

Canada

Foreign Investment

Canadian Government Refuses to Approve U.S. Takeover of Canadian Space Company

By Mark Katz (Davies Ward Phillips & Vineberg LLP)

The Investment Canada Act ("ICA"), which governs acquisitions of Canadian businesses by foreigners, was passed in 1985. In the 23 years since its enactment, not a single acquisition that was subject to review by the Minister of Industry was denied approval.¹

MDA's space division developed the famous "Canadarm", which is used by NASA, and the Radarsat 2 satellite, a remote sensing satellite which scans Canada's Arctic region. Pursuant to a licence arrangement, the data and images generated by the Radarsat 2 satellite are used by the Canadian government to monitor Canada's Arctic interests.

It appears that this perfect string of approvals may now have been broken. In a surprising move, Canada's Minister of Industry, The Honourable Jim Prentice, has refused to approve the proposed \$1.325 billion acquisition by Alliant Techsystems Inc. ("Alliant") of the space division of MacDonald, Detwiler and Associates Ltd. ("MDA"). By letter dated April 8, 2008, Minister Prentice advised Alliant that he is not satisfied that the proposed transaction is likely to be of "net benefit to Canada", the standard for approval under the ICA.

Alliant is a U.S.-based arms and rocket manufacturer. It announced its offer for MDA's space division in January 2008. Among other things, MDA's space division

developed the famous "Canadarm", which is used by NASA, and the Radarsat 2 satellite, a remote sensing satellite which scans Canada's Arctic region. Pursuant to a licence arrangement, the data and images generated by the Radarsat 2 satellite are used by the Canadian government to monitor Canada's Arctic interests. The Canadian government also supported the development of Radarsat 2 with \$445 million in funding. MDA decided to sell the space division because it said the business could not compete for the lucrative U.S. defence contracts necessary to survive unless owned by a U.S. company.

It was the possible acquisition of the Radarsat 2 technology by a U.S. firm that proved to be the undoing of the proposed transaction. Concerns were raised that the sale of the satellite would compromise Canada's ability to exercise sovereignty over disputed territories in the Arctic region, where the U.S. government does not recognize the full extent of Canada's territorial claims. MDA and Alliant countered by claiming that the transaction would have no impact on the Canadian government's ability to access the satellite's data.

Although Minister Prentice did not disclose the reasons underlying his decision in the April 8 letter sent to Alliant, it is clear from comments he made subsequently that the fate of the Radarsat 2 satellite was a major consideration. Apart from national security concerns, the Minister also indicated that continued Canadian control of the Radarsat 2 technology is necessary if Canada is to have a "vibrant" aerospace sector (even though the Canadian government has not shown much enthusiasm for investing in the space sector in recent years).

The ICA does not expressly incorporate "national security" concerns among the criteria upon which a "net benefit" assessment should be made. This has caused some to suggest that the ICA should be amended to include a formal "national security" review process, analogous to the CFIUS process in the United States. Indeed, draft legislation to this effect was introduced by the former Liberal government (it was never enacted), and the current minority Conservative government had indicated that it was considering similar amendments as well. The Minister's decision in the Alliant/MDA case confirms what many had believed already, namely that the ICA's existing "net benefit" review process is sufficiently flexible to encapsulate national security concerns as well.

The Minister's April 8 decision does not necessarily

end matters. The ICA gives parties 30 days following a refusal letter to persuade the Minister to reverse his decision. According to various press reports, both Alliant and MDA are trying to do just that. However, many observers are skeptical that Minister Prentice will be able to backtrack and approve the sale.

The Conservative government is now trying to minimize concerns that its decision in the Alliant/MDA case heralds a new era of economic protectionism for Canada. Minister Prentice has emphasized in interviews that the transaction involved "pretty unique circumstances". Yet, given the recent backlash against foreign takeovers in Canada (now the subject of study by a federally-appointed review panel), lingering questions remain. In the meanwhile, MDA is stuck with a business that it

does not want, with very limited prospects of selling it to a Canadian buyer.

1. The Minister of Industry is responsible for reviewing acquisitions of "non-cultural" businesses. The Minister of Canadian Heritage reviews acquisitions of "cultural" businesses. Since 1999, when the Minister of Canadian Heritage received that authority, only three such transactions have been turned down.

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