

> perspective

History Is Made: Canadian Government Confirms Refusal of Foreign Acquisition Under Investment Canada Act

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

This perfect string of approvals has now been broken. On May 8, 2008, Canada's Minister of Industry, The Honourable Jim Prentice, confirmed that he had denied his approval to the proposed \$1.325 billion acquisition by Alliant Techsystems Inc. ("Alliant") of the space division of MacDonald, Detwiler and Associates Ltd. ("MDA").

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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. There are also or have been both cultural and non-cultural sectors in which foreign acquisitions have been limited or prohibited by other legislation or government policies.

According to Minister Prentice, 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.

On April 8, 2008, Minister Prentice sent a letter to Alliant stating that it had not passed the "net benefit" test. Although Minister Prentice did not disclose the reasons underlying his decision in this April 8 letter, 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.

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 did not end matters definitively. 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 attempted to do just that. However, many observers were skeptical that Minister Prentice would backtrack and approve the sale. Yesterday's announcement confirms that he was not inclined to do so.

The Alliant/MDA case represents an important development in the history of the ICA. However, it is not at all clear that this decision heralds a new era of economic protectionism for Canada or that potential foreign acquirors are suddenly re-considering whether Canada still offers a friendly investment climate.

The Conservative government is certainly doing its best to dispel any type of negative impression. Minister Prentice has emphasized in interviews that the Alliant/MDA 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 are likely to remain, pending further developments (or the lack thereof).

If you have any questions regarding the foregoing, please contact [George Addy](#), [John Bodrug](#), [Mark Katz](#), [Richard Elliott](#), [Hillel Rosen](#) or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at (416) 863-0900 (Toronto) or (514) 841-6400 (Montréal).

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