

Blackberry Expected to Lobby the Canadian Government for Changes to the Investment Canada Act

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Editor's Note: *After the article was written, an announcement was made that Blackberry had signed a provisional agreement to sell its business to a group led by Fairfax Financial Holdings Limited, a Canadian entity. However, during the due diligence period, Blackberry may still actively solicit, receive, evaluate and potentially enter into negotiations with parties that offer alternative proposals. As a result, Blackberry may still solicit offers from foreign purchasers.*

Introduction

On August 12, 2013, BlackBerry Limited ("Blackberry"), formerly known as Research In Motion Limited, announced that the company's Board of Directors had formed a Special Committee to explore its potential sale. In the beginning of September 2013, the media reported that Blackberry had registered to meet with the Government of Canada in order to discuss the *Investment Canada Act*¹ (the "ICA").

The ICA establishes a process for the review of certain foreign investments that will result in the acquisition of controlling interest in a Canadian business. Proposed acquisitions that exceed the applicable minimum investment threshold are subject to review by Industry Canada, which can discourage foreign investors.

The fact that Blackberry is attempting to lobby for changes to the ICA strongly suggests that it does not expect to sell its business operations to a domestic investor and is now trying to encourage potential acquisitions by foreign investors. Potential foreign suitors include China-based Lenovo Group Limited ("Lenovo") and U.S.-based Microsoft Corporation.

Current ICA Review Thresholds

When establishing investment thresholds, the ICA makes a distinction between countries that are members of the World Trade Organization (“WTO”) and those that are not. It also makes a distinction between direct and indirect acquisitions.

A direct acquisition involves the acquisition of voting shares of a Canadian corporation that carries on the Canadian business, voting interests in an unincorporated entity that carries on the Canadian business, or an asset transaction where the vendor is the Canadian business in Canada. An indirect acquisition is a transaction involving the acquisition of the shares of a parent company incorporated outside of Canada, which owns subsidiaries in Canada.

According to the ICA, the thresholds for transactions involving non-WTO members are \$5 million for direct investments and \$50 million for indirect investments. These thresholds are based on the book value of gross assets of the Canadian business and are stated in Canadian dollars.

WTO members benefit from much higher thresholds. The threshold for review in the case of a WTO member, or where a Canadian business is ultimately controlled by a WTO member (other than a Canadian) prior to its acquisition, becomes effective on January 1 of every year; the 2013 threshold for review in the case of direct investment by a WTO member is \$344 million. This threshold is also based on the book value of gross assets of the Canadian business and is stated in Canadian dollars.

Considering the current value of BlackBerry’s assets, any direct acquisition of the company will clearly be subject to review under the ICA, even if the purchaser is a WTO member.

National Security Reviews

As a result of amendments enacted in 2009, the Canadian Government also has the authority to review any investment (either proposed or already implemented) made by a non-Canadian if there are reasonable grounds to believe that it may be injurious to national security. Although national security reviews are expected to be initiated only in cases where the Canadian business operates in military or other strategically-sensitive areas, a national security review is a possibility in the case of BlackBerry.

When Lenovo indicated that it was assessing potential acquisition targets, including BlackBerry, Finance Minister Jim Flaherty responded by saying that certain local technologies were off-limits to foreign buyers and that the Canadian Government would look “carefully” at any bid from Lenovo. BlackBerry operates secure servers for the Canadian and United States Governments, which could raise national security issues if Lenovo decides to acquire the company.

Potential Issues to be Raised by BlackBerry

It is less likely that BlackBerry could successfully lobby the Canadian Government for higher review thresholds or advance confirmation that a national security review would not occur. However, lobbying for clearer guidelines in determining when a foreign investment subject to ICA review will be approved is an attainable goal.

The Canadian Government is already under pressure to provide improved guidance on its “net benefit” criteria, which is applied in ICA reviews. According to the ICA, in determining whether an investment will be of “net benefit” to Canada, the factors to be taken into account are as follows:

- a. The effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;
- b. The degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;
- c. The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- d. The effect of the investment on competition within any industry or industries in Canada;
- e. The compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- f. The contribution of the investment to Canada’s ability to compete in world markets.

The discretionary nature of the above criteria was clearly demonstrated when Industry Canada objected to the \$38.6 billion proposed takeover of Potash Corporation of Saskatchewan Inc. (“Potash Corporation”) in November 2010. The proposed takeover by BHP Billiton, an Australian-based company, was blocked under the ICA on the basis that it would not be of net benefit to Canada.

Potash Corporation produces about half of the world’s supply of potash, a crucial ingredient used in fertilizers. Although it initially appeared as though the proposed takeover would be approved, both Potash Corporation and the Province of Saskatchewan aggressively lobbied the Federal Government to block the deal. As a result of Industry Canada’s negative decision, BHP Billiton withdrew its offer.

If Blackberry can successfully lobby for clearer guidelines regarding when net benefit to Canada will be found, this will give foreign investors greater certainty when considering potential acquisitions in Canada. Greater certainty in the ICA review process will benefit not only Blackberry but many other Canadian businesses as well.

¹ R.S., 1985 (1st Supp.).

