favour of the Applicants

[85] In summary, there are some considerations that weigh in favour of the Applicants in the assessment of the balance of convenience. Those considerations consist of (i) a portion of the irreparable harm that the Applicants will suffer if the stay they are requesting is not granted, and (ii) the public interest in resolving the serious issue that I have found has been raised by the Applicants, before a Canadian business is forced to wind up or be divested. However, for the

reasons I have provided, the weight that these considerations merit in assessing the balance of convenience is significantly less than what the Applicants have claimed.

(6) The alleged harm to the public interest

[86] The Respondents submit that in their capacity as public authorities who were enforcing validly enacted legislation when they took the actions that are at the heart of this Motion, they benefit from the principle that "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action": *RJR*, above, at 346. They add that this harm should weigh heavily in the balance: see paragraph 51 above. For greater certainty, they maintain that the Applicants have not established any offsetting public benefit.

[87] I agree. One of the purposes of the ICA is to provide for the review of investments in Canada by non-Canadians that could be injurious to national security: ICA, s. 2. This provides a sufficient basis upon which to conclude that the ICA "is directed to the public good and services a valid public purpose": *US Steel*, above, at para 23. It is also sufficient to trigger the principle that actions taken to enforce the ICA ought to weigh heavily in the balance: *US Steel*, above, at para 23.

[88] Beyond their reliance on the foregoing principles, the Respondents have provided some evidence to justify their concerns regarding CMI Canada's facilitation of espionage and foreign interference activities in Canada by the People's Republic of China [**PRC**]. They begin by underscoring that CMI Canada "is ultimately owned and controlled by the government of the PRC, a foreign entity posing a strategic threat to Canada and carrying out activities detrimental to the national security and economic prosperity of Canada and other likeminded countries."

[89] The indirect control of CMI Canada by the PRC is confirmed in the notification that CMI Canada filed with the IRD in October 2020. That indirect control is exercised through the state-owned Assets Supervision & Administration Commission, which controls CMCG.

[90] Regarding the basis for their concerns about the PRC's indirect influence over CMI Canada, the Respondents rely on several third party sources of evidence. In particular, they refer to the Canadian Security Establishment's 2020 report entitled *National Cyber Threat Assessment* [the **CSE Report**]: Respondent's Motion Record, Tab D. In the Foreword to that report, the Minister of National Defence stated: "Foreign state-sponsored cyber programs are probing our critical infrastructure for vulnerabilities." The Minister added: "… the Internet is at a crossroads, with countries like China and Russia pushing to change the way it is governed, to turn it into a tool for censorship, surveillance, and state control." In the Executive Summary of the report, the following passage appears:

> **While cybercrime is the most likely threat, the state-sponsored programs of China, Russia, Iran, and North Korea pose the greatest strategic threats to Canada.** State-sponsored cyber activity is generally the most sophisticated threat to Canadians and Canadian organizations.
>
> [Emphasis in original.]

[91] The foregoing concern is then discussed at greater length at page 11 of the CSE Report.

[92] The Respondents also refer to the Canadian Security Intelligence Service's 2020 public report entitled *A Safe, Secure and Prosperous Canada Through Trusted Intelligence and Advice*

[the **CSIS Report**]: Respondent's Motion Record, Tab I. The following passage appears at page 22 of that report:

> Canadian interests can be damaged by espionage activities through the loss of sensitive and proprietary information or leading-edge technologies, and through the unauthorized disclosure of classified and sensitive government information. While federal, provincial, and municipal levels of Canadian government are of interest, **foreign states such as the People's Republic of China and Russia also target non-governmental organizations in Canada** — including academic institutions, the private sector, and civil society. **In 2020, the People's Republic of China, Russia, and other foreign states continued to covertly gather political, economic, and military information in Canada through targeted threat activities in support of their own state development goals. To accomplish this, these states take advantage of the collaborative, transparent, and open nature of Canada's government, economy and society, often using "non-traditional collectors"** including those with little to no formal intelligence training — such as researchers, private entities, and other third parties — to collect information and expertise of value on behalf of the state.
>
> Foreign governments also continue to use their state resources and their relationships with private entities to conduct clandestine, deceptive, or threatening foreign interference activities in Canada. In many cases, these clandestine influence operations are meant to support foreign political agendas or to deceptively influence Government of Canada policies, officials, or democratic processes. **An example of significant concern are activities by threat actors affiliated with the People's Republic of China that seek to leverage and exploit critical freedoms that are otherwise protected by Canadian society and the Government in order to further the political interests of the Communist Party of China.**
>
> [Emphasis added.]

[93] In addition to the foregoing, the Respondents refer to a speech by the Director of the Canadian Security Intelligence Service [**CSIS**], dated February 9, 2021: Respondent's Motion Record, Tab J – *Remarks by Director David Vigneault to the Centre for International*

*Governance Innovation* [the **CSIS Director's Speech**]. At pages 6 and 7 of that speech, Mr. Vigneault stated:

> It is no secret that **we are most concerned about the actions by the governments of countries like Russia and China** …
>
> ….
>
> To be clear, the threat does not come from the Chinese people, **but rather the Government of China that is pursuing a strategy for geopolitical advantage on all fronts – economic, technological, political, and military – and using all elements of state power to carry out activities that are a direct threat to our national security and sovereignty.** We all must strengthen our defences.
>
> [Emphasis added.]

[94] Beyond the domestic sources referred to above, the Respondents also refer to a Memorandum Opinion and Order released by the United States Federal Communications Commission on May 10, 2019: Respondent's Record, Tab L [the **FCC Decision**]. The opening paragraph of that decision states:

> China Mobile International (USA) Inc. (China Mobile USA) is ultimately owned and controlled by the People's Republic of China (Chinese government). In this Memorandum Opinion and Order (Order), we deny China Mobile USA's application for a section 214 authorization to provide international telecommunications services between the United States and foreign destinations. **After reviewing the record evidence in this proceeding, we find that due to a number of factors related to China Mobile USA's ownership and control by the Chinese government, grant of the application would raise substantial and serious national security and law enforcement risks that cannot be addressed through a mitigation agreement.** Therefore, grant of this application would not be in the public interest.
>
> [Emphasis added. Footnotes removed.]

[95] Of particular relevance to the present Motion is the following passage regarding China Mobile USA's vulnerability to exploitation, influence and control by the Chinese government:

> 19. In sum, we find China Mobile USA's argument that it is not susceptible to exploitation, influence, and control by the Chinese government because it is incorporated and based in the United States to be unpersuasive. The record does not provide any basis for the contention that China Mobile would not be treated similarly to other Chinese state-owned enterprises or that China Mobile USA itself, as a subsidiary of China Mobile, would not be subject to such control. Indeed, there is substantial risk that the Chinese government would exert even greater control over China Mobile and China Mobile USA than over other state-owned enterprises given the Chinese government's 100% ownership of China Mobile, the size and reach of China Mobile and its subsidiaries, and the importance of and opportunities afforded by the telecommunications services offered both within China and globally. In light of these findings, **we conclude that China Mobile USA would, if granted the authority it seeks, be highly likely to succumb to exploitation, influence, and control by the Chinese government.**
>
> [Emphasis added. Footnote removed.]

[96] For the record, I note that the Respondents referred to an additional publication by CSIS, which was included at Tab H of their Motion Record. That publication set out the views expressed by experts from around the world at a workshop held on March 6, 2018. However, the identity of the persons expressing the various views was not provided. For the purposes of this Motion, I do not consider it appropriate to rely on any information contained in that publication: *Canada (Privacy Commissioner) v Facebook, Inc.*, 2021 FC 599 at para 36.

[97] The Respondents also submitted that "the PRC's suite of national security laws ensures that China Mobile, and its subsidiaries, such as CMI Canada, must comply with requests to support Beijing's intelligence requirements." In support of this, they rely on the FCC Decision,

which accepted that "Chinese law requires citizens and organizations, including state-owned enterprises, to cooperate, assist, and support Chinese intelligence efforts wherever they are in the world": FCC Decision at para 17. However, the Respondents have not adduced any expert evidence to support their position regarding Chinese law. Therefore, I will refrain from relying on this aspect of the Respondents' submissions: *International Air Transport Association v Canada (Transportation Agency)*, 2020 FCA 172 at para 14. Given the Chinese Government's indirect control over CMI Canada, it is unnecessary to make any findings regarding Chinese law, for the purposes of this Motion. My conclusion in this regard is reinforced by the fact that CMI Canada's two directors, its senior executive, and two of its four other highest paid employees are Chinese citizens.

[98] In response to the evidence adduced by the Respondents, the Applicants maintain that CMI Canada (i) does not own or operate any telecommunications transmission facilities in Canada, (ii) does not have privileged or direct access to any critical telecommunications infrastructure, (iii) does not have access to any telecommunications data, and (iv) does not have access to personal information, other than basic, non-verified, and limited contact information (name, email address, delivery address) as well as payment information.

[99] However, in my view, the CSE Report, the CSIS Report, the CSIS Director's Speech and the FCC Decision provide reliable, objective support for the public interest harms identified by the Respondents. I will deliberately refrain from commenting upon whether that evidence demonstrates that the CMI Canada's continued operation in Canada "would be" injurious to Canada, as contemplated by subparagraph 25.3(6)(a)(i) of the ICA. That is a matter to be

addressed in the JR Application. However, for the purposes of this Motion, I consider that this evidence provides sufficient substantiation for the Respondents' allegations concerning CMI Canada's facilitation of espionage and foreign interference activities in Canada by the PRC.

[100] It bears underscoring that, in assessing the balance of convenience, the Supreme Court of Canada has cautioned that courts should refrain from attempting to ascertain whether harm to the public interest that has been identified by a public authority would actually result from the granting of injunctive relief. The Court explained that such an approach "… would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of action would therefore not harm the public interest": *RJR*, above, at 346.

[101] In addition to the foregoing, it is relevant to note that all personal and commercially sensitive information belonging to CMI Canada's customers is stored in a data centre located in Hong Kong, where it can be stored for up to six years after the year to which the data pertains. This is confirmed in the Applicants' Motion Record, at page 118.

[102] In summary, for the various reasons set forth above, I find that the Respondents have provided reliable, objective support for the public interest harms they have identified. Those harms are serious and deserving of substantial weight in assessing the balance of convenience.

(7) Conclusion with respect to the balance of convenience

[103] The Applicants have established that they will suffer some irreparable harm if the stay they seek is not granted and they ultimately prevail on the JR Application. This harm includes the permanent loss of some of CMI Canada's customers, employees and revenues. It also includes some reputational harm and the loss of CMI Canada's BITS Licence. However, in the absence of clear and non-speculative evidence to support the irreparable nature of those harms in a detailed and concrete way, it is very difficult to have a good sense of the extent to which those harms will actually be suffered if the stay is not granted. Accordingly, the weight those alleged harms merit in the overall balancing of convenience analysis is less than it would be if such evidence had been provided.

[104] I am also prepared to accord some weight to the public interest in resolving the serious issue that I have found has been raised by the Applicants, before a Canadian business is forced to wind up or be divested.

[105] I find that, in aggregate, the weight that the foregoing considerations merit on the Applicants' side of the scales is much less than the substantial weight that I have accorded to the serious public interest harms that the Respondents have identified and established with reliable, objective evidence. Stated differently, the public harms associated with the PRC's opportunity to use its indirect control over CMI Canada to facilitate espionage and foreign interference activities in Canada are significantly greater than the harm that the Applicants have established they will suffer if the stay they seek is not granted.

[106] This provides a sufficient basis upon which to conclude that it would be "just and equitable in all of the circumstances of the case" to refuse to issue the stay sought by the Applicants: see paragraph 26 above.

[107] However, for the record, a further equitable consideration that favours the Respondents on this Motion is that CMI Canada operated for several years in contravention of the ICA. Despite seeking its BITS licence in 2015 and then commencing operations in 2016, CMI Canada did not provide a notification under Part III of the ICA until October 2020, notwithstanding that it was required to do so before commencing operations, or within 30 days thereafter. The fact that the Applicants may not have been aware of the requirements of the ICA is no excuse, particularly considering that CMCG is a large, sophisticated entity with expert legal counsel. The same is true with respect to the Applicants' contention that aspects of their activities were a matter of public record. Likewise, the fact that the ICA contemplates that a company may operate in Canada after it has provided a notification and until it is required to stop does not assist CMI Canada, as it has only been in this position since October 13, 2020.

D. *Conclusion*

[108] For the reasons set forth above, this Motion will be dismissed.

[109] Given that no requests were made by the parties regarding costs, no order in that regard will be made.

**ORDER in T-1377-21**

**THIS COURT ORDERS** that:

1. This Motion is dismissed.

2. There will be no order as to costs.

"Paul S. Crampton"
Chief Justice

## APPENDIX 1 — Relevant Legislation

| | |
|---|---|
| **Purpose of Act** | **Objet de la loi** |
| **2** Recognizing that increased capital and technology benefits Canada, and recognizing the importance of protecting national security, the purposes of this Act are to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security. | **2** Étant donné les avantages que retire le Canada d'une augmentation du capital et de l'essor de la technologie et compte tenu de l'importance de préserver la sécurité nationale, la présente loi vise à instituer un mécanisme d'examen des investissements importants effectués au Canada par des non-Canadiens de manière à encourager les investissements au Canada et à contribuer à la croissance de l'économie et à la création d'emplois, de même qu'un mécanisme d'examen des investissements effectués au Canada par des non-Canadiens et susceptibles de porter atteinte à la sécurité nationale. |
| […] | […] |
| **Investments subject to notification** | **Investissements visés** |
| **11** The following investments by non-Canadians are subject to notification under this Part: | **11** Font l'objet d'un avis au titre de la présente partie les investissements faits par un non-Canadien dans l'un des buts suivants : |
| **(a)** an investment to establish a new Canadian business; and | **a)** la constitution d'une nouvelle entreprise canadienne; |
| **(b)** an investment to acquire control of a Canadian business in any manner described in | **b)** l'acquisition du contrôle d'une entreprise canadienne de la manière visée au |

subsection 28(1), unless the investment is reviewable pursuant to section 14.

paragraphe 28(1) dans le cas où l'investissement n'est pas sujet à l'examen au titre de l'article 14.

**Notice of investment**

**12** Where an investment is subject to notification under this Part, the non-Canadian making the investment shall, at any time prior to the implementation of the investment or within thirty days thereafter, in the manner prescribed, give notice of the investment to the Director providing such information as is prescribed.

**Dépôt de l'avis**

**12** L'investisseur non canadien qui se propose de faire un investissement qui doit faire l'objet d'un avis au titre de la présente partie dépose, de la façon prévue par règlement, un avis d'investissement auprès du directeur; l'avis contient les renseignements que prévoient les règlements et est déposé avant que l'investissement ne soit effectué ou dans les trente jours qui suivent.

[…]

[…]

**Reviewable investments**

**25.3 (1)** An investment is reviewable under this Part if the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, considers that the investment could be injurious to national security and the Governor in Council, on the recommendation of the Minister, makes an order within the prescribed period for the review of the investment.

**Investissements sujets à examen**

**25.3 (1)** L'investissement est sujet à l'examen au titre de la présente partie si le ministre, après consultation du ministre de la Sécurité publique et de la Protection civile, est d'avis que l'investissement pourrait porter atteinte à la sécurité nationale et que le gouverneur en conseil prend, sur recommandation du ministre et dans le délai réglementaire, un décret ordonnant l'examen de l'investissement.

[…]

[…]

**Ministerial action**

**25.3 (6)** After consultation with the Minister of Public Safety and Emergency Preparedness, the Minister shall, within the prescribed period,

**(a)** refer the investment under review to the Governor in Council, together with a report of the Minister's findings and recommendations on the review, if

**(i)** the Minister is satisfied that the investment would be injurious to national security, or

**(ii)** on the basis of the information available, the Minister is not able to determine whether the investment would be injurious to national security; or

**(b)** send to the non-Canadian a notice indicating that no further action will be taken in respect of the investment if the Minister is satisfied that the investment would not be injurious to national security.

[…]

**Governor in Council's powers**

**25.4 (1)** On the referral of an investment under paragraph

**Obligation du ministre**

**25.3 (6)** Après consultation du ministre de la Sécurité publique et de la Protection civile, le ministre est tenu, dans le délai réglementaire :

**a)** de renvoyer la question au gouverneur en conseil et de lui présenter ses conclusions et recommandations, si, selon le cas :

**(i)** il est convaincu que l'investissement porterait atteinte à la sécurité nationale,

**(ii)** il n'est pas en mesure d'établir, sur le fondement des renseignements disponibles, si l'investissement porterait atteinte à la sécurité nationale;

**b)** de faire parvenir à l'investisseur non canadien un avis l'informant qu'aucune mesure supplémentaire ne sera prise à l'égard de l'investissement, s'il est convaincu que celui-ci ne porterait pas atteinte à la sécurité nationale.

[…]

**Pouvoirs du gouverneur en conseil**

**25.4 (1)** S'il est saisi de la question en application de

25.3(6)(a) or subsection 25.3(7), the Governor in Council may, by order, within the prescribed period, take any measures in respect of the investment that he or she considers advisable to protect national security, including

l’alinéa 25.3(6)a) ou du paragraphe 25.3(7), le gouverneur en conseil peut, dans le délai réglementaire, prendre par décret toute mesure relative à l’investissement qu’il estime indiquée pour préserver la sécurité nationale, notamment :

**(a)** directing the non-Canadian not to implement the investment;

**a)** ordonner à l’investisseur non canadien de ne pas effectuer l’investissement;

**(b)** authorizing the investment on condition that the non-Canadian

**b)** autoriser l’investisseur non canadien à effectuer l’investissement à la condition :

**(i)** give any written undertakings to Her Majesty in right of Canada relating to the investment that the Governor in Council considers necessary in the circumstances, or

**(i)** d’une part, de prendre envers Sa Majesté du chef du Canada les engagements écrits à l’égard de l’investissement qu’il estime nécessaires dans les circonstances,

**(ii)** implement the investment on the terms and conditions contained in the order; or

**(ii)** d’autre part, de l’effectuer selon les modalités précisées dans le décret;

**(c)** requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity.

**c)** exiger que l’investisseur non canadien se départisse du contrôle de l’entreprise canadienne ou de son investissement dans l’unité.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1377-21 |
| **STYLE OF CAUSE:** | CHINA MOBILE COMMUNICATIONS GROUP CO., LTD. ET AL v AGC ET AL |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 24, 2021 |
| **ORDER AND REASONS:** | CRAMPTON C.J. |
| **CONFIDENTIAL ORDER AND REASONS ISSUED:** | DECEMBER 3, 2021 |
| **PUBLIC ORDER AND REASONS ISSUED:** | DECEMBER 7, 2021 |

**APPEARANCES:**

| | |
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| Sean Gaudet<br>Ani Mamikon | FOR THE RESPONDENTS |

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