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Chair

Mr. David Sweet

Standing Committee on Industry, Science and Technology

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● (1530)

[*English*]

The Chair (Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC)): Ladies and gentlemen, welcome to the 70th meeting of the Standing Committee on Industry, Science and Technology. We have two witnesses before us who I will introduce in just one moment. I just wanted to get a motion on our current budget for this study. Our clerk always makes sure we have enough in our budget. It's $5,100 for this study. Could I get a motion for that budget amount for the study?

Mr. Dan Harris (Scarborough Southwest, NDP): Is this the study on Investment Canada?

The Chair: Yes, presently.

Thank you, Mr. Carmichael. All in favour?

Some hon. members: Agreed.

(Motion agreed to)

The Chair: That's carried. Thank you very much.

Yes, Madam LeBlanc.

Ms. Hélène LeBlanc (LaSalle—Émard, NDP): I would like to move the motion that was presented on May 7. I have a copy of the motion in French and in English.

The motion is basically requesting that Bill C-60 be divided into six pieces of legislation, which could then be properly referred to the appropriate committees. I am more interested in the part stating that "Clauses 136 to 154, related to the Investment Canada Act; be allowed to be renamed as Bill C-62".

You have the whole motion, for which I have already given notice. We strongly feel it is very important that in order for us to properly study the Investment Canada Act it shouldn't be hidden in an omnibus bill such as Bill C-60, but should be divided so that we can properly study it in committee and in depth, and so that as a committee we would be able to make recommendations and report back to the House.

This is the motion I would like to move at this point.

The Chair: Madam LeBlanc, I need to rule against the admissibility of the motion. I can outline the reasons for that. It goes outside of the mandate of the committee and there are two specific reasons why it does.

First, Bill C-60 was not referred to this committee and certain issues raised in the motion fall outside the committee's mandate as provided by Standing Order 108(2).

As well, the motion suggests the committee call on the House to delegate a power to the Standing Committee on Finance. Committees are creatures of the House and may not go beyond the powers given to them by the House. Only the House has the ability to delegate certain powers to the committees, and refer to them in any other issue for review. That's according to O'Brien and Bosc, pages 962 and 973. Therefore, it's not admissible for a committee to make recommendations regarding the powers of another committee.

Second, it's also suggested the committee recommend to the House that the finance committee be given the power to divide Bill C-60 into several bills. It also recommends that these various bills be referred to various committees. Once again, such recommendation goes well beyond the mandate of this committee. It is up to the House to decide which committee a bill will be referred to.

The House already decided to refer Bill C-60 to the finance committee. Even if the House agreed to give the finance committee the authority to divide the bill, and the committee exercised the authority, the resulting bills would remain before the finance committee. Therefore, this is clearly not an issue that our committee is able to decide on.

For all these reasons, I have to rule against the admissibility of the motion.

● (1535)

Ms. Hélène LeBlanc: If I may make a comment, I find it very unfortunate that this committee will not have the opportunity as duly elected representatives of Canadians to study in depth the portion of Bill C-60 that relates to the Investment Canada Act. We strongly feel it is something that should be done. We are being deprived of the opportunity to do so.

The Chair: With that set aside, we'll go back to our regular agenda and introduce the two witnesses who are before the committee. First is Mr. Paul Halucha, director general, marketplace framework policy branch, strategic policy sector, Department of Industry. With him is Matthew Dooley, who's a senior policy analyst, marketplace framework policy branch, strategic policy sector.

It's my understanding, Mr. Halucha, you'll be doing the opening remarks, so please proceed.

Mr. Paul Halucha (Director General, Marketplace Framework Policy Branch, Strategic Policy Sector, Department of Industry): Thank you, Mr. Chair, and members of the committee.

My name is Paul Halucha, and I'm the director general of the marketplace framework policy branch at Industry Canada. I'm here with Matthew Dooley, who is the acting director of the investment, insolvency, competition and corporate policy directorate at Industry Canada.

[*Translation*]

We are here to speak to Division 6 of Bill C-60, Economic Action Plan 2013 Act, No. 1, which would amend the Investment Canada Act, or ICA, for two reasons. The first is to clarify how proposed investments in Canada by foreign state-owned enterprises, or SOEs, and World Trade Organization, or WTO, investors will be assessed. The second is to allow for the extension, when necessary, of timelines associated with national security reviews.

[*English*]

The proposed amendments to the ICA are being advanced within the broader context of Canada's commitment to an open foreign investment and trade environment. Canada welcomes foreign investment and is an important contributor to economic growth that brings new ideas, capital, and jobs, as well as access to new markets and global supply chains. At the same time, Canada is committed to maintaining marketplace framework laws that are up to date and effective.

Since 2006, in response to the changing economic and global circumstances, the government has advanced several changes to Canada's foreign investment review framework. In 2007 the government introduced guidelines to clarify the application of the net benefit factors in the review of proposed SOE, state-owned enterprise, investments.

[*Translation*]

In 2009, the government introduced amendments to the ICA. They included a commitment to incrementally increase the net benefit review threshold to $1 billion in enterprise value for WTO investors, transparency provisions and a national security review process.

[*English*]

In 2012 the government introduced additional transparency amendments to the ICA. The government also introduced new enforcement provisions to promote investor compliance with undertakings. Finally, the government published information on the administration of the Investment Canada Act.

These recent changes to the ICA framework have updated Canada's foreign investment review process, the purpose of which is to review significant investments in Canada by non-Canadians to determine whether they are likely to be of net benefit to Canada, and to provide for the review of investments that could be injurious to national security.

[*Translation*]

Each investment is examined on a case-by-case basis. An investment is either notifiable or reviewable, depending on what size it is, whether it involves a WTO investor, whether it is direct or indirect and whether it could pose a national security threat.

[*English*]

Where an investment is subject to a net benefit review, the Minister of Industry considers the plans, undertakings, and other information submitted by the investor in light of the six net benefit factors listed in section 20 of the Investment Canada Act.

[*Translation*]

On December 7, 2012, following the approval of two significant foreign investment transactions—CNOOC's acquisition of Nexen and Petronas' acquisition of Progress Energy—the government provided clarification. The Prime Minister and the Minister of Industry issued statements clarifying the foreign investment review process, with a particular focus on SOEs and potential concerns about their non-commercial objectives.

● (1540)

[*English*]

Statements stress that while foreign investment is crucial to Canada's economic growth and prosperity, the government clarified that going forward, investments by foreign state-owned enterprises resulting in the acquisition of a Canadian oil sands business would be found to be of net benefit only on an exceptional basis, and that SOE transactions will be carefully monitored throughout the Canadian economy.

[*Translation*]

The government also updated the SOE guidelines to emphasize the importance of good corporate governance, free enterprise principles and industrial efficiency. Another reason for that update was to address concerns surrounding the potential influence of foreign states on commercial activities in Canada.

In addition, the government announced plans to retain the current net benefit review threshold for WTO SOE investors. Meanwhile, the government continued with its plans to progressively increase the net benefit review threshold for private sector WTO investors to $1 billion in enterprise value.

Lastly, the government announced its intention to allow for the extension of the timelines associated with the national security review process. These extensions will provide the government with additional time, if needed, to thoroughly review transactions that are potentially injurious to the security of Canadians.

[*English*]

Division 6 of Bill C-60 includes amendments to the Investment Canada Act needed to implement key components of the government's December 7 announcement. The amendments can be grouped into three principal areas.

First, section 137 establishes distinct net benefit review thresholds for WTO private sector and SOE investors, apart from those in the cultural sector.

With direct reference to the amendments passed by Parliament in 2009, the thresholds for WTO private sector investors will incrementally increase to $1 billion in enterprise value over four years. Related regulatory amendments that define the methodology for enterprise value will be required to bring these changes into force.

The current asset value threshold of $344 million will be maintained for WTO SOE investors. As is currently the case, the threshold will be annually indexed to account for inflation, i.e., changes in nominal GDP.

Second, provisions in clauses 138 to 142 concern timelines associated with national security reviews. Clauses 138 and 139 increase the amount of time the minister has to deliver a final net benefit decision once a national security review process has been concluded from five days to 30 days. Clauses 140 to 142 support the extension of related timelines under the national security review process. The government intends to prescribe the length of some of the related timelines through subsequent amendments to the national security review of investments regulations. The Minister of Industry intends to use these extensions when addressing complex national security issues, which can involve multiple jurisdictions.

Third, provisions in clauses 143 to 145 permit the Minister of Industry to determine or declare that an entity is controlled in fact by a state-owned enterprise. These provisions support the government's commitment to carefully scrutinize SOE activity across the Canadian economy. The control in fact provisions mirror those powers already contained in the cultural and national security sections of the Investment Canada Act. Following parliamentary approval, the government intends to publish the necessary related regulatory amendments required to bring certain changes into force.

[*Translation*]

We are happy to answer any questions you may have on the proposed amendments.

[*English*]

The Chair: Thank you very much for your remarks, Mr. Halucha.

We'll move now to our first round of questioning, a seven-minute round.

Mr. McColeman, for seven minutes.

Mr. Phil McColeman (Brant, CPC): Thank you, Chair, and thank you, witnesses, for being here.

I'm going to start off with questions that were raised in a letter presented to Chair Sweet. It's addressed to the Honourable Joseph A. Day, senator and chair. It is from the Canadian Bar Association.

They have three questions relating to the changes that you've talked about. I'll read them one at a time. I'm not sure that time is going to permit, but I'd like to ask for your response to their questions. If we have time to get through all three, all the better, but if not, perhaps one of my colleagues can follow up in subsequent questioning.

The first question is:

> The definition of state-owned enterprise (SOE) is unclear and, in conjunction with new powers that allow the Minister to deem an entity an SOE, make it difficult to ascertain whether an entity will be treated as an SOE under the ICA. As drafted, even Canadian companies could be subject to the SOE review provisions. The broad reach of the SOE definition engenders uncertainty for all investors.

Could you respond to that question?

● (1545)

Mr. Paul Halucha: For sure.

I would argue that the definition is actually not unclear. The government announced and published, as part of the state-owned enterprise guidelines in the fall, an updated definition of what a state-owned enterprise is. It's contained in the bill and is spelled out very clearly. It reads:

> "state-owned enterprise" means
>
> (a) the government of a foreign state, whether federal, state or local, or an agency of such a government;
>
> (b) an entity that is controlled or influenced, directly or indirectly, by a government or agency referred to in paragraph (a); or
>
> (c) an individual who is acting under the direction of a government or agency referred to in paragraph (a) or who is acting under the influence, directly or indirectly, of such a government or agency;

I would conjecture, and this is consistent with some of the other arguments brought forward by the legal community, their concern is that the concept of influence is not as precise as the concept of direct or indirect control. We can talk a bit about influence in the discussion today.

I would argue, first, it's clear that influence is not as certain as direct control or indirect control. There's a level of ministerial discretion.

I would also note that the act provides principally for ministerial discretion in making evaluations. You could argue that the net benefit factors similarly provide the minister with discretion. They're not as clear as many in the investment community would like.

I would argue as well that at the time when a new public policy is put in place, when powers have not been tried, have not been used, this is the time when you have maximum uncertainty. As cases are reviewed, as the minister makes determinations, there will be a body of evidence that will build up. This is the same practice, the same body of evidence that has built up around other unclear concepts that lawyers have identified in the past.

For example, in 2007, when the SOE guidelines came in, they indicated they were unclear, that there would be a lack of clarity. With time it became evident how the government was implementing them and uncertainty declined. The legal community doesn't have concerns about SOE guidelines anymore.

In 2009, when the national security provisions were brought into force, it was the same thing. There were concerns that with this increased uncertainty, we wouldn't know how the minister would apply the power. Now, after a number of years, the uncertainty is down quite a bit. In fact, you'll notice that in none of the legal briefs that have been written since the budget implementation bill was tabled do they raise any concern around national security provisions, even though there are changes in the budget implementation bill related to those.

With time, I think the clarity will be there.

Finally, I would note that we have an investment review group within Industry Canada. The investment review division engages often with lawyers, engages often with foreign investors. To the extent that they can help to provide certainty, that group can be called upon to consult with foreign investors.

Mr. Phil McColeman: I'm only going to pick out one sentence. Maybe you hit on it with your influence factor, but I want to make sure that their concern is considered. They say, "As drafted, even Canadian companies could be subject to the SOE review provisions". Is there that ambiguity, in your mind, in terms of these changes?

Mr. Paul Halucha: No, there's not. I would indicate that if, through a de facto review, it were determined that a Canadian company was in fact owned, controlled, or influenced by a foreign state, then it's not a Canadian business.

Mr. Phil McColeman: I'll move to question number two that they posed:

> The Minister will have broad powers to deem an "acquisition of control" of a Canadian business by an SOE even if it is only a minority investment or joint venture. This will make it difficult to know whether an investment is subject to "net benefit" review. In addition, the Minister could potentially exercise this deeming discretion long after a transaction has closed.

What's your reaction to that concern they've articulated?

Mr. Paul Halucha: SOE investors could fall below the review threshold in the asset value of a private sector trust.

Effectively the de facto power provides the minister with the authority when he has evidence, or reason to believe, that a transaction that has, in appearances, been effectively billed as a minority stake in fact provides control to a foreign entity, a foreign state-owned enterprise. It only applies in the case of state-owned enterprises so there is no authority with this power to look at regular private commercial transactions. It's only for state-owned enterprises.

That, by definition, significantly limits the types of transactions that we're talking about. I would note as well that there are instances where transactions are structured precisely to get around the review process in the act. The act has an anti-avoidance provision in it, but it's quite a blunt measure. It doesn't provide an exploratory power. The de facto power provides the minister with an exploratory power. If he has concerns, if he has reason to believe that a transaction is in fact giving control to a state-owned enterprise, he can undertake a de facto control test with the purposes of giving himself clarity. That's what the power does. Then there's ultimately a review on the other side of that.

If he determines that a company, a state-owned enterprise, in fact has acquired control, not legal control but de facto control, of a Canadian business, then he has the authority to order a review under the act.

It's not as though he says no at that point. It's not as though the determination that it's a state-owned enterprise ends the process. There's still the full review process to go through.

In terms of the question they raised at the end about the lack of limitation around the power, the challenge would be that if you were to delimit the power and, say, arbitrarily pick a period of 180 days, effectively you would be telling foreign state-owned enterprises they had 180 days to structure a deal in a way that the government doesn't notice and so the minister wouldn't do a de facto control test. After that the minister has absolutely no ability to look back. It would be like working around the avoidance provision. The anti-avoidance provision is similarly an arbitrary power within the act, and it similarly is not time delimited. If you avoided the act five years ago and the minister finds out about it today, he's permitted to act.

I'd make another point around the de facto control power in that under the Investment Canada Act, it already applies in the realm of culture and in national security, and it is broadly used in many other acts and legislation. It's not a power that's been developed from the ground up. It does have a precedent and it exists.

Thank you.

● (1550)

The Chair: I just want to advise members, if they don't mind my exercising my discretion, that because of the nature and the complexity of the questions and answers, I'll try to be fair to all parties across the board. I just want to make sure that when a question is asked there's a fulsome answer, because I think the nature of the subject requires that.

Madam LeBlanc.

[*Translation*]

Ms. Hélène LeBlanc: I would like to thank the witnesses very much for coming to speak to us about a topic, which as the chair pointed out, is quite complex. And for that very reason, we have to study this part of the bill, indeed the entire Investment Canada Act, thoroughly.

I would like to focus on the increasing threshold that will be put in place over the next five years. The increase will actually lead to fewer and fewer transactions being subject to the Investment Canada Act. They will just be approved without a real review. A company like Future Shop could just end up in the hands of foreign investors, and we would lose one or more Canadian companies.

As far as the higher threshold goes, I'd like to know whether you've done an assessment of how many acquisitions would no longer be subject to the application of the Investment Canada Act.

● (1555)

[*English*]

Mr. Paul Halucha: Thank you very much for the question.

Before we turn to the enterprise value, I want to be clear that for national security there is no threshold, so at no point does anything change around the requirement that all transactions be considered from a national security perspective. The liberalization is only in the context of the net benefit review.

As I indicated, it's a regulatory proposal that's been published two times. It was published two years ago and then last spring, and we are right now finishing analysis of the comments we've received from stakeholders. The proposal will only come into effect, obviously, once the changes in the budget implementation bill are approved by Parliament, and then also once the regulatory approvals are approved. So the five-year clock has not started yet.

In terms of analysis, forecasting is very difficult to do because you cannot be sure what types of investment and what sectors are going to be impacted. You can't look forward with a crystal ball and make any kind of prediction, even if we look—

[*Translation*]

Ms. Hélène LeBlanc: If I may, I want to know whether you can do any forecasting by analyzing the data from the past five years, when the current threshold was being applied.

Mr. Paul Halucha: Yes, that's exactly what we did.

[*English*]

We did an analysis based on past reviews. The threshold increase to $600 million in enterprise value would reduce the number of reviews, by our estimate. This is looking back. We looked back over about four years of reviews. We manually, ourselves, went to look at what their trading value was. For some things like liability, for some parts of the formula, there is often proprietary information behind it so we couldn't perfectly replicate it. But based on assumption, once we go to about $600 million liberalization, then the number of transactions reviewed decreases by 30%. At $1 billion, the enterprise value reduction is about 50%.

Another factor was that at the time we did this analysis the government hadn't yet made the determination to maintain the threshold where it was for state-owned enterprises, so to the extent that in that four years of data we have state-owned enterprises that made acquisitions in Canada, they would not be counted. So it could be slightly different from that, but I think that's a fair assumption.

I think that's about it. That was the analysis we undertook.

[*Translation*]

Ms. Hélène LeBlanc: I want to pick up on something you said in your opening statement.

I would like to know whether natural resource companies with oil sands operations are going to benefit from the exceptional circumstances under Bill C-60. Would you kindly elaborate on that?

[*English*]

Mr. Paul Halucha: If I understand you correctly, you're asking in the case of the oil sands about the nature of the exceptional circumstances the Prime Minister elaborated on.

Ms. Hélène LeBlanc: Yes.

Mr. Paul Halucha: To be clear, the Prime Minister spoke on behalf of the government at length on this last December. He did not say under what exceptional circumstances a transaction would be approved. This had been left to the discretion of the minister.

He did note, and I would echo it here, that there is a legal obligation under the act for every transaction to be considered on its merit. It's a case-by-case legal obligation in the act in order to conduct that review. So it would be difficult for the government to essentially make a prohibition vis-à-vis a certain sector. So that would be a statement.

I would note a quote from the December press conference. The Prime Minister stated, "...we should not expect to see future transactions involving controlled interests in the oil sands approved".

Ms. Hélène LeBlanc: I'll ask my next question in English.

In terms of state-owned enterprises, will proposed foreign acquisitions of Canadian companies by SOEs under $1 billion merely be rubber-stamped as well, provided they are not operating in the oil sands?

Mr. Paul Halucha: I would take issue with the characterization of the application of the act as "rubber-stamping". No transactions are rubber-stamped. It's a careful analysis. There is a set of consultations outside of government, and also with the investor.

● (1600)

Ms. Hélène LeBlanc: You're right, I shouldn't use that expression. But will they have to go through the process? Let's say, if it's not in the oil sands, would they have to go through the process if it's an SOE that is acquiring something under the...?

Mr. Paul Halucha: Yes, so if they were still within the threshold and were acquiring a controlling share, or if the minister at the end of de facto control determined that they were taking control, they would be reviewed under the act. The provisions in the SOE guideline would be maintained as well. So there would be a continuous effort to get mining undertakings to have them, to ensure that they're commercially oriented, to ensure that they encourage them to list on stock exchanges, to be transparent in their operations. So all the types of activities that the minister has done in the past would continue. But the commitment is very specific around the exceptions. It's only in the oil sands. Outside of the economy, it's just to monitor.

Ms. Hélène LeBlanc: I would like to touch on the differences between asset value and enterprise value. Also, what are the consequences of the number of transactions? I think I've seen there would be fewer transactions because the enterprise value would be a little higher than the asset value.

Mr. Matthew Dooley (Acting Director, Investment, Insolvency, Competition and Corporate Policy, Department of Industry): As Paul mentioned earlier, the analysis we did historically was about a 30% reduction once you got to $600 million of enterprise value. So that's the basis we give it on both the increase in the threshold and the switch to enterprise value. So it's all together.

Ms. Hélène LeBlanc: What comprised the enterprise value? I leave that up in the air.

Up, no, maybe not.

The Chair: Go ahead and finish it. I'm trying to keep it within reason. It's fairly clear.

Mr. Paul Halucha: Matt is looking up the technical definition at this point.

But it's to get a better market approximation of the value of the company versus a book value. So, for example, company assets like intellectual property would not necessarily be captured in the asset value but would be much more likely to be factored into the market price of the company.

Ms. Hélène LeBlanc: But that's a big question.

Mr. Paul Halucha: In terms of the actual mechanics, the proposal is to go back about two months and look at a period of 20 days prior to the bid because you don't want to have a case whereby the bid results in an increase. Market prices jump because of a bid in an acquisition, as often happens, so you go back to a period before the bid. It's a 20-day period prescribed in the regulations. We take an average of that period. We add liabilities because those are costs that the investor would be taking on and that gives us the market value.

The Chair: Thank you very much, Mr. Halucha.

Mr. Dooley, do you have the technical explanation there quickly?

Mr. Matthew Dooley: Certainly. The calculation for publicly traded companies, as Mr. Halucha just said, is the market capitalization based on our going back two months and over 20 days, plus assumed liabilities. It's a cost that the investor will incur less any cash on hand because it's money the investor is receiving.

For privately held companies, it will be the price to be paid according to the terms of the agreement that the parties enter into plus assumed liabilities less cash on hand.

The Chair: Thank you very much, Mr. Dooley.

Now I'll move on to Mr. Carmichael.

Mr. John Carmichael (Don Valley West, CPC): Thank you, Chair.

Gentlemen, I'd like to follow my colleague's questions with regard to the letter we received from the Canadian Bar Association. I'd like to come back to a better understanding of the de facto control issues, so I'm clear.

The question that was raised was:

> Notwithstanding the lower monetary threshold applicable to SOE investors, because of the way those thresholds are calculated (“enterprise value” for non-SOE WTO investors and “book value” for SOE WTO investors), an SOE investor could fall under the threshold for “net benefit” review while a non-SOE WTO investor could be subject to a review for the same proposed transaction. The CBA Section does not believe this to be the Government's intention.

I wonder if you could clarify that for us.

Mr. Matthew Dooley: Certainly. What they're describing is a situation where, in an SOE, because the valuation of the company is based on asset value, the asset value could in some circumstances be higher than the enterprise value. Perhaps the stock of the publicly traded company has been depressed for some reason. Therefore, its book value or asset value is higher.

Our response would be that this is a theoretical concern. We can't say in every particular case that, yes, the enterprise value is higher than the asset value. What we have found through our analysis, as we've just discussed, is that in the majority of cases, because as well as going to enterprise value we're also increasing the threshold, there are going to be fewer cases that will run into this wall of having to have a review. As the threshold continues to increase—it starts at $600 million and goes to $800 million and then $1 billion and then is indexed to inflation thereafter—the chance of this happening will fall significantly as we go up each level.

As well, one of the reasons we looked at this is that Canada has trade obligations. We've taken reservations for the application of the Investment Canada Act, and one of the implications is that we can't make the act more restrictive than it currently is. The idea of an SOE staying at asset value and staying at its current threshold means we haven't made the act more restrictive. We're staying where we are. Switching to enterprise value, where we assume from the analysis we've done that enterprise value is usually higher than asset value, and yet staying at the same threshold of $344 million for state-owned enterprises puts us at a risk of going offside of that obligation not to make the Investment Canada Act more restrictive.

We're at a situation where we've maintained the SOE threshold for reviews where it was as per our trade agreements. At the same time, for private sector agreements, we are going to increase the threshold so that only the more significant transactions will be captured.

● (1605)

Mr. John Carmichael: I don't want to confuse a couple of thoughts that seem to be moving through the room here.

When you talk about those values, are those values a snapshot in time when you do the appraisal, or are they over a longer term sustainability measurement?

Mr. Matthew Dooley: The calculation is done when a transaction or investment is made. The threshold tells the companies whether they need to make a notification under the act, which is simply advising the government that a transaction is occurring. Alternatively, if they're over the threshold, then they must go through an application for review, at which point the Minister of Industry is entitled to review whether the investment is of net benefit. It is a snapshot at the time of the investment.

Mr. John Carmichael: Okay, that's clear. Thank you.

Mr. Halucha, when you were providing your comments, you mentioned that transactions can be structured to circumvent guidelines. That's not an unusual concept. It's one that's out there, and I understand that. Thus, I suspect that explains the need for the de facto control element within the bill. Is that correct?

Mr. Paul Halucha: That's a strong rationale for that policy change being done.

Mr. John Carmichael: Right. Is that policy change new or amended?

Mr. Paul Halucha: The de facto power didn't exist for the net benefit test. It's a new authority for that portion of the act. As I mentioned, it already exists for cultural industries. It's quite specific in the cultural businesses sector, because there's often an obligation on the companies in order to qualify for programs, in order to obtain beneficial tax treatment, they need to demonstrate that they are a Canadian business. Obtaining a status review from the Minister of Canadian Heritage is frequently used for that purpose rather than necessarily just for reviews.

For national security, there is an authority as well for a de facto control. If on the national security side they make a determination that a company has de facto control, then they can look at it from a security perspective. We're building very much on those two.

Mr. John Carmichael: I understand that. Are there other factors that are considered when you're considering de facto control analysis?

Mr. Paul Halucha: Sure. First, I'll go through some of the factors. We do have a list. The analysis would resemble an undertaking in support of other federal legislation. I just want to underline that this isn't a type of analysis that's done in support of other pieces of legislation, including the Insurance Companies Act, the Bank Act, the Canada Transportation Act, or the Income Tax Act. We have the Telecommunications Act and Broadcasting Act as well.

De facto control can be determined through analysis of a variety of factors—this is a non-exhaustive list—including: the number, type, and distribution of securities; the rights and privileges or features attached to the securities; shareholders' agreements, including the holding of a casting vote and veto powers; commercial or contractual relations of the corporation; and the use of proxies.

For example, one scenario that we thought of in the context of de facto control is that you could have a situation where a foreign state-owned enterprise acquires just beneath the level of legal control and then works through an alliance with another investor that has the shares that together effectively give them acting control of the company.

Then there are factors related to the membership structure, processes of the board of directors and senior management to the extent that you have a non-legal controlling share of the company, but you have three members on the board of directors; you have members who go between a foreign state and the board of directors of a company. These would all be factors, and the minister could say that, while it's not legal control, consideration of all of these others or a subset of them gives reason to believe that there is control. I think that would be the list.

One more I would mention as well is situations of companies already having a history in another jurisdiction. States often own companies that are active in many jurisdictions. If it were to come to the minister's attention that a state had influenced, in a non-commercial way, a company in another jurisdiction outside of Canada, we would want him to be able to consider that in the context of looking at whether this is legal or non-legal control of the Canadian company.

● (1610)

The Chair: Thank you very much.

Mr. Regan.

Hon. Geoff Regan (Halifax West, Lib.): If a small Canadian investor is looking at investing in a company that, as far as he or she can tell, appears to be Canadian, how are they going to know whether or not it's likely that the minister or the department, at some point either before or after a sale, will determine then that in fact it is not effectively Canadian-controlled?

Mr. Paul Halucha: Did you say a Canadian investor?

Hon. Geoff Regan: An investor here in Canada, a person with his RRSP or whatever, wants to invest in a company and invests and suddenly finds out that the minister says it's not Canadian. “Well, I didn't know that.” Now the idea the person has perhaps that it might be sold to foreign investors or whatever suddenly is a problem. Doesn't that create uncertainty?

How is an investor going to know what the heck is going to go on, and isn't it the case, according to the Canadian Bar Association, that it may even happen after the fact? According to the provisions of Bill C-60, it looks like this declaration could be made at any time. There is no requirement for the minister to do this in advance of a takeover. He can do it afterwards and nullify it. When investors are trying to decide what they should invest in and are looking for companies that will potentially have some gain, maybe because they'll be sold in some cases, how are they going to know?

Mr. Paul Halucha: They won't know. A Canadian investor will not know specifically.

Matt, do you want to jump in?

Mr. Matthew Dooley: Yes, sure.

Your question is, how will a small Canadian investor buying shares on the TSX, for example, in a Canadian company know whether that Canadian company is Canadian or not? Is that the question you're asking?

Hon. Geoff Regan: Yes.

Mr. Matthew Dooley: Then the response here would be that they may not know. They may not know until later, but whether this is the way it is or not in the act, they wouldn't know either. The only way there is a potential loss is if there was an attempted takeover of that Canadian company by a foreign state-owned—

Hon. Geoff Regan: The first question to begin with was whether or not you have control of that, this part where it can well be under the threshold, the investor looks at it and says he knows it's majority Canadian-owned, so what does he have to worry about?

Well, now they don't know. They don't know what they're getting into.

Mr. Matthew Dooley: How would that impact their investment? I'm sorry—

Hon. Geoff Regan: The whole problem here is when you have investors who are looking at making investments, whether that be in the oil and gas sector or whatever, the more certainty there is, the more likely.... There is enough uncertainty as it is and there's a lot of risk in Canada. Investors obviously look to avoid or minimize their uncertainty.

It seems to me what's happening here is we're creating more uncertainty.

Mr. Paul Halucha: Well, the uncertainty would exist in the other direction as well. If a Canadian made an investment in what he or she believes is a Canadian-owned and operated company, and, in fact, it turns out that through a de facto control test the company is not owned and controlled, then it's not the minister who has led to the circumstances; all the minister has done is uncovered circumstances which existed.

Hon. Geoff Regan: But if the result is that it can't be sold, then the investor is the one who loses out.

● (1615)

Mr. Matthew Dooley: There's no limitation on a Canadian company that's not a Canadian company being sold.

Hon. Geoff Regan: I'd refer you to the arguments from the Canadian Bar Association because they seem to be very concerned about not only the Canadian entities and the control, in fact, but also subsidiaries of a company that suddenly it turns out, supposedly, isn't Canadian anymore because the minister has decided, “Hey, I don't think it's really Canadian”. There's no way for the investor to know that.

Let me ask you, can you provide the committee with a complete list of everyone who was consulted by the government, and when they were consulted, prior to proposing these changes to the Investment Canada Act ?

Mr. Paul Halucha: Certainly, we could put together that list.

Hon. Geoff Regan: Did Industry Canada receive instructions from the Privy Council Office or the Prime Minister's Office with respect to these amendments to the Investment Canada Act? If so, could you provide the committee with those documents?

Mr. Paul Halucha: Is that a question? For the policy review process, we did work, obviously, with our minister's office in terms of developing these policy amendments. In terms of the Privy Council Office and the Prime Minister's Office, we had no direct interaction.

Hon. Geoff Regan: Who made the decision that these amendments would be part of Bill C-60 instead of being introduced as a stand-alone bill which, of course, would have ensured that Parliament and this committee would have a chance to actually have the proper time to hear from expert witnesses, analyze this, consider amendments, and give serious consideration of the impact of these changes?

Mr. Paul Halucha: I don't know who made the ultimate decision on it.

Mr. James Bezan: On a point of order, Mr. Chair, I believe O'Brien and Bosc is quite clear on page 1058, in chapter 20, talking about the need for witnesses who are employees of the department to be careful in how they're asked questions and how they respond to questions. Often committees usually excuse witnesses from making comments as it entails their personal relationship or the relationship between the department and their ministers.

I think that the line of questioning by Mr. Regan is out of order and we need at least to provide the witnesses a chance to recuse themselves from actually replying to any comments that may jeopardize or compromise their relationship with the minister.

The Chair: Mr. Bezan, I don't know if I can specifically direct the wording for Mr. Regan, but I do hope that the witnesses know that at any time, if they feel that they're going to compromise their position, they can recuse themselves from answering, or, of course, if it's some aspect of policy, they're aware of their appropriate responsibilities in that regard as well.

Mr. Harris, is it on the same point?

Mr. Dan Harris: I was going to ask Mr. Bezan if maybe he could clarify exactly which part of the question he thought was stepping over the line.

Mr. James Bezan: Mr. Regan had asked at what point in time who made the decision to include this in Bill C-60. I think that compromises the position of our witnesses in trying to answer a question that is beyond their mandate in providing testimony here today.

The Chair: You may proceed with questioning, Mr. Regan.

Hon. Geoff Regan: I will start. I presume the clock stopped, Mr. Chair.

The Chair: The clock did stop. It is still stopped until you begin to speak.

Hon. Geoff Regan: Thank you. I think Mr. Bezan should have more confidence in the witnesses and their ability to handle these questions.

Was the definition of net benefit test under consideration during the review of the Investment Canada Act that led to the changes in Bill C-60?

Mr. Paul Halucha: The changes that were announced by the Prime Minister in December and all of the policy work that was undertaken leading up to that was undertaken in the context of cabinet confidence, so I'm not at liberty to talk about what else was or was not on the table for policy changes.

Hon. Geoff Regan: Have you done any analysis to determine if the proposed amendments will restrict global economic interest in investing in Canada, whether through the actual language of the act itself or through the environment it creates?

If you did that kind of assessment or analysis, what was the result of it? If not, why did you fail to assess this impact?

Mr. Paul Halucha: Are you talking about a specific provision in the act?

Hon. Geoff Regan: The question is whether these provisions changing the ICA will affect global economic interest in investing in Canada.

Have you assessed that, and if you haven't, why haven't you?

Mr. Paul Halucha: It would be extremely difficult to forecast and interpret what kind of impact these will have. As was noted at the beginning, these are all discretionary authorities.

● (1620)

Hon. Geoff Regan: There's no assessment at all about what the impact will be on investment in Canada?

Mr. Paul Halucha: You're asking specifically what the impact would be of each of these changes on the global capital availability and—

Hon. Geoff Regan: Are you telling me you've done no analysis of that?

Mr. Paul Halucha: I'm saying it would be very difficult to answer that question from an economic perspective.

We have looked at it from a policy perspective. We have a track record of similar changes that were undertaken. We believe, for example, that it's consistent with the policy direction that the government announced in December. We looked very carefully at the impacts of the Prime Minister's announcement in December on capital markets. We saw that it was welcomed by most investors. It was welcomed by most of our trading partners. It did not lead to increased ambiguity. We did not measure that there were any negative economic impacts of that announcement, from the time of the announcement until now.

In the sense that what the government is proposing in the budget implementation bill is simply to implement decisions already announced, we do not believe there are any new risks associated with these.

The Chair: Thank you, Mr. Halucha.

Mr. Regan, Thank you.

Now we go on to round two with five minutes for questions.

Ms. Elizabeth May (Saanich—Gulf Islands, GP): Mr. Chairman, is it appropriate for me to ask if I might have a chance to ask a question between rounds one and two?

The Chair: It's my understanding that after round two there would be unanimous consent.

Would that be the case, Madame LeBlanc?

Ms. Hélène LeBlanc: We have many questions to ask.

The Chair: It has to be unanimous. There's no consent.

Mr. Dan Harris: Maybe ask again after the second round.

The Chair: Maybe we'll ask again.

I'll be glad to ask as many times as you allow me.

Mr. Warawa, you have five minutes.

Mr. Mark Warawa (Langley, CPC): Thank you, Chair.

Welcome, Ms. May. I appreciate your being here.

I want to comment on Mr. Regan's cheery disposition and his incredibly colourful shirt.

I want to talk about national security timelines.

You highlighted that there will be some changes. Can you first describe how the national security review process works?

Mr. Paul Halucha: Absolutely. I'll walk through the review process.

The review process has three distinct stages. There's a 45-day pre-review stage, in which the Minister of Industry, in consultation with the Minister of Public Safety, determines whether an investment could be injurious to national security, and the GIC can order a review of the investment. During this time the minister may send a notice indicating that he has reasonable grounds to believe that the foreign investment could be injurious. The first 45-day period coincides with the first 45-day period of the net benefit test. The two review processes are going on simultaneously at that point.

The second review stage is for the Minister of Industry, in consultation with the Minister of Public Safety, to complete a review and report findings and recommendations to the GIC.

The first period he undertakes a review to determine if there is a national security concern. The operative words are "could be injurious". The Minister of Public Safety provides him with a recommendation. If he's going forward and he's making a recommendation that the transaction could be injurious, the Minister of Industry concurs or doesn't concur. If he concurs, then he makes that similar recommendation to the GIC, an order comes out from the cabinet, and a review process is launched. That's a 45-day review process.

The Minister of Industry, working closely with the Minister of Public Safety, completes a review and reports the findings and recommendations to the GIC. During this period, government officials conduct further analysis, incorporating any additional intelligence and information received from allies, the non-Canadian investor, and the Canadian business. The Minister of Industry refers an investment to the GIC if he is satisfied that an investment would be injurious to national security.

He's out of cabinet, the first period, at the end of the first 45 days. He's answered the question that it could be injurious and a review is ordered. The purpose of the review is to determine if there is an evidence base that moves it from "could be" to "will be injurious". If the minister believes that the transaction would still be injurious—and this is again, the Minister of Public Safety working in concert with the Minister of Industry—then it would return to the GIC for a decision. The GIC would make a ruling in terms of whether or not there are national security considerations.

We're speaking hypothetically here. Typically at that point, there is a possibility that the GIC could approve the transaction subject to conditions. For example, a condition could be that the Canadian business is required to divest itself of certain assets, a certain business line, or certain technologies. Any of that could come out of the cabinet decision as a condition of it returning to the net benefit review for final approval from the Minister of Industry.

Even after the national security process is done, if there are no national security issues or if the national security issues have been addressed, at that point we have the minister complete the net benefit review, as per the act, around the net benefit test.

● (1625)

Mr. Mark Warawa: There are some changes in that there'll be additional time in part of the process. Additional time will be required. Could you speak to that and when that would be needed?

Mr. Paul Halucha: Absolutely. There are two provisions in the budget implementation bill dealing with the timelines.

The first one deals with more or less a technical fix. As I noted, the national security provisions are quite new. One of the issues around the original drafting of it is that it said that basically, once the minister completes the national security review, he would only have five days to complete the net benefit evaluation, and if he doesn't complete it within five days, it's deemed to be approved. So it put the minister in a very tight situation.

Effectively, the purpose of this provision is to change that, to move it from 5 to 30 days, so the minister has sufficient time to complete the net benefit review, sufficient time to implement any provisions coming out of the national security review. For example, as I mentioned, if there was a requirement for a divestiture or a sell-off of an asset, it would provide additional time for the minister to feel comfortable that the Canadian business and the foreign investor had a way to implement that condition.

The second one is dealing with the actual national security timelines. As I mentioned, there are three phases. There's the pre-review, the review, and then the GIC review process. Right now, the minister does not have the authority to extend any of those periods, except for the first one. For the first one, he has the power in the act and under regulation to take a 25-day extension when he issues an order, in that first phase only. He can't take additional time in the second one, and he can't take additional time in the third phase. The proposal would provide him with the authority in regulations to prescribe extension periods for the second and the third review periods.

The Chair: Thank you very much, Mr. Warawa.

Now on to Mr. Harris. We'll try to keep it to five minutes, as close as we can.

Mr. Dan Harris: Thank you for coming here today.

Of course, we have the six net benefit factors listed in section 20 of the Investment Canada Act. When was the last time those were modified?

Mr. Paul Halucha: I'm not 100% certain, but fairly sure they've not been modified, that in fact they were part of the Foreign Investment Review Act that was rescinded in the early 1980s and the Investment Canada Act was created. I believe they were transposed from the one act to the second one, but if it would please the committee, we could come back with a firm answer on that.

Mr. Dan Harris: That was my understanding as well. I asked the question because in 2008-09 we had the then minister of industry, Tony Clement, after the deals to reject the takeover of potash and MacDonald, Dettwiler and Associates came out and said there needed to be a thorough review of the act. But recently we've heard time and time again from the government that those six provisions are enough, even though they haven't been changed, and yet ministers on successive occasions have said, in fact, it wasn't enough and there needed to be a review.

“Exceptional basis” that the Prime Minister put into the lingo in December was specifically for oil sands development. Is that correct?

Mr. Paul Halucha: That's correct.

Mr. Dan Harris: So any large mining takeovers that involve similarly sized companies that did not specifically operate in the oil sands would not be subject to that kind of a restriction. Is that correct?

Mr. Paul Halucha: I wouldn't characterize it as another restriction, but you're correct that the exceptional language of the policy statement in the fall would not apply to a mining company.

Mr. Dan Harris: So that would exist for future developments in, say, the Ring of Fire or in the territories. They could have just as large an implication on Canada's resource sector as, certainly, the oil sands.

In your opinion, has “exceptional basis” been defined?

Mr. Paul Halucha: The “exceptional” only has not been defined.

Mr. Dan Harris: Okay.

In 2009, again, when the previous deals were rejected on potash and on MacDonald, Dettwiler, there was another term that was added, again I say into the lingo, which was “strategic assets” and “strategic industries”. To your knowledge, has that been clearly defined in the act or by the government, or by Industry Canada yet?

● (1630)

Mr. Paul Halucha: To the contrary, not only is it not defined, it's not an operable concept in the act at all. I always thought that the concept of strategic industries or strategic resources was used more in public commentary to ascribe an importance to an economic asset, and I think it makes sense there because it's easy to communicate. But in the context of the act, it doesn't have any grounding in any one of the six factors, so it's not an operable concept in the regime.

Mr. Dan Harris: Does the fact that these terms are being used but aren't operable in the act, as you say, provide more or less clarity to potential investors looking to invest in Canada?

Mr. Paul Halucha: To the extent that the public debate in Canada has an array of concepts around it?

Mr. Dan Harris: We have “strategic assets” and “exceptional basis” being used as terms, but they're not operable within the act.

Hon. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): On a point of order, Mr. Chair. I'm not clear on what he's asking.

Is he suggesting that every single time someone uses a new piece of terminology we should change the act? Is it that any time some commentator introduces a new term, the act should be changed? It sounds like that is what he's suggesting.

Mr. Dan Harris: Well, I think when the commentator—

The Chair: Hang on just a second, Mr. Harris.

It's not a point of order, but I will keep the clock stopped and if Mr. Harris would like to explain that, then he can do so without his time elapsing.

Mr. Dan Harris: Any regular commentator, no, but when the Prime Minister of Canada and the Minister of Industry add new terminology to the words being used, and when they say they're not going to accept any more foreign takeovers, except in exceptional circumstances vis-à-vis the oil sands and state-owned enterprises, or previously, when the Minister of Industry saying that industry, like say, MacDonald, Dettwiler and Associates and potash, are strategic assets, this adds uncertainty.

Certainly when you have the Prime Minister and the Minister of Industry bringing it into the lingo being used, then it should reflect a government direction and that changes are forthcoming, but we see many years later, potentially, that it's not there.

Hon. Mike Lake: That's ridiculous, Dan.

Mr. Dan Harris: Oh, do you think it's ridiculous?

I think Canadians want an answer to those and business wants an answer. They want clarity in the act when they're looking to invest in Canada, and this government has done a very poor job of doing that.

The Chair: Thanks, Mr. Harris. I allowed you to respond. I'm going to start the time now.

Mr. Halucha, go ahead.

Mr. Paul Halucha: Concerning the term “exceptional”, I would make the point that we undertook an analysis, and the Prime Minister did reflect in his speech what “exceptional” meant and why the oil sands were identified as a sector requiring this additional policy statement. The analysis was on the number of market entrants, the ease with which companies come into and out of the oil sands sector, and the small number of companies actually in the sector right now.

We have about 15 companies effectively controlling more than 90% of the production in the oil sands. The fact is that it's principally, commercially, private sector oriented right now, which makes it very different from oil projects under development internationally, where more than 90% of oil at the international level is already owned by states or by state-owned enterprises. For Canada, the oil sands were exceptional. As well, he made the point that the proper development of the oil sands around private sector principles would bring dividends to all Canadians in terms of increasing the wealth and GDP of Canadians.

So there was an exceptional nature to it.

Mr. Dan Harris: By comparison, how many different companies are operating in mining in Canada at present?

Mr. Paul Halucha: Yes, we did that analysis as well.

There are two factors about the mining sector. First, many of the companies are actually quite small, lower than the threshold, so a lot of them would only be reviewed under national security grounds. Our analysis showed that many wouldn't even be captured, and second, there—

Mr. Dan Harris: Current thresholds or the new thresholds?

Mr. Paul Halucha: I believe we looked at the current thresholds, and we found that in fact there were a lot more companies active in there. You didn't have the same kind of consideration where you had 15 companies and therefore a relatively small number, so that if you had two or three transactions, fundamentally the tenor of the sector could move from being principally private sector oriented to state-owned, and that was the overwhelming condition that made it exceptional.

● (1635)

The Chair: Thank you, Mr. Harris.

We're on to Mr. Bezan.

Mr. James Bezan: Thank you, Mr. Chair. I want to thank the witnesses for appearing today.

I want to follow up on the national security timelines that Mr. Warawa started talking about.

I'm not clear on one thing. You always mention the Minister of Industry, but when we're doing national security, who actually leads that evaluation? Is it through CSIS? Is it through the RCMP, or is it through a different agency altogether?

Mr. Paul Halucha: It is through the Minister of Public Safety. The way the act spells it out, it gives the minister the ultimate decision-making authority on whether there is a national security concern. He makes the decision on the “will be” and the “could be” that I mentioned in the two different phases, but it's obviously heavily reliant on the analysis of both the security and the intelligence community, who report to the Minister of Public Safety.

If he makes a recommendation, that would be taken with extraordinary seriousness by the Minister of Industry.

Mr. James Bezan: I'm on the national defence committee. One of the things we are looking at is cybersecurity and all of the things that are happening in cyberspace. Of course, last fall Canadians heard about the Huawei Technologies corporation and things happening in Canada with that company. I guess they want to make sure that if they decide to buy up another business or another tech-com from China or elsewhere that is moving into Canada, the proper national security guidelines are going to be implemented through these amendments. I just want to make sure that this is going to be taken care of by the professionals.

You also went into detail about our needing, with these amendments, to make sure that we're still compliant with our trade obligations under existing trade agreements. You specifically mentioned WTO.

Are there any other bilaterals or trade agreements that Canada is part of that we also have to be cognizant of in dealing with the amendments being proposed here today?

Mr. Paul Halucha: Reservations have been taken for the Investment Canada Act and for the review mechanism, within WTO for sure, I think, but within NAFTA, and we had a precursor of it, the free trade agreement. It's also permitted for in our foreign investment promotion agreements, the FIPAs that have been done. We're permitted, obviously, within the context of the FIPAs: no one signs away the ability to conduct a review, so the review mechanism is kept intact.

Mr. James Bezan: A final question I have is based upon the feedback I received from constituents during the whole Nexen and Petronas-Progress Energy decision process.

You have alluded already to the fact that if those companies now in Canada that definitely have state-traded backgrounds decide to expand within Canada and buy up another Canadian company, the act will apply under the new definitions and new thresholds.

Mr. Paul Halucha: I'm sorry. One more time, sir...?

Mr. James Bezan: I mean, with the new definitions and thresholds that are defined in the amendments to the Investment Canada Act, in the context that if existing state-traded enterprises that exist in Canada today that are foreign-owned decide to take on other Canadian companies, they would have to be reviewed, under the current conditions.

Mr. Paul Halucha: If they are acquiring a Canadian business house with this, the requirement is that they be reviewed.

Mr. James Bezan: And this is not just in the context of the energy sector, but would apply to other asset accumulations, if they were so interested.

Mr. Paul Halucha: The exceptional nature of the oil sands did not set up any sort of intake process different from that under the Investment Canada Act. The notification review process is still conducted along the normal lines, just with this additional policy clarification around how the minister will weigh those types of transaction proposals.

Mr. James Bezan: Once these amendments are passed in Parliament, how will the thresholds and new definitions be brought into force?

Mr. Paul Halucha: It will be via regulation, both on the national security side.... I would be speculating as to whether there would be one or two regulatory packages, but there would be one set of regulatory changes to implement the national security provisions in the act and a second one around enterprise value. We have obviously had a head start on that work, given that we have already done pre-publication, last year; however, ensuring that it's appropriate now for the definition of state-owned enterprises would be work still to be done.

Mr. James Bezan: Are those drafts that are to be gazetted about ready to go, just as soon as the act is declared?

● (1640)

Mr. Paul Halucha: Yes.

Mr. James Bezan: Okay, thanks.

The Chair: We go on to Mr. Masse, for five minutes.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair. It's good to have the witnesses here.

The NDP first raised in 2003 and in 2004 the question of the Investment Canada Act's being deficient under national security and called for changes then. In 2005 the minister—at that time Emerson, who was a Liberal and then a Conservative—stated in his press release, "We expect these reviews will be rare, as existing tools are generally adequate in addressing potential national security concerns." It took from that point in time to 2009 to get to a development of that idea into legislation.

From 2009 to 2013, how many cases would these changes actually have applied to during that timeframe, and which ones?

Mr. Paul Halucha: I can't answer that question.

Mr. Brian Masse: Could you come back to our committee with that information? It would be interesting to find out what the new provisions actually trigger, from among the cases that have come forward. It would give some more clarity, in my opinion.

Mr. Paul Halucha: It's a national security process. To my knowledge, that information is not readily available. I can't commit to bring back something that I wouldn't be able to make public.

Mr. Brian Masse: Okay. I think that's just part of the problem that we're faced with here still: the nebulidity of this issue and private investors trying to understand what the impact is going to be.

In these new changes, I just want to get this for the record. Are there any changes for the enforcement of undertakings or improvements? For example, in the Stelco case, let's say, is there anything in these changes right here that would improve that situation?

Mr. Paul Halucha: No. The government brought forward measures to strengthen enforcement in the previous budget implementation act, not in the current one.

Mr. Brian Masse: Yes, and I think this is part of the problem we're seeing here. I believe this is the third time, if I'm correct, that the act has been amended in a budget implementation bill. Is that correct?

Mr. Paul Halucha: I wouldn't know. I know for certain that it's happened the last two years in a row.

Mr. Brian Masse: Okay—

Mr. Paul Halucha: Sorry—at least three in a row.

Mr. Brian Masse: I think that's the point my colleague was mentioning with regard to the way the process is going.

What other countries have exceptional designations? Have we looked at what other countries have done? Have we looked at the United States, Australia? Has there been a review? What exceptions do they have?

Mr. Paul Halucha: It's challenging to do a review of the foreign investment regimes of other countries, principally because many of them are focused on national security. Canada is not completely alone, but we're in a relatively small crowd in terms of having an economic review desk. Trying to find out what happens behind the scenes of a national security review in the United States is extraordinarily difficult.

Mr. Brian Masse: Do other countries have designated exemptions, like oil or mining, or like in Australia?

Mr. Paul Halucha: Yes. The United States has an exhaustive list, and many other countries put out lists of sectors that are of concern.

Mr. Brian Masse: Okay. So it's more common, then, to have multiple exemptions. What other types of industries are you aware of that have those exemptions?

Mr. Paul Halucha: Well, for example, in the U.S., there's the defence industry, and I think ports, and all kinds of transportation infrastructure. In terms of the U.S. list, it's actually sometimes easier to find sectors that aren't there. They have a very exhaustive interpretation of national security.

I would note that many other countries are also considering how to adapt their foreign investment review regimes in the context of increased activity by state-owned enterprises. For example, in Australia in the last couple of years, they have developed a definition of state-owned enterprises.

The U.S. has added a definition of state-owned enterprises. For example, in the U.S. now, they have a requirement to finish their reviews within 30 days. They have to go quite high up in the policy chains in Washington to get an extension for the additional 45 days. We understand now that in fact all transactions involving SOEs automatically trigger that second review period.

There is definitely a consensus in other countries that they want to pay attention. In that context, I think Canada is not exceptional.

Mr. Brian Masse: With regard to China Minmetals, which started a lot of this, there was a lot of concern expressed at that time about labour laws and environmental laws. That was back in 2004. What in this current bill and in the legislation do we have to protect workers over here or to also have a lens on the environmental and labour laws of those state-owned enterprises from China and other countries?

● (1645)

Mr. Paul Halucha: There's nothing explicit on that.

Mr. Brian Masse: Yes. That's unfortunate, because even in the United States that has been addressed and has been examined as well.

With regard to the moving of up to 50%, when we get to a billion dollars we're going to be doing 50% fewer reviews. Is that 50% less of the 30%, or is that from the original target?

Mr. Paul Halucha: It's based, as I said, on a backcasting. It's looking at three or four years of transactions and then playing out with an economic model what the drop-off would be in the number reviewed had the billion-dollar threshold been in place in the past.

Mr. Brian Masse: Thank you.

The Chair: We'll now go on to Mr. Lake.

Hon. Mike Lake: Thank you, Mr. Chair.

Thank you to the witnesses.

I've found this to be a very, very interesting committee hearing so far. It's good that Mr. Masse is here today, because as much as I've been listening to the opposition members talk about their desire to study the Investment Canada Act, it's interesting hearing a reference to Minister Clement—-his name is “Clement”, by the way, with no “s” at the end—and his request that the industry committee study this issue back in 2011, not too long ago.

I was actually on the committee. Mr. Masse was on the committee at the time. There might be a few other members here—I'm not sure—who were on the committee at the time. On the government side, we wanted to take a look at the Investment Canada Act, and I believe there were actually three members from the Liberal Party and two members from the Bloc who didn't want to study it, so Brian had the deciding vote on that. We argued vehemently for the—

Mr. Brian Masse: On a point of order, Mr. Chair.

We wanted to actually study both the Investment Canada Act and the actual census act.

The Chair: Mr. Masse, I think you know what I'm going to say.

Go ahead, Mr. Lake.

Hon. Mike Lake: Yes, that's interesting because I actually remember we had about 15 hours of study, I believe, on the census up to that point. In fact, we came back for two full days during the summer to study that issue.

When it came time to cast his vote, Mr. Masse decided to cast it with the Bloc and the Liberals and against studying the Investment Canada Act as fully as we would have liked to study it. Of course, subsequently the NDP cast their vote to have an election right around that same time.

There's a little bit of a history lesson there, so it's interesting. I'm hearing a little bit of revisionist history from the NDP today as it relates to this. I just find that history interesting.

Also, there's the fact that we have taken steps to strengthen the Investment Canada Act. We've taken steps to address the national security issues. We've taken steps to strengthen transparency and accountability. We've taken steps to address issues around state-owned enterprises. For the most part the opposition parties have opposed those steps and measures as we've taken them.

So again, it's interesting to listen to the dialogue from the other side.

To Mr. Harris's point on terminology, it's ridiculous to put forward the idea that any time a commentator...and you were referring to commentators. The statements you were referring to were statements that were made by commentators, even if they're made by MPs from whatever party.

The fact of the matter is that sometimes when we're talking about legislation, we might use words that are not necessarily contained in the legislation. That doesn't mean you have to go back and actually introduce new legislation every time that happens. Quite frankly, if we actually did amend the legislation, you wouldn't vote for it anyway.

What I do want to refer to is section 20 of the Investment Canada Act. Actually, I'm going to go to section 20 because when we're having these discussions, and oftentimes when I'm on panels—because I've been on many panels with different members from the opposition parties—they create this idea that there's absolutely no criteria, or very vague criteria, for evaluating net benefit.

Paul or Matthew, I don't know which one of you wants to walk through the criteria. There are six criteria in section 20, and of course within each of those paragraphs of section 20 there are multiple criteria listed, I believe.

Perhaps you could walk us through the net benefit criteria in section 20.

Mr. Matthew Dooley: Sure, I'd be happy to do so.

As mentioned, there are six net benefit criteria set out specifically in the act.

The first is the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, and on the utilization of parts, components, and services produced in Canada. An example of that would be an investment that may result in increased production and investments at Canadian facilities, and result in opportunities for Canadian suppliers.

The second factor that the Minister of Industry is to consider is the degree and significance of participation by Canadians in the Canadian business. An example of this would be the number of Canadians who would occupy senior management positions following the investment.

The third factor is the effect of the investment on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada. An example there would be an investment that brings new technologies or expertise to Canada resulting in increased productivity, or new goods onto the Canadian markets.

The fourth is the effect of the investment on competition within any industry or industries in Canada. Here, consideration can be given to the impact on concentration within an industry, and it can involve consultations with the Competition Bureau.

The fifth is the compatibility of the investment with national and provincial industrial, economic, and cultural policies. An example here would be consideration given to an investor's track record in upholding such industrial policies, such as employee health and safety standards.

The sixth is the contribution of the investment to Canada's ability to compete in world markets. Here, the minister would be considering how the investment could create operating synergies resulting in greater international presence.

● (1650)

The Chair: Thank you, Mr. Lake.

Now on to Mr. Stewart, for five minutes.

Mr. Kennedy Stewart (Burnaby—Douglas, NDP): Thank you, Mr. Chair, and thank you to the witnesses for coming today.

I have more of a macro question, kind of a bird's eye view. I'm really thinking about the value of this act as a piece of legislation. I'm just wondering what would happen if we didn't have the ICA. If we could get out of the technical details of what we've been talking about, could you give me a sense of what the last five years or so would have looked like in Canada?

Mr. Paul Halucha: Are you asking if we had no investment review regime, how would that have affected investments in Canada?

Mr. Kennedy Stewart: Yes.

Mr. Paul Halucha: You need to look at what the elements of the act are and what they provide.

The national security provision permits the government to review from a national security perspective and make a determination whether or not and then mitigate if there are any national security considerations. In the absence of a national security review, we would have no way of knowing what the impacts were on Canada, whether any national security risks increased in Canada as a result of a transaction.

Mr. Kennedy Stewart: Sorry, and so—

Mr. Paul Halucha: I don't have specific examples I can provide on that.

Mr. Kennedy Stewart: You wouldn't have any that were overturned specifically because of national security purposes.

Mr. Paul Halucha: There's no reporting on national security under the provisions of the act.

Mr. Kennedy Stewart: What kinds of reports are issued? The offers are public, right? If a foreign company were to offer to take over a Canadian-based company—

Mr. Paul Halucha: First of all, there's a high degree of commercial confidentiality around the transaction, and that would be heightened in the case where there was a national security consideration being raised. It would be unlikely that either the investor or the Canadian business would have an incentive to make public the fact that it was the subject of a national security review or that national security considerations were dealt with in the context of a review of a transaction.

Mr. Kennedy Stewart: Are the offers themselves not available to the public?

Mr. Paul Halucha: Notifications are made public. Correct.

Mr. Kennedy Stewart: Right. So, could we go back and catalogue which deals have been overturned for...?

Mr. Paul Halucha: Yes. There's been only one transaction that's been rejected under the Investment Canada Act.

Mr. Kennedy Stewart: Okay.

Mr. Paul Halucha: In terms of the potash one that was mentioned earlier in discussion, a section 23 notice was sent by then Minister Clement to the investor advising them that they had a 30-day period within which they could make.... He was basically signalling that he wasn't convinced it was of net benefit, but he provided them with a 30-day window during which they could make representations and change his decision. They elected to withdraw the transaction during that period. So it's incorrect to say it was rejected.

Mr. Kennedy Stewart: The ICA, then, has only had the effect of overturning one offer in the whole last five years.

Mr. Paul Halucha: Correct. There are also undertakings. On the cultural side, there have been others. We don't administer the cultural side of the act at Industry Canada, so I'm much less familiar with it. But this is correct.

● (1655)

Mr. Kennedy Stewart: Do you have a sense of how many? There's a lot of discussion here about a particular act, lots of kerfuffle. I'm just wondering how much it's actually impacted investment.

Mr. Matthew Dooley: In the cultural sector we understand the Minister of Canadian Heritage has rejected at least four transactions.

Mr. Kennedy Stewart: Okay, but those aren't rejected for security reasons.

Mr. Matthew Dooley: They're rejected because they don't meet the net benefit test from the cultural perspective.

Mr. Kennedy Stewart: So we have...I'm counting five deals.

Do you think there are companies that, for example, don't, because of the Investment Canada Act...? You're the expert, so I'll ask you. Do you think there are companies that are dissuaded from even making those initial deals because this act is in place?

Mr. Paul Halucha: We don't have evidence of that.

Mr. Kennedy Stewart: You don't have evidence of that.

Mr. Paul Halucha: In fact, it would do the opposite.

If you look at it from a comparison of regulatory processes in many other countries, it's a very efficient process to obtain the approval or to have a transaction approved or not. There's not a set of regulatory.... It doesn't take place in every jurisdiction in the country. We consult with provinces. It has a start date. It has an end date. It's very clear what the minister's accountabilities are throughout. The factors are published.

In fact, if you go back historically and look at the data since 1985 when the act was brought in, the level of investment in Canada has gone up extraordinarily. To what extent you would argue that it was just the two contrasting regimes, that would be an analytical discussion, but I think it's very hard to come up with examples of cases where it's been an impediment or an obstacle to investment.

Mr. Kennedy Stewart: I would also mention that under the Investment Canada Act, there is the ability for investors to provide undertakings to the Minister of Industry in order to obtain an approval under the net benefit test. Without the Investment Canada Act there'd be no need to provide such undertakings because there'd be no review of the legislation.

So any undertaking that has been given in the time of the act would be a benefit that we've received from the act that we may not have received otherwise.

The Chair: Mr. Stewart, your time is up.

Mr. Lake, you have five minutes.

Hon. Mike Lake: Thank you, Mr. Chair.

As we study this I want to get some context to what we're looking at within the budget implementation bill because we, including myself, have delved a little deeper into the actual act, just the Investment Canada Act, or the actual legislation.

What are we talking about? How many pages within the budget implementation bill are dedicated to changes to the ICA?

Mr. Paul Halucha: By my count earlier today, there are 11 pages in the budget implementation bill.

Hon. Mike Lake: How many paragraphs or clauses are there?

Mr. Matthew Dooley: I don't think they're numbered in the bill.

Hon. Mike Lake: Is it 20 or something like that, or 18?

Could we take some time to walk through them? I don't know if we'll get to clause-by-clause in this case. As a committee I don't think we will look at this. Maybe we could just walk through the different sections in order and you could explain the changes to help us understand.

Mr. Paul Halucha: Absolutely. Matt will take the lead on that.

Hon. Mike Lake: I'll just throw the ball to you because I'm sure that will take up my time.

The Chair: Try to do that in four minutes.

Mr. Matthew Dooley: What I will do then is stick to the substantive amendments. If I don't mention a clause or a subclause, it's because there were a number of changes that were simply technical changes, French-English concordance, that sort of thing.

The definition of “state-owned enterprise” was added in subclause 136(2). I think Mr. Halucha mentioned it earlier, that this captures foreign governments or agencies, entities controlled or influenced by foreign governments, and individuals acting on behalf of or influenced by a foreign government.

Subclauses 137(1) and (2) create the new threshold that we're talking about. In 2009 there was a commitment to increase the threshold from the current $344 million up to $1 billion.

These subclauses do two things. One, they reintroduce that increase in threshold, but they separate out the private sector investors from WTO countries and the SOE investors from WTO countries. Essentially there will be two separate thresholds for private sector companies under subclause 137(1). It will eventually increase to $1 billion before transactions are reviewed. For SOEs from WTO countries, it will maintain its current level at $344 million of asset value, indexed to inflation going forward.

Clause 138 is quite long. I believe it's two or three pages. It's essentially a technical amendment. It was discussed earlier. After a national security review has been completed, the minister has only five days to finish the net benefit review. We're increasing that to 30 days to ensure they have time to solve any problems that may have arisen, or finalize any undertakings, etc.

The reason it is such a long clause is simply that it captures the various scenarios in which a national security review can go forward, from the initial stage, where there's a pre-review and a notice is sent to the investor, all the way through the multiple stages, where finally a Governor in Council order is given demanding that certain actions be taken by the investor. As I say, there are a number of stages that happen through there, and each one had to be covered off to ensure that this 5-day to 30-day period will occur in each one of those scenarios.

Clause 139 is similar. Simply, it's the case where the net benefit review has been extended from 45 days to 75 days, so it captures that period as well.

Subclauses 141(1) and (2) as well as clause 142 create the authority for the Minister of Industry to prescribe the periods upon which the national security review process can be extended. It gives legislative authority for regulations to be created to prescribe periods to extend the national security review period and the Governor in Council decision period.

Clauses 143 and 144 deal with the de facto control provisions we were speaking about. Clause 143 deals with the Canadian status of an entity. In this case it is a matter of whether a company that appears to be Canadian controlled is in fact de facto controlled by a state-owned enterprise.

Clause 144 permits the minister to review whether an acquisition by a clearly state-owned enterprise of a Canadian business—although it doesn't mean the de jure or legal control as set out in the act, the thresholds—is still in fact an acquisition for control based on the de facto factors we discussed earlier.

Clause 145 goes to the Canadian status we spoke about earlier. Currently the Minister of Canadian Heritage and the Minister of Industry must provide a written opinion as to whether a company is Canadian controlled or not.

● (1700)

This is important in the cultural sector, we understand from our colleagues at Heritage Canada, because whether a company is Canadian or not will provide it with access to different government programs at the federal level. It's important to them to have the ability to receive a written opinion from the government that they are in fact Canadian. This will be maintained, so they will still have the right to go to the Minister of Canadian Heritage and get that legal written opinion.

On the other hand, for the Minister of Industry, it simply gives him the flexibility to decide on the facts, on the case, whether it's appropriate for him to provide a written opinion as to whether a company is Canadian controlled or not.

Finally, skipping a few sections here, the transitionals, etc., this is important because it seems to have been missed by some of the legal community commentary. We talked about de facto control. The minister will be able to go back to the date that the bill was tabled in the House, which I believe was April 29. From April 29 to the day the bill receives royal assent, for any transaction or investment that has occurred, the minister will have the right to reach back and check those transactions for whether there was de facto control transferred or acquired at that time, but this reach-back ability is limited. The minister must send a notice within 60 days of royal assent.

The purpose here is simply to ensure that there's no gaming of the system. They rush a transaction through knowing that they are acquiring de facto control simply to avoid the application of the new provisions before the government can bring them into force.

● (1705)

The Chair: Ms. May.

Ms. Elizabeth May: Thank you, Mr. Chair.

Thanks to members of the committee for allowing me a chance to ask questions.

Do I have a five-minute time limit, Mr. Chair?

The Chair: Five minutes, that's correct, Ms. May.

Ms. Hélène LeBlanc: Mr. Chair, can we make sure that the time allocated for the opposition is not used for this and that we would still have our time to....

The Chair: That's correct.

Ms. Hélène LeBlanc: Thank you very much.

The Chair: That said, that means I'll have to stick very tight now to the five minutes. So for the questions and the answers, I'm going to have to stick a lot tighter because we only have 27 minutes left.

Hon. Mike Lake: Just to clarify, where are we with questions?

The Chair: After Ms. May is done, we'll go to our third round. It will be Conservative, NDP, Conservative, Liberal.

Ms. May.

Ms. Elizabeth May: Thank you, Mr. Chair. I'll attempt to use my time efficiently.

Thank you, witnesses.

I want to go back to the competition policy review panel and their advice before the amendments were tabled in 2009. I'm going to ask questions specifically around the fact that these amendments through Bill C-60 are attempting, as I see it, to bring greater clarity around certain concepts and to extend timelines for national security reviews.

What I want to know is whether within Industry Canada, you received advice that it would be helpful to review and clarify the term “national security”, which currently isn't defined within the act.

Mr. Paul Halucha: It has been something that has been mentioned by, I would say, think tanks and certain legal firms that represent foreign investors. In their efforts to have a maximum certainty, they wanted to have a prescribed definition of it, or a list, the way that some other countries do, like the United States.

Ms. Elizabeth May: Yes, I think it's the United States, the U.K., China, Japan, and Germany that would have reviews that would be triggered by an actually defined term of national security.

What I'm wondering is whether at Industry Canada you're aware of any studies in the Canadian context. As you've said, think tanks have recommended this. It's in the *Canada Gazette*, from when the 2009 amendments were accepted, that there were recommendations at the time that the term “national security” should be “explicitly defined and national security reviews should take place according to concrete, objective, and transparent criteria”.

Are you aware of any empirically designed studies that would in any way question the benefit of having such defined terms and such transparent reviews?

Mr. Paul Halucha: I'm not. We're not aware of any studies on that. I'd clarify that it was a policy decision by the government to not have a prescribed definition for national security on the basis that the types of threats that Canada could face from period to period can change. Given the evolving nature of threats, you wouldn't want to have a definition of national security that precluded you from considering certain specific types of threats.

Ms. Elizabeth May: But you'd agree with me that other countries haven't found a defined term to be an impediment to applying their investment tests in relation to national security.

Mr. Matthew Dooley: I would point out that the United States, as a clear example, has an non-exhaustive list. It's exhaustive in that it's very long, but it's non-exhaustive in that they can add more to it if they want to. I would argue that they don't have a clearly defined definition for “national security”. What they have done is list their sensitive industries or sectors that they're going to be concerned about. If another sector comes up, as Mr. Halucha said, the threats change and they'll add that to the list.

Ms. Elizabeth May: Yes, Mr. Dooley, you may find their list exhausting but it's not exhaustive. In any case, it might be a model we can look at.

Those are all of my questions. Thank you.

The Chair: Thank you very much, Ms. May.

Now on to the Conservative Party. I don't have a speakers list here.

Mr. McColeman.

Mr. Phil McColeman: Thank you, Chair.

Paul, on your original answers to the questions from the Bar Association, you touched on.... I'd like a little more explanation and I'll put it this way. Can you explain what factors would be considered in evaluating influence? I think in the context of your original answer to question one by the Bar Association, you were explaining influence in that answer, but I really wasn't understanding the context as well as I'd like to on that factor and how it plays into these changes.

● (1710)

Mr. Paul Halucha: Influence is determined, as we noted earlier, on a case-by-case basis. It only presents an issue where there is indirect or direct control.

In a case where a state-owned enterprise has direct or indirect control influence it becomes a tertiary concept because you already have damage-rated control in the first two points.

They review the process. Investors are expected to address in their plans and undertakings the inherent characteristics of SOEs, specifically whether they are susceptible to state influence. Investors also have to demonstrate their strong commitment to transparent and commercial operations. In terms of some of the types of factors that we talked about that could be influenced but don't get caught by direct or indirect control, I would note the following examples.

There's the ownership of special shares of a corporation, often called golden shares. If a foreign state has 5% golden share, that carries with it certain negative covenants, which they often do. That would be considered in an evaluation of influence.

There's the track record of the company, for example, the evidence of other SOEs from the same state and how they've operated and how they've conducted themselves in other jurisdictions. That would be considered.

There's the state's ability to nominate or replace board members, appoint senior management.

There's any authority under foreign law or corporations governing documents permitting the foreign state to direct the affairs of a business.

Those are some examples, and we talked earlier about some of the de facto control ones as well.

Mr. Phil McColeman: I appreciate that.

It seems to me, from a layman's language versus the various legal ways that these things are stated, that as we develop these changes and as we bring in new amendments and regulations, in many ways they are the result of trying to close loopholes, figure out ways that people are going to try to come in through the side door or some other fashion that's going to not be what was intended with the regulations in the first place.

In other words, there's this industry out there that considers how to figure out a way to get around these rules and regulations. So, we're trying to work out a system here or changes that will allow us to balance the interests of foreign investment along with the lines of protecting the many and the diverse interests of Canada. Is it fair to say that it's kind of the thrust of these changes, what we're trying to accomplish?

Mr. Paul Halucha: I think it's very well put.

If you look at each of the instances where there's a lack of clarity and there's discretionary power with the minister, it's to permit the minister to safeguard the interests of Canadians. That's a balance we're interested in. This is not a question of the transactions being cleared as efficiently as possible from the market perspective, but ensuring that Canadians have a system, a foreign investment regime that adequately protects their interests.

Mr. Phil McColeman: We've had the rules and regulations and now we're adding different dimensions to it, but over time we get this body of knowledge built where we're moving towards a better understanding of what the best scenarios would be, but we never will catch up with people or companies trying to circumvent the rules. Maybe that's asking you for an opinion and I don't mean to put you into a tough position. If it is, just say so. Is that not also the thrust of what governments do when they bring in guidelines and new regulations such as this?

Mr. Paul Halucha: I would agree. The changes are there to ensure that the government's policy intent as articulated in December...that the minister has the tools to ensure that the policy intent is achieved.

Mr. Phil McColeman: I'll use one last word in terms of this. Again, if you wish to respond, please do.

I think that one of the ultimate tools I would like to see in many more parts of the rules and regulations of governments at all levels is flexibility, flexibility to deal with especially exceptional circumstances, and flexibility to respond, in business terms, in a timely and nimble way if it means good things for Canada, if it means good things for Canadians.

● (1715)

The Chair: Thank you, Mr. McColeman. That is going to have to be the final word.

Mr. Phil McColeman: Oh no, Mr. Chair....

The Chair: I mentioned that I had to stay pretty tight in this to make sure that everybody gets an opportunity. I know that Mr. Regan wants that last opportunity.

Hon. Geoff Regan: Thank you very much, Mr. Chairman.

The Chair: No, no, not yet. I'm sorry.

Hon. Geoff Regan: Not yet? I was going to finally get there. I'm working on it.

The Chair: Mr. Harris, please.

Mr. Dan Harris: Thank you. I'm glad to have another round.

I just have to follow up on what Mr. Lake said. It's bizarre to me to characterize the Prime Minister and the industry minister as "commentators". They are decision-makers: people who are supposed to be crafting the direction of government and policy.

On the case of the Investment Canada Act reviews and what happened in the past in previous Parliaments, I do believe that a study actually had been started but then got cut short when the Prime Minister broke his own fixed election date legislation to call an election in 2008.

Moving to the present, we have had in Parliament a motion that was passed by all parties to engage in a thorough study of the Investment Canada Act, as well as a motion passed by this committee itself. As the Conservatives are in the majority position, they're the ones who dictate when, where, and what we are going to study as a committee.

The fact that the Investment Canada Act, despite there being large cases with Petronas and CNOOC-Nexen next year.... This government has decided in fact to not engage in a thorough review and study of the act. Instead, all we have are two meetings to deal with rather large and substantive changes to the act.

Earlier in Mr. Regan's questions, you mentioned capital confidences and the issue of not being able to say who with or where consultations have been done. The Minister of Industry, when he was here a couple of weeks ago, spoke of round tables that have been done. How many round tables have actually been done in consultations with stakeholders in regard to these changes that have been brought forward in the budget implementation bill?

Mr. Paul Halucha: What the minister mentioned, I'm not sure.... I think the minister was talking about general discussions that he's had with stakeholders. I'm not aware of any specific round tables on the changes in the budget implementation bill.

I would point out the fact that the minister meets many, many representatives of industrial sectors, internationally and in Canada, and investment comes up frequently as a topic. I'm certain that he and our deputy minister would have heard, and the senior management generally hears often, the assessments of different proposed changes around the Investment Canada Act.

To the extent that almost everything that's in the budget implementation bill was signalled quite publicly by the government in December, we've had a number of months to take the pulse of Canadian industry, as it were, and internationally as well, around these changes.

Mr. Dan Harris: Were these changes signalled in the 2013 budget or the economic action plan prior to the budget implementation bill?

Mr. Paul Halucha: There was a page in the BIA—or, sorry, in the budget bill, the documentation I saw, there was a page that described these changes.

Mr. Dan Harris: With those, are you aware of any public consultations that have happened in regard to these changes?

Mr. Paul Halucha: As I mentioned, we were in cabinet secrecy for a number of months undertaking the work in support of it. Therefore, consultations.... At my level, this is what I can speak to. We did not have the ability to undertake consultations.

Mr. Dan Harris: I'd like to share what's left of my time with Mr. Masse, please.

The Chair: You have 80 seconds.

Mr. Brian Masse: Thank you, Mr. Chair.

With regard to change number three and state-owned enterprises, it states there that "activity across the Canadian economy" will be scrutinized to determine the position. Can you tell me what types of activity will be scrutinized and what they'll be focusing on and looking at, and will that also include a wider global look at the state-owned enterprise's assets in activity internationally?

Mr. Paul Halucha: What section are you in, I'm sorry?

Mr. Brian Masse: It's the third point, "the Minister of Industry declare the entity is controlled by S-O-E. These provisions support the Government' s commitment to carefully scrutinize S-O-E activity across the Canadian economy."

What type of activity will be scrutinized by the minister, and does this exclude the global economy and the SOE's activity in the global economy?

● (1720)

Mr. Paul Halucha: I'll answer the first point.

SOE activity, basically, from an analytical perspective, as a result of the changes in the budget implementation bill, and the policy articulated in the fall, the government committed to monitor SOE activity in all sectors of the Canadian economy. We are working diligently now to undertake that analysis in support of the government. For a number of years now, there's been attention and awareness paid to whether or not it was a state-owned enterprise or a private sector company, so that type of work will continue going forward.

The Chair: Thank you, Mr. Halucha. That's the limit I'm able to give you. We're under quite a time pressure here.

Mr. Carmichael.

Mr. John Carmichael: Thank you, Chair, and thank you to our witnesses. I think this will be my last go-round.

It's my understanding—and if this is repetitive from earlier questions, I apologize—that in proposed Bill C-60, the SOE definitions of direct or indirect influence remain undefined. Am I correct in that?

Mr. Paul Halucha: You're correct, sir, only that they already are defined in the existing Investment Canada Act, so there's already a—

Mr. John Carmichael: From an interpretative perspective—

Mr. Paul Halucha: Oh, sorry, you said “influence”. I thought you said “control”.

Mr. John Carmichael: Influence, yes.

Mr. Paul Halucha: Control, yes, is not defined. Indirect and direct control are defined, though, in the act.

Mr. John Carmichael: So they are defined.

Would they be characterized similarly? There's an interpretative value here, right?

Mr. Paul Halucha: Right.

So you're asking if direct and indirect control—

Mr. John Carmichael: I'm thinking it through as I'm asking you the question. Influence, clearly, could sway a control issue—

Mr. Paul Halucha: Correct.

Mr. John Carmichael: —where actual control is defined by numbers, it's numerically controlled.

Mr. Paul Halucha: That's correct.

Mr. John Carmichael: With regard to Canadian-to-Canadian business, again from an interpretative perspective, you've got SOEs who step into a market, and they make an investment. I think 30% is the minimum threshold. Is that correct?

Mr. Matthew Dooley: One-third.

Mr. John Carmichael: Sorry, one-third.

So as you begin, you then have a Canadian company that's controlled by a foreign SOE. They start making acquisitions internally. I'm wondering about the interpretative value. You've got this extension of influence that obviously is going to cascade through those acquisitions. I'm wondering how far we go with that. Are we talking about sovereign wealth? Are we talking, in terms of the markets, about making acquisitions? Who would be considered the buyers in that, and how far does the SOE actually influence, in terms of those multiple acquisitions, as you step into a Canadian-to-Canadian...?

Have I confused you?

Mr. Matthew Dooley: I hope not, but let me know if I'm not answering your question.

Mr. John Carmichael: Somebody said “nebulidity” earlier. I thought that was a great new word.

Voices: Oh, oh!

Mr. John Carmichael: I'm trying not to stray.

Mr. Matthew Dooley: In the scenario you're discussing, it's a Canadian company purchasing or investing in another Canadian company, but the investing company that's Canadian is potentially influenced by a foreign SOE. In that case, the act, for a definition of SOE, would permit the minister to look at that Canadian company—and I have to use quotes for this—as to whether it actually is Canadian or not, or whether it is an SOE for the purposes of this act because it's being influenced, its business decisions, its management, etc., is being influenced, and therefore directed by the foreign SOE.

It's a difficulty in talking about a Canadian business investing in another Canadian business. If it truly is a Canadian business investing in another Canadian business, this act doesn't apply. We're looking at the scenario where the business folks have arranged their corporate group, or arranged their transactions in such a way as to provide control or direction through influence over a business by another entity, and it's allowing the minister to look back at who is actually pulling the levers on the investor.

This goes as well to the rest of the act. The rest of the act permits the minister to look at control, but that control is not based simply on the initial holder. It allows the minister to look back at who the beneficial holder is. That's why this direct versus indirect control is in the act. If, for example, a foreign state owns company A, and they purchase company B, and company B purchases company C, and company C purchases company D, the act permits the minister to look all the way back up the chain to see who's actually running company D, the final company. It's a similar scenario with influence, where the minister will be permitted to look to see who's actually making the decisions.

● (1725)

Mr. John Carmichael: Do you not actually have a diminishing value of that influence as it cascades through those acquisitions?

Mr. Matthew Dooley: In that case, then, it would be a case-by-case analysis by the minister to determine whether it truly is influence or not. If you've got this whole chain and the foreign government is 10 rows back and it can only control or direct the actions of that one company, but then as you go through the chain, the minister sees that, well, there is actually no influence by the time you get down to the company, then it's not influence.

The Chair: Okay, thank you.

Ms. Hélène LeBlanc: Chair, I would like to request that the next industry committee meeting be televised.

The Chair: I'll just go to Mr. Regan right now, because of time, and then we'll deal with that.

Go ahead, Mr. Regan.

Hon. Geoff Regan: Thank you very much, Mr. Chairman.

When I was talking earlier I was asking you about the question of investment chill or what the impact has been, and your view was that there hasn't really been any impact. The sense you're getting is that it's not really a problem now.

There was a report today in *The Globe and Mail* suggesting in fact that mergers and acquisitions are way down, below $1 billion in the first quarter. In fact, there was a report in the *National Post* on May 9, an op-ed piece by Lawson Hunter and Michael Kilby of Stikeman Elliott saying basically it's not clear whether the government fully appreciates the potential chilling effect of significantly changing the rules twice in a matter of months, especially at a time when resource markets are weak and capital spending is being curtailed. They say that while they believe Canada remains open to investments by SOEs, SOEs appear much less confident.

That raises this question. Is putting more restrictions in place at this time a wise thing to do, and to what degree are we putting a damper on investment in Canada?

Mr. Paul Halucha: My view is that the act is still overwhelmingly supportive of foreign investment in Canada. I think the record in the administration of the act shows that. The fact is that when the government made these announcements, it indicated very clearly that non-controlling acquisitions and investments by even state-owned enterprises were considered still to be positive.

The restrictions were put in place, to the extent that they are restrictions, because the minister still has an obligation to review, as I've said, any new transactions including those proposed from the oil sands sector.

I would also note that there's been a reduction in the value of resource markets around the world right now, which could also be an indication of why there hasn't been merger and acquisition activity. I think a quarter is a very short period of time to come to a generalization.

Hon. Geoff Regan: It seems to me that during the recession there was a lot of merger and acquisition activity because there were opportunities for companies to get assets at lower values. So if asset values are down, as they seem to be in the last few months, it's surprising to me that.... I think it should be of concern. In fact, you were saying earlier that you've seen no indication that interest is down. It just seems to me that the evidence is to the contrary.

The other question is about how these amendments will impact Canadian sellers. I think I was a bit confused earlier in the question I was asking. Really, the question is this. When we have Canadian investors who are looking at selling, what will this do to our investors in their risk aversion when they're thinking about whether or not a foreign company might be able to buy them?

What kind of analysis has been done? How will these amendments further impact Canadian sellers in terms of their investments and their risk aversion and economic growth? That really is the key. The critical question here is whether Canadians will want to invest in Canadian companies if they feel there's less chance of making money on them.

Mr. Paul Halucha: I will answer that in two parts.

First, I'd go back to liberalization. The fact is that there will be more private sector companies that would be available for sale or for foreign acquisition without a review process once the liberalization process is completed.

Second, there's not a new restriction in place that says state-owned enterprises can't undertake investments in Canada. The act only applies when it's a controlling share of a Canadian company. That's when it gets triggered. The determination that it's a state-owned enterprise only has effect around the threshold.

The government continues to encourage state-owned enterprises to take non-majority stakes in Canadian companies and invest.

● (1730)

Hon. Geoff Regan: When you have people from Stikeman Elliott's competition and foreign investment group telling us that SOEs appear much less confident, the suggestion is that from what they're hearing, SOEs aren't.... The message that they're receiving is,“Look out. Don't bother investing”. That's the point I—

Mr. Paul Halucha: As a contrary to that, since the announcement happened in December, we have been very involved with our foreign economic consulates, including those in many of the Asian-Pacific countries in which there are state-owned enterprises. We have seen a steady attention and have continued to work with them to help explain the policy, including in the oil sands.

Hon. Geoff Regan: Let me ask you this.

It was stated in December that these changes even then might bring forward more confusion than clarity. And really, the transparency that is talked about here doesn't mean very much if Canadians don't actually have access to the reasoning behind government decisions, behind rejecting or accepting a merger or an acquisition.

What additional methods of communicating this information to Canadians can be and will be put in place?

Mr. Paul Halucha: Going back to the budget 2010 changes, the act was changed at that time to provide the minister with more discretion in communicating his decisions under the act. The challenge of the circumstance is that the transactions are reviewed in the context of commercial confidentiality, and so he can make information public up to the point that he risks being injurious to the company, and then he's not permitted to do it.

The Chair: You've run out of time. We're actually over the meeting time too. Thank you very much.

There was a request for the next meeting to be televised, and there appears to be consent, but I want you to know that it looks nigh to impossible that we will be able to do it. Three of the witnesses are off-site, and to be able to do it is technologically unlikely, but we'll see what we can do.

Thank you very much to the witnesses.

The meeting is adjourned.