



INVESTMENT IN CANADA

VALERIE MANN

Is Canada open for business?

The decision of the **Minister of Industry** on November 3 to block **BHP Billiton's** proposed acquisition of **Potash Corp.** of Saskatchewan was a bit of a surprise. While political expediency may have determined the outcome, the decision does shine a light on the "net-benefit-to-Canada" test under the Investment Canada Act. What that test means, how to meet it and whether it is consistently applied are all fair questions to foreign acquirers seeking advice.

By way of comparison, the acquisitions of **Alcan**, **Inco** and **Falconbridge**, all of which occurred in the past four years, were allowed to proceed with **Rio Tinto**, **Companhia Vale do Rio Doce** and **Xstrata** respectively taking control of their Canadian targets. One of those transactions was of comparable size to the BHP \$38.6 billion bid for Potash Corp.

Without commenting on the success in the implementation of the undertakings given by the foreign acquirers in each case, the requirements under the Investment Canada Act were, in the view of the minister of industry of the day, met at the review stage.

While the full details of what BHP may have offered in its application for review as support for its bid are confidential, **Marius Kloppers**, CEO of BHP, recently publicly announced that should it be successful in its bid, BHP would maintain Potash Corp.'s employment levels, increase investment in the company's Canadian mining operations and create a "centre of excellence" in Saskatoon to serve as BHP's global potash headquarters.

All of these considerations touch on key elements of establishing "net benefit to Canada." It is unclear as to whether this is a complete list or just the highlights of what was on offer. But they like-

ly would have been, but for the provincial opposition to the deal, sufficient to establish support for a determination that the net-benefit-to-Canada test had been met. To further bolster its submission, and alluding to previous approvals that have resulted in failed undertakings, BHP has stated that it would submit to a longer effective time for its undertakings to remain in place.

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Does this mean that foreign takeover bids are no longer welcome? Probably not. Mid-market deals, which are showing a return to strength, are not generally caught by the foreign review process. The volume of transactions in the \$50 million to \$250 million range is up in 2010, and regardless of the buyer, proceed to close.

Despite BHP's difficulties, larger transactions that are subject to foreign investment review will still, in the vast majority of cases, be approved on the basis that the acquirer has met the net-benefit-to-Canada test. What we do not know, however, is whether a chill has rippled out across the globe which causes potential acquirers to shy away from making a bid as a result of regulatory uncertainty.

Calls for more transparency in the review process, including the introduction of a private members' bill to disclose undertakings given by acquirers in approved transactions, may gain more traction. An understanding of how the government assesses and has assessed net-benefit-to-Canada proposals and

undertakings would go some distance to providing clarity of process.

Coming out of this decision, it is clear that foreign acquirers will have to take more seriously efforts to gain provincial support. But the federal government has not always

paid as much heed to provincial input. For example, when faced with the **Province of Ontario's** urging to block **Ericsson's** purchase, for \$1.1 billion, of a portfolio of **Nortel** wireless technology patents, the federal government approved the deal. There is

certainly no consistent message that an acquirer can glean from recent history.

Although BHP has 30 days to submit further representations and undertakings to the minister, it seems unlikely the decision will be overturned at this point. ■

Valerie Mann is a partner at Lawson Lundell LLP. She carries on a transactional (mergers and acquisitions / corporate finance) and advisory practice. She is also chair of the firm's technology and competition law groups and co-chair of the firm's M&A practice group.



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