

FEDERAL COURT

B E T W E E N:

TIKTOK TECHNOLOGY CANADA INC.

Applicant

– and –

**CANADA (ATTORNEY GENERAL), MINISTER FOR INNOVATION, SCIENCE and
ECONOMIC DEVELOPMENT and THE GOVERNOR IN COUNCIL**

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____

Issued by: _____
(Registry Officer)

Address of local office:

Federal Court of Canada
Pacific Centre, PO Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: Attorney General of Canada

AND TO: Minister for Innovation, Science and Economic Development

AND TO: The Governor in Council

APPLICATION

1. This is an application by TikTok Technology Canada Inc. (“**TikTok Canada**”) for judicial review of: (i) the referral (the “**Referral**”) of the Investment (defined below) by the Minister of Innovation, Science and Economic Development (the “**Minister**” and “**ISED**”) to the Governor in Council (“**GIC**”) under subparagraph 25.3(6)(a)(i) of the *Investment Canada Act*, R.S.C. 1985, c 28 (the “**ICA**”), and (ii) the November 5, 2024 Order of the GIC issued pursuant to subsection 25.4(1) of the ICA, ordering that TikTok Canada wind-up its business and cease all operations in Canada on the basis that the Investment would be injurious to national security (the “**OIC**”).

2. The Applicant makes application for:

- (a) an order setting aside the OIC;
- (b) in the alternative, an order setting aside the OIC, and remitting the issue back to the Minister and GIC to redetermine the review of the Investment with directions from this Honourable Court;
- (c) a stay of the OIC pending the outcome of this application and any appeals;
- (d) a confidentiality order pursuant to Rule 151 in respect of confidential documents that may be filed;
- (e) leave to judicially review the Referral and the OIC in this single application notwithstanding Rule 302;
- (f) the Applicant’s costs of this application; and
- (g) such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

A. **Statutory Scheme: *Investment Canada Act* Review of Investments by Non-Canadians**

3. The ICA establishes a regime for the review of investments by non-Canadians who establish a new Canadian business or acquire control of a Canadian business (an “**Investor**”) to assess, *inter alia*, whether they: (i) are likely to be “of net benefit” to Canada, and (ii) could be

injurious to Canadian national security. The purpose of the ICA is to provide for the review of: (i) “significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada;” and (ii) “investments in Canada by non-Canadians that could be injurious to national security.”

4. ***National Security Review***: Part IV.1 of the ICA establishes the regime for the review of investments that could be injurious to Canadian national security, *i.e.* national security review (“**NSR**”). An NSR is subject to statutory timelines under the *National Security Review of Investments Regulations*, S.O.R./2009-271 (the “**NSR Regulations**”), which contemplate that, absent an extension request by the Minister, an NSR will conclude within approximately 200 days.

5. Under section 25.2 of the ICA, if the Minister has reasonable grounds to believe that an investment could be injurious to national security, the Minister may notify the Investor that a review may be ordered pursuant to subsection 25.3(1) (the “**Initial Review Notice**”).

6. ***National Security Review Ordered by Minister (subsections 25.3(1) and (2))***: If the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness (“**Public Safety Minister**”), considers that an investment could be injurious to national security, the Minister shall make an order for the further review of the investment under subsection 25.3(1) (the “**NSR Order**”). The Minister must make the NSR Order within 45 days of the Initial Review Notice, and advise the Investor of its right to make representations to the Minister.

7. ***Referral to Governor in Council (paragraph 25.3(6)(a))***: Within the prescribed period following the NSR Order, the Minister must – after consultation with the Public Safety Minister – either: (i) discontinue the NSR with no further action and send a notice to that effect to the Investor pursuant to paragraphs 25.3(6)(b) and (c); or, (ii) refer the Investment under review to the GIC. A referral to the GIC is made where:

(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.

8. A referral must include a report of the Minister’s findings and recommendations on the NSR.

9. ***Minister may Request an Extension (subsection 25.3(7))***: The time for conducting an NSR after issuance of an NSR Order is 45 days. The Minister must notify the Investor if he is unable to complete the consideration of an investment within 45 days. The Minister then has until the end of the relevant prescribed period (a further 45 days, pursuant to the NSR Regulations), to take the above-noted steps, unless the Investor agrees to a further period.

10. ***Governor in Council's Powers (subsection 25.4(1))***: On receiving a referral from the Minister, the GIC may, within 20 days, take any measures considered advisable to protect national security, including:

- (a) directing the non-Canadian not to implement the investment;
- (b) authorizing the non-Canadian to make the investment on the terms and conditions contained in the order; or
- (c) requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity.

11. ***2024 Amendments to the ICA – Submitting Undertakings to the Minister***: Prior to September 2024, the ICA provided that the GIC could authorize an investment under review on the condition that the Investor implement any undertakings the GIC deemed necessary. On September 3, 2024, amendments to the ICA came into force. Under subsection 25.3(4), the Investor may now submit written undertakings to the Minister prior to the referral stage. The amendments contemplate that the Minister may conclude the review if he is satisfied that the investment would not be injurious to national security because of the undertakings given by the Investor. The amending statute provides that any ongoing NSR commenced prior to the amendments, in respect of which a measure had not been taken under subsection 25.3(6), would be continued in accordance with the ICA as amended.

B. TikTok Canada and the Investment Under Review

(i) The TikTok Platform

12. TikTok is an entertainment platform for creating, sharing, and viewing videos, primarily available through the TikTok mobile application (the “**TikTok Platform**”).

13. People use the TikTok Platform to share and discuss all manner of topics, from sports and entertainment to current events and culture. Subject to limitations based on a user’s age, users can communicate in a variety of ways, including by creating, sharing, and commenting on videos,

direct messaging other users, and creating new content that incorporates and responds to other users' videos. Users view content primarily through the TikTok Platform's "For You" feed, which presents users with videos curated specifically for them by the TikTok Platform's innovative technology, including its proprietary recommendation engine.

14. The TikTok Platform is provided in Canada by TikTok Pte. Ltd. ("**TTPL**"), a Singaporean corporation, which is also the data controller of Canadian user data. The TikTok Platform currently has over 14 million monthly users in Canada. Through the TikTok Platform, Canadian businesses and content creators can reach a global audience of over one billion monthly users.

(ii) TikTok Canada

15. TikTok Canada is incorporated under British Columbia law. It was previously known as Network Sense Ventures Limited ("**NSVL**"), which was acquired in 2018 by ByteDance (HK) Limited, a subsidiary of ByteDance Ltd. and formally renamed TikTok Technology Canada Inc.¹ in August 2020. The establishment of TikTok Canada was the subject of the NSR that led to the Referral and the OIC and, in turn, this application (the "**Investment**").

16. TikTok Canada is currently a subsidiary of TikTok Ltd., a Cayman Islands company, which is a wholly owned subsidiary of ByteDance Ltd.

17. ByteDance Ltd. is a privately held Cayman Islands company, the subsidiaries of which provide many products and services that, among other things, allow users to connect with, create, and consume content on the Internet.

18. ByteDance Ltd. was incorporated in 2012. Today, it is approximately 58%-owned by investors around the world, 21%-owned by its subsidiaries' global workforce, and 21%-owned by one of its founders, Yiming Zhang, who resides in Singapore.

(iii) TikTok Canada's Business and Engagement with Content Creators and the Canadian Government

19. TikTok Canada provides hundreds of Canadians with well-paying jobs, and contributes millions of dollars annually to the Canadian economy.

¹ "**TikTok Canada**," as defined above.

20. TikTok Canada sells advertising space to consumer brands, governments, and other Canadian organizations that wish to advertise on the TikTok Platform. Most of TikTok Canada's revenue is generated from these ad sales.

21. In addition to selling advertisements, TikTok Canada's team supports the TikTok Platform through various activities, including carrying out initiatives to support Canadian creators, artists, and businesses on the TikTok Platform, developing products, tools and infrastructure that support advertising features, and developing tools to detect, monitor and promptly handle violative content on the TikTok Platform.

22. TikTok Canada participates in important Canadian public policy issues at the federal and provincial level, including those related to online safety, elections, and culture. TikTok Canada works with Canadian federal and provincial government organizations to help address online harms and, during the 2021 federal election, TikTok Canada also worked with Elections Canada and the Privy Council Office on partnerships to support election integrity on the TikTok Platform.

C. The National Security Review of the Investment

(i) TikTok Canada's cooperation with FIRES prior to the National Security Review

23. Under the ICA, TikTok Canada was required to provide notice to ISED, both at the time of: (i) the acquisition of NSVL; and (ii) the establishment of TikTok Canada (the "**ISED Notices**"). Given the nature of TikTok Canada's business, it was also required to provide notice of the establishment of TikTok Canada to the Department of Canadian Heritage ("**DCH**") (the "**DCH Notice**", together with the ISED Notices, the "**ICA Notices**").

24. In August 2020, following routine discussions with the Foreign Investment Review and Economic Security Branch ("**FIRES**") of ISED,² TikTok Canada first became aware of the fact that such notices had not been provided.

² Formerly named the "Investment Review Division" of ISED.

FIRES did not require TikTok Canada to file ICA Notices

25. From September 2020 to January 2023, FIRES officials, with the agreement of DCH officials, took the position that it would be preferable for TikTok Canada to delay filing the ICA Notices.

26. FIRES advised that it preferred that TikTok Canada delay the filings pending further developments relating to the TikTok Platform in the United States, including those related to a review conducted by the Committee on Foreign Investment in the United States.

TikTok Canada files ICA Notices and responds to Requests for Information

27. In the spring of 2022, TikTok Canada approached FIRES and DCH officials to attempt to proactively address the ICA Notices. It concurrently began working on the filings and accompanying materials. FIRES expressed no urgency surrounding the ICA Notices, and did not specify a timeline for their delivery.

28. In February 2023, FIRES notified TikTok Canada that it would soon be requesting the ICA Notices. FIRES and TikTok Canada agreed that TikTok Canada would prepare draft filings for FIRES's review prior to filing perfected versions. On February 14, 2023, TikTok Canada provided the draft ICA Notices to FIRES and DCH and subsequently responded to their clarificatory questions regarding the drafts.

29. In March 2023, FIRES issued the first of what would be many Requests for Information ("RFIs"). TikTok Canada provided its responses to the first RFI on a rolling basis in the following months. The RFI responses contain highly sensitive confidential information.

30. Over the next year and a half, both prior to and during the NSR, TikTok Canada responded to detailed formal RFIs and numerous additional clarificatory questions.

31. On June 7, 2023, TikTok Canada submitted the finalized ICA Notices to FIRES and DCH.

(ii) Commencement of the National Security Review – TikTok Canada responds to further RFIs and makes representations to FIRES

32. On September 7, 2023, FIRES issued a Section 25.3 Notice, stating that the GIC had issued an order for the NSR of the establishment of TikTok Canada. The notice included a confidential

summary of the national security concerns regarding the Investment (the “**Summary of Concerns**”).

33. In October 2023, FIRES requested an extension of the NSR to March 1, 2024. TikTok Canada consented.

TikTok Canada makes representations to FIRES

34. On November 2, 2023, TikTok Canada representatives travelled to Ottawa to meet with and make representations to FIRES officials in response to the Summary of Concerns. They provided information about TikTok Canada’s business selling advertisements, and explained TTPL’s role in providing the TikTok Platform in Canada. TikTok Canada emphasized its desire to reach a resolution of the NSR.

35. In December 2023, FIRES requested a further ten-month extension of the NSR, to October 31, 2024. TikTok Canada consented to the request.

FIRES ceases engagement with TikTok Canada

36. While TikTok Canada continued to deliver confidential responses to RFIs, including in January, February, June and August of 2024, FIRES’ substantive engagement with TikTok ceased in early 2024.

37. On March 5, 2024, the United States Congress introduced legislation to ban the TikTok Platform in the United States (the “**U.S. Ban**”).

38. TikTok Canada spoke with FIRES officials in light of this development and offered updates on developments in the United States and reiterated its continued willingness to engage with FIRES. However, FIRES advised that it was not yet ready to engage with TikTok Canada, and provided no advice as to how it would be prepared to engage, advising only that FIRES may have more clarity on this in the next couple of months.

39. On March 14, 2024, the Minister publicly announced that he had ordered the NSR six months prior.

40. In late April 2024, in the absence of any update from FIRES, TikTok Canada again contacted FIRES to provide an update on developments in the United States (including the company's intention to challenge the U.S. Ban in a U.S. court).

41. On that call, TikTok Canada again asked FIRES for insight as to when FIRES would be ready to re-engage with TikTok Canada in respect of the NSR. FIRES responded that it could not provide an update at that time. TikTok Canada advised FIRES that a further extension to the NSR would be considered by TikTok Canada, if requested, to allow sufficient time for developments in the United States to unfold.

(iii) FIRES abruptly concludes the NSR

42. From April to September 2024, TikTok Canada had no engagement with FIRES other than to: (i) deliver confidential responses to the RFIs; and (ii) receive one further RFI from FIRES. By September 2024, the NSR had formally been ongoing for nearly one year.

43. On September 3, 2024, FIRES sent an email to counsel for TikTok Canada addressing the recent amendments to the ICA allowing Investors to submit undertakings that could be accepted directly by the Minister as part of the NSR (the "**Form Letter**"). The Form Letter appended the same Summary of Concerns document that was attached to the NSR Notice delivered by FIRES in September 2023. The Form Letter requested confirmation of whether undertakings would be provided within three days, and delivery of any undertakings within 10 business days.

44. Also on September 3, 2024, FIRES published an Administrative Note concerning the new statutory provisions related to undertakings. The Administrative Note contemplates that the deadlines "are not consistently adhered to", and references extensions to the deadlines to allow time for undertakings to be considered.

45. At the request of TikTok Canada's counsel, FIRES met with counsel on September 5, 2024 to discuss the Form Letter. During that call, a FIRES official confirmed that the Form Letter was a standard form letter that had been sent to all Investors under ongoing NSRs and it was not intended as a message tailored specifically to TikTok Canada. The FIRES official did not ask TikTok Canada to submit undertakings to the Minister, suggest it was important that undertakings be submitted, or provide any indication as to what proposed undertakings the Minister may wish to receive from TikTok Canada.

46. On October 2, 2024, as the extended NSR period drew nearer to a close, TikTok Canada inquired with FIRES as to whether the Minister intended to seek an extension of the NSR. A FIRES official responded that she did not expect that the Minister would require a further extension.

47. On October 4, 2024, FIRES and counsel to TikTok Canada convened a call during which FIRES advised that the Form Letter, and TikTok Canada's failure to submit undertakings within the specified time period, were important reasons that led to the Minister's decision to conclude the NSR.

48. On October 16, 2024, TikTok Canada and FIRES convened another call at TikTok Canada's request, during which FIRES stated that: (i) TikTok Canada's failure to propose undertakings in response to the Form Letter was an important factor in the Minister's decision to conclude the NSR; and (ii) there were no undertakings that could resolve or mitigate the Minister's concerns. TikTok Canada noted the prior discussion of the Form Letter as not being specific to TikTok Canada and reiterated its desire to discuss a resolution and a willingness to grant an extension to the NSR.

49. On October 22, 2024, TikTok Canada wrote to FIRES expressing its concern regarding the possibility of the NSR coming to an end. In particular, TikTok Canada noted that if the Form Letter was in fact an urgent and final opportunity to discuss a resolution then this should have been made clear to TikTok Canada, especially given: (i) the long history of delays of the NSR, (ii) the fact that FIRES had demonstrated an unwillingness to engage with TikTok Canada since at least early 2024; and (iii) TikTok Canada's history of good faith cooperation and express desire to offer commitments to reach a resolution.

50. On October 25, 2024, FIRES confirmed via email that the Minister had determined that the review process could be completed by October 31, 2024, and that as such, the Minister did not intend to seek an extension of the NSR.

51. On October 29, 2024, TikTok Canada wrote to the Minister, proposing undertakings to address Canada's national security concerns. Despite the Minister's failure to meaningfully engage with TikTok Canada throughout the NSR, and the lack of guidance provided by the Minister as to what undertakings might be capable of resolving the NSR, TikTok Canada made best efforts to

prepare a confidential list of proposed undertakings that would address the Minister's national security concerns.

52. TikTok Canada did not receive a response to that letter.

D. Governor in Council Orders Wind-Up of TikTok Canada

53. On or about October 31, 2024, it is assumed that the Minister concluded the NSR and referred the Investment to the GIC (the "**Referral**", as defined above). The accompanying report of the Minister's findings and recommendations, as provided for under paragraph 25.3(6)(a) of the ICA, was not communicated to TikTok Canada.

54. On November 5, 2024, the GIC issued Order-in-Council P.C. 2024-1173 (the "**OIC**", as defined above), which was communicated to TikTok Canada on November 6, 2024.

55. Among other things, the OIC requires TikTok Canada to wind-up its business and cease operations in Canada. The OIC does not impose any restriction on the continued provision of the TikTok Platform in Canada.

56. On November 6, 2024, the Minister issued a public statement to announce the OIC, confirming that the OIC was intended to wind-up TikTok Canada, and would not block Canadians' access to the TikTok Platform or their ability to create content.

E. Grounds for Review

57. The OIC should be set aside on one or more of the following bases:

- (a) The Minister's conclusion that the Investment would be injurious to national security, and the Referral to the GIC, was unreasonable;
- (b) The OIC is *ultra vires* the GIC because it was predominantly driven by improper purposes;
- (c) The GIC unreasonably exercised its discretion under the ICA in issuing the OIC;
- (d) The OIC is grossly disproportionate; and
- (e) The NSR was procedurally unfair.

(i) The Minister's Conclusion and Referral were Unreasonable

58. The Minister's conclusion that the Investment would be injurious to national security (the "**Conclusion**"), and the Referral of the Investment to the GIC pursuant to subparagraph 25.3(6)(a)(i), was not transparent, intelligible or justified and was therefore unreasonable. In particular:

- (a) the Conclusion was untenable in light of the facts and the law;
- (b) The Minister erroneously, and without any basis in fact, concluded that the Investment "would be injurious to national security" under subparagraph 25.3(6)(a)(i) of the ICA;
- (c) the Minister failed to engage with TikTok Canada on the purported substance of the concerns that led to the OIC, which resulted in the Minister making the Conclusion and the Referral without the benefit of relevant information and potential mitigation efforts;
- (d) the Minister fettered his discretion by considering irrelevant factors; and
- (e) the Minister failed to consider relevant factors, including the purpose of the statutory scheme.

(ii) The GIC Erred in Law or Acted Unreasonably

(a) The OIC is *ultra vires*

59. The OIC is *ultra vires* the discretion accorded to the GIC under the ICA because it was predominantly driven by improper purposes.

(b) Unreasonable Exercise of Discretion by the Governor in Council

60. The GIC unreasonably exercised its discretion in issuing the OIC and ordering the wind-up of TikTok Canada. In particular:

- (a) the OIC orders measures that bear no rational connection to the national security risks it identifies;

- (b) the reasons for the OIC are unintelligible, fail to reveal a rational chain of analysis and are rife with logical fallacies;
- (c) the GIC, independently and in reliance on the findings and process overseen by the Minister, misapprehended the evidence and therefore the OIC is premised on incorrect facts;
- (d) the GIC, independently and in reliance on the findings and process overseen by the Minister, fettered its discretion by considering irrelevant factors in issuing the OIC; and
- (e) the GIC, independently and in reliance on the findings and process overseen by the Minister, failed to consider relevant factors in issuing the OIC, including whether the OIC would achieve the national security objectives contemplated by subsection 25.4(1) and the NSR, and the purposes of the ICA more generally.

(iii) The OIC is Grossly Disproportionate

61. The OIC will result in the termination of hundreds of employees in Canada and the potential termination of over 250,000 contracts with Canadian-based advertisers. In addition, the OIC will cause the destruction of significant economic opportunities and intangible benefits to Canadian creators, artists and businesses, and the Canadian cultural community more broadly.

62. The measures set out in the OIC are grossly disproportionate to the GIC's stated concerns, particularly in light of the less onerous measures that were available to the GIC under the ICA, including the imposition of terms and conditions on the Investment.

(iv) National Security Review Process was Procedurally Unfair

63. Given the potential grave consequences of the NSR for TikTok Canada, the Minister owed TikTok Canada a heightened duty of procedural fairness.

64. The Minister erred in law and breached TikTok Canada's rights to procedural fairness by, among other things, failing to substantively engage in the course of the NSR, abruptly concluding the NSR, and depriving TikTok Canada of the chance to fully and fairly benefit from its statutory and procedural rights.

Statutes and regulations relied on:

65. *Investment Canada Act*, R.S.C. 1985, c 28;
66. *National Security Review of Investments Regulations*, S.O.R./2009-271;
67. *Federal Courts Act*, R.S.C. 1985, c. F-7;
68. *Federal Courts Rules*, SOR/98-106; and
69. such further and other statutes and regulations as counsel may advise and this Honourable Court may permit.

This application will be supported by the following materials:

70. One or more affidavits, to be filed.
71. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Rule 317 Request

72. Pursuant to Rule 317, the Applicant requests that the Minister and the GIC transmit a certified copy to the Applicant of all materials in the possession of the Minister, the Public Safety Minister and the GIC that were before or reviewed by the Minister, the Public Safety Minister and/or the GIC in making the Referral and/or the OIC that are not in the possession of the Applicant.

Dated at Vancouver, British Columbia this 5th day of December, 2024.



OSLER, HOSKIN & HARCOURT LLP

Suite 3000, Bentall Four
1055 Dunsmuir Street
Vancouver, British Columbia
Canada, V7X 1K8

Maureen Killoran, KC
Telephone: (604) 692-2793
Email: mkilloran@osler.com

Tommy Gelbman

Telephone: (403) 260-7073

Email: tgelbman@osler.com

Adam Hirsh

Telephone: (416) 862-6635

Email: ahirsh@osler.com

**Solicitors for the applicant,
TikTok Technology Canada Inc.**