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Canadian Government Rejects BHP’s proposed acquisition of Potash Corporation under the Investment Canada Act – Is Canada Still Open for Business?

On November 3, 2010, Canada’s Industry Minister Tony Clement announced his decision that the proposed $38-billion acquisition of Potash Corporation of Saskatchewan Inc. (PotashCorp) by BHP Billiton Limited (BHP) is not likely to be of “net benefit to Canada” under the Investment Canada Act. In accordance with the Investment Canada Act, BHP has a 30-day period during which to make further representations and offer additional undertakings to the Minister.

If the rejection becomes final, this would be only the second investment rejected under the Investment Canada Act (outside of the cultural area) since the legislation was enacted in 1985. The first deal to be rejected was the proposed acquisition by an American company, Alliant Techsystems (ATK), of the geospatial business of MacDonald, Dettwiler and Associates Ltd. (MDA) in early 2008.

The reasons for Minister Clement’s rejection of the BHP investment in PotashCorp have not been made public because the Investment Canada Act requires these reasons be kept confidential until the final decision is made. However, Minister Clement has made clear that he intends to provide a full explanation for his decision following the conclusion of the 30-day appeal period. In the meantime, there has been considerable speculation that the government bowed to political pressure from the Saskatchewan government, as well as public pressure to preserve Canadian control over a high profile Canadian company and a “strategic” resource. Some have expressed the view that the decision signals a more restrictive approach to foreign investment in major Canadian businesses.

At this stage, it is premature to conclude that Canada has changed its historical approach to welcoming foreign investment. In this regard, Prime Minister Stephen Harper emphasized in remarks on November 4, 2010, that Canada remains open to, and welcomes, foreign investment. In addition, the Canadian government has recently approved other investments in important Canadian businesses, including investments by state owned enterprises. Nevertheless, this decision is significant and, if it becomes final, it will be important to carefully scrutinize the reasons for the rejection to assess what implications there may be for future foreign investments in Canada.

Most importantly, if the decision becomes final, it will be critical to assess whether the rejection can be
explained based on considerations that are unique to this particular case. In this regard, while the rejection of ATK’s proposed investment in MDA in 2008 raised concerns about a shift in Canada’s approach to welcoming foreign investment, the facts in that particular case were unique (control over satellites and Arctic sovereignty) and the rejection is believed to have been due to concerns about the implications for national security, rather than concerns about the benefits of the investment to Canada more broadly. By contrast, national security does not appear to have been an important consideration in the government’s decision to reject the PotashCorp investment, as this transaction does not appear to have been reviewed under Canada’s new national security review regime and, in any event, has been rejected based on the “net benefit to Canada” test. The key question, therefore, is whether it will be possible to identify a reason for the government’s rejection of the PotashCorp investment that is unique or specific to this case, rather than a general concern about a loss of Canadian control over a large Canadian corporation or of sizeable natural resource assets more generally. According to a statement by Minister Clement, the government’s explanation for rejecting the PotashCorp investment will include an articulation of certain “general principles” to guide the global business community in future transactions. It remains to be seen the extent to which these “general principles” will provide clarity on the types of foreign investments that are likely to give rise to concerns, and whether such potentially problematic investments are narrowly or broadly described.

In addition to the potential implications for future foreign investments in high profile Canadian companies, the public and media scrutiny surrounding the PotashCorp decision may also lead to changes to the Investment Canada Act which could have significant implications for reviewable investments more generally. Immediately following the announcement of the PotashCorp decision, Prime Minister Harper stated that the government will ask a committee of the House of Commons to review the Investment Canada Act and recommend improvements. Based on the criticisms that have been levelled at Canada’s foreign investment review process in recent years, we would expect that the House of Commons committee will consider, amongst other issues, providing greater transparency into the foreign investment review process.

We will continue to follow these developments and will provide a more detailed analysis of Mr. Clement’s decision and its potential implications for foreign investment in Canada once additional facts are available and the basis for the government’s decision has been made public. For further information, please contact Peter Franklyn, Michelle Lally, Peter Glossop or Shuli Rodal.

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