

IN THE NATIONAL INTEREST?

DAN HERMAN

Is BlackBerry's patent hoard a strategic national asset?

Le portefeuille de brevets de BlackBerry constitue-t-il un « bien national stratégique » ?

In the competitive global race for high-wage employment, governments have begun to see intellectual property as a strategic tool to be corralled within national borders for the benefit of domestic firms. State-sponsored patent-buying organizations have sprung up in Europe and Asia, with different configurations but the same mission: to privilege domestic firms in high-tech industries and ensure that the results of publicly funded research remain within the borders where they were developed.

The purveyors of conventional economic wisdom oppose this expression of state intervention, dismissing it as a resurgence of the cult of industrial policy. Their voices remain loud and dominant in Canada. But the rise of state-driven vehicles in other jurisdictions requires immediate attention from Canadian policy-makers. The future of Canada's innovation economy requires it.

This is especially true given the potential sale of BlackBerry, be it to Fairfax Financial or another white-knight bidder. The company's most valuable asset is its hoard of patents — over 5,000 of them — with a value estimated between \$2 billion and \$5 billion. There are certainly buyers for those patents. But before they are sold, Canadians need to ask what the fate of BlackBerry's patents means for the long-term innovation and technological prowess of our economy — and whether the federal government should intervene to keep these patents at home.

We already ask the same broad questions about who's buying whenever a major Canadian company comes up for sale. The *Investment Canada Act (ICA)* requires review of any foreign takeover of a Canadian company valued over \$344 million. In theory, the *ICA* facilitates a determination of whether such

transactions would constitute a “net benefit to Canada.” In the case of BlackBerry's ownership, the analysis will focus on what the *ICA* defines as “the effect of the [transaction] on productivity, industrial efficiency, technological development, product innovation and product variety in Canada” and, by extension, “the contribution of the investment to Canada's ability to compete in world markets.”

In reality, however, this analysis is necessarily spurious. The bureaucrats working on these files know there is little concrete means of making ironclad determinations on the basis of what-if scenarios and counterfactuals. For example, when the federal government ruled against the proposed takeover of Potash Corporation in 2009, no one foresaw the changes to Russia's potash industry that have led to the bottom falling out of the global potash market. That market may or may not rebound. But the drop has revealed that we have few means to quantify what a sustained “net benefit” really is.

Semantics aside, the potential sale of BlackBerry and its cache of patents presents another opportunity to examine the federal government's role in such high-profile and vital transactions.

This is a loaded question. Err too strongly on the side of economic nationalism by forbidding foreign acquisitions, and we risk causing more harm to the long-term growth of the economy as a result of tit-for-tat protectionism from abroad. Yet, when it comes to patents and intellectual property, we cannot ignore the fact that other countries are taking an aggressive stance in defence of this aspect of domestic innovation.

As former Research in Motion (RIM) CEO Jim Balsillie noted in a speech given at McGill University, “The land of intellectual property rights is manipulative, predatory and vicious. And here is the best part: it's managed at the state level.” And while governments have always played a role in shaping international and domestic regulation with respect to intellectual property rights, some have expanded their involvement to include patent-buying organizations that are explicitly tasked with corraling intellectual property (IP) for domestic use.

Dan Herman is the co-founder of the Centre for Digital Entrepreneurship and Economic Performance, and a PhD candidate in global political economy at the Balsillie School of International Affairs, in Waterloo, Ontario.

DAN HERMAN

Three countries have so far established these so-called patent-buying organizations.

The French government created France Brevets (France patents) in March 2011 with a €100-million investment fund split between the state and the Caisse des Dépôts, the French equivalent of the Canada Pension Plan. Tasked with purchasing patents both at home and abroad, the organization has as its objective, as noted on its Web site, “to provide French players in innovation with a higher added-value, based on critical mass on an international level.” Couched in a narrative about a “patent drain” from France, this is all about giving domestic firms a leg up. The France Brevets program showcases a “government-as-strategic-partner” approach to IP and industry.

In Asia, South Korea’s Intellectual Discovery organization is a “defensive alliance” of public and private partners seeking to protect Korean industrial development. This defence has two components: first, a legal program that seeks to protect companies from patent lawsuits by buying up related IP, and second, a development program that looks to identify and nurture domestic patents relevant to industrial development. The company, backed by \$140 million in government funding, and with partners that include Samsung and LG, has so

far purchased over 200 US patents, with 1,300 others in its portfolio.

The implications of this public-private role in patent strategy are significant, given that South Korea has become one of the world’s top-ranked innovation economies and outranks Canada on most metrics of knowledge and technology output. Are South Korean companies getting a leg up on their Canadian competitors thanks to this evolving public-private interface on IP?

Similarly, Japan wields the Tokyo-based Innovation Network Corporation of Japan (INCJ), a joint public-private investment company created in 2009. Over 90 percent of the INCJ’s funding comes from the Japanese government, with the rest coming from a group of 19 domestic companies. Self-described as a patent fund, the organization has programs including the Life Sciences Intellectual Property Fund, an investment vehicle that seeks to purchase and aggregate patents and IP from domestic and international sources for offensive and defensive purposes. Meanwhile, China and Taiwan are contemplating similar public funds.

In Canada, the government has opted to let the market dictate where the intellectual property of domestic firms lands. A case in point is the 2011 sell-off of patents held by Nortel Networks. Despite (certainly self-serv-

ing) pleas from Canada’s technology community, Ottawa did not object to the sale of over 6,000 patents and applications for wireless technology to a consortium of mostly foreign buyers (along with RIM, the buyers were Apple, EMC, Ericsson, Microsoft and Sony). The \$4.5 billion received for the patents certainly pleased Nortel’s creditors. But as other countries begin to strategically protect domestic intellectual property, the Nortel sale begs the question of whether Canada is naive in not guarding some of the country’s most important — and often publicly funded — assets.

The fantasy of a level playing field is melting away. Government-sponsored and -funded intellectual property organizations are being established in response to domestic pressures for jobs and economic growth. Acquiring patents and intellectual property, whether by quasi-private or by public organizations, has become a key strategic lever in a global race for growth.

Whether Canada should join this club of strategic patent nationalists is certainly up for debate. But it is a debate that should begin immediately, given the deep implications for Canadian companies and their ability to compete on the global stage. BlackBerry’s cache of patents is our chance to kick-start the discussion. ■

PHOTO: SHUTTERSTOCK

