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Chair

Mr. Brent St. Denis

Standing Committee on Industry, Natural Resources, Science and Technology

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● (1530)

[*English*]

The Chair (Mr. Brent St. Denis (Algoma—Manitoulin—Kapuskasing, Lib.)): I'd like to call to order this October 26 meeting of the Standing Committee on Industry, Natural Resources, Science and Technology.

Before I welcome our witnesses, I would just like to acknowledge Brian Masse's letter to the committee about the notice of compliance. We'll take a few minutes at the end just to see where we're going to go with that, Brian, if that's okay.

Also, I would like to mention for members who don't know that even though this room doesn't have television, all of our audio for meetings that are not in camera goes worldwide on the World Wide Web. So your voices are being heard well beyond this room for those outside of here who are interested. Of course it's helpful if you want others than your constituency or your staff to monitor the meeting without having to be here. That can be very helpful.

There's also an industry committee website that I encourage you to have a look at to make sure your biography is correct, that you have the best picture available on the website and so on.

There is a seminar on Friday, where Marc Garneau, the head of the Canadian Space Agency, is speaking between nine and ten. I have an information sheet here for anybody who is around on Friday and would like to go.

The committee passed a motion at its first or second meeting requiring that notices of motion be given 24 hours ahead. In order for that to work, we would need them in both languages. If the clerk gets a motion in one language, with only 24 hours' notice—it does take a little time to get translations done—then that only means that the committee will not have much time to have the notice. So it's to your own benefit. There's no requirement that it be given to us in both languages, at least as the motion is written, but to help all of us, please do that.

Just for the record, at our business meeting last Thursday we agreed to start briefings on four major areas as part of helping the committee decide its future business, and we're starting with one today. On those four major areas, in no particular order, energy and the Kyoto Protocol, the energy sector, is one large area. The other is the outsourcing of Canadian manufactured goods in other parts of the world. The other large area is smart regulation, particularly with respect to industry. The other area is the foreign investment review process.

We decided that it was to our advantage to be well informed on these different areas so that we could plan our work very well. In that regard, we're starting in one of those four areas today.

You have the list of witnesses from the Department of Industry. They are here to help us understand the Investment Canada Act and the process around applications for foreign takeovers of the large magnitude category—I believe $247 million plus. It is my understanding that the officials will not be able to speak about the *au courant* issues of the day because, yes, they may be reported in the paper, but there is no application as of yet to Investment Canada.

So I would exhort members to use this opportunity to learn about the process, and I will leave it to the officials to tell us if they can or cannot answer a particular question. Then, if that is the case, there will be a future time, should the committee pursue this, to ask those questions. So we have to respect the position of the officials in that regard.

With that, I will invite Messrs. Legault, McInnes, and Vermaeten to begin.

I think, with the indulgence of members, we will go a little longer than the normal ten minutes. I think this is an information and education session for all of us, and it's open to the public, so we'll let you go as long as it is reasonable to have you help us and then we'll have some good time for questions.

Please proceed. Thank you.

[*Translation*]

Mr. Pierre Legault (Senior General Counsel, Department of Industry): Mr. Chairman, thank you very much for having invited us to explain how the act works and how it is administered.

I am accompanied by my colleagues Simon McInnes, outgoing Deputy Director of Investments, and Frank Vermaeten, who is Director General of International and Intergovernmental Affairs and who will very soon be the new Deputy Director of Investments.

If I may, I will first give you a general description of the act and then entertain your questions.

● (1535)

[*English*]

So the purpose of the act, as is stated and as it applies today, is to review significant investment and to see if it can bring some net benefit to Canada.

The act itself is administered by the Minister of Industry except for that part of the economy that pertains basically to cultural businesses and national heritage issues that are defined as being books, videos, audio, and those kinds of things. For that purpose, the Minister of Canadian Heritage is the minister responsible for the act, but for everything else, all other sectors of the economy, it is the Minister of Industry who is responsible for enforcement of the act, even in cultural matters.

The Minister of Industry is assisted in his role by a director of investments. That person will provide advice and will support the minister in the fulfillment of his functions. This is a little different, perhaps, from what you will otherwise find in many other pieces of legislation, in that the prime adviser is the director of investment, as opposed to the Deputy Minister of Industry.

The act is a fairly technical act, complicated in itself. It has been administered over the years in a fairly rigorous manner, in that we live by precedents. We try to be extremely consistent over time, given a similar set of facts.

Basically, what the act says is that investments have to either be reviewed or notified. In the case of the establishment of a new Canadian business in Canada or the acquisition of an existing business by a non-Canadian, normally you will have notification if the value of the assets is below $237 million.

There are exceptions to that, where the threshold, rather than being $237 million, is $5 million for industries or sectors of the economy that are related to transportation services, uranium, financial services, and cultural businesses. So the threshold is much lower for those types of businesses.

If a business is being acquired or is being created—by the way, there is no threshold for a business being created—a notification has to be sent to the Minister of Industry and has to provide a certain level of information. Once the notification has been reviewed by the staff of the Department of Industry and is judged to be complete and includes all the information that is required, then the Minister of Industry will acknowledge receipt of that and will welcome the investor to Canada.

Perhaps the more complicated part is if the investment is above $237 million, when there's a review. The review has to follow certain rules, indeed. First, you need an application for review that will contain a modicum of information, the identify of the company being taken over, the address and name and the comptroller of the non-Canadian who's acquiring the Canadian business. The non-Canadian will also have to provide the plans, i.e., to explain what that non-Canadian intends to do with the Canadian business, and some other information. That application for review has to be filed with the minister prior to the investment being finalized. They cannot send the application after the fact. It has to be beforehand.

In the case of notification, where there is no review, that notification can be sent up to 30 days after the closing of the investment. But again, in the case of a review, it has to be sent beforehand and the investor cannot close a transaction before receiving the okay of the Minister of Industry.

The Minister of Industry has 45 days to review the application that he receives. If he cannot complete his review within that period of time, he can use an extra 30 days. If he doesn't have enough time within that total of 75 days, he can take more time but only with the support or the accord of the non-Canadian. There's no time limit as long as the non-Canadian agrees, so the negotiations can take a lot longer.

● (1540)

The Minister of Industry will indeed consider the information that is being sent to him. The director of investments and the deputy director of investments will consult in the course of looking at a file. They will get information on the business, on the sector of the economy, etc., and I will cover some of that a little bit in more detail in a few minutes. They will also consult with the provinces where the Canadian being acquired has some substantive operations or assets so that the provincial views can be taken into account.

Once all this has been collected, then the director of investments will forward the recommendation to the minister along with all the information that he has received from the non-Canadian and from the Canadian being acquired and from the provinces, and the minister will have to make a decision as to whether or not there is a net benefit.

In making his decision the minister will consider a certain number of factors. Those factors are described in section 20 of the act. Let me just mention some of them in passing, not the full text.

He will look at the effect of the investment on the level and nature of economic activity in Canada of that business, including the effect on employment, on resource processing, parts, components, and services. He will also be looking at the participation of Canadians and Canadian business, at the effect of the investment on productivity and industrial efficiency, and technological development. The minister will look at the impact of the investment itself on competition in Canada. Very importantly, he will consider the compatibility of the investment with national industrial, economic, and cultural policies taking into account not only the federal policies but also the provincial policies that may exist in this area. He will consider as well the ability of Canada to compete in the world in the context of that investment.

He's going to then have to decide on the basis of all these factors whether there's a net benefit. Roughly speaking, net benefit means that there are more pluses than minuses in an investment. It's not a science; it's an art, in effect, to be able to judge all those factors and come up with a decision. If a minister believes there is a net benefit, then he can send a notice to that effect to the non-Canadian and welcome that non-Canadian to do business in Canada.

On the other hand, if the minister believes that there is no net benefit, then he will give a notice to the non-Canadian and invite that non-Canadian to provide additional information or perhaps provide some undertakings that will tip the balance towards a net benefit. Normally the non-Canadian will have 30 days to do so.

If after that period of 30 days the minister is still convinced that the non-Canadian does not offer any net benefit, then he will turn down the investment. On the other hand, if he is satisfied that there is net benefit, then he will send a notice to the non-Canadian saying that they meet the test.

I should add as well that if the minister were not to make a decision between the period of time that we can find in the act, then the investment would be deemed to be approved. It is a practice, obviously, of Industry Canada to always make sure that the minister makes a decision within the timeframe and to never let a project or an investment be deemed.

There is one other important factor in the act. It is that the information that is collected on a case is privileged and cannot be disclosed. To disclose that information is a criminal infraction. On the other hand, there are some exceptions in the act. If you are interested, I can talk a little bit about that later.

I should also add that plans such as the ones that investors will submit to the minister are not enforceable. Simply, they are an expression of their intent versus the company they are taking over. That is why, quite often, the Minister of Industry will ask for undertakings, because undertakings are enforceable. It is, in effect, some kind of contract between the crown and the investor whereby the investor will commit to do a certain number of things in exchange for getting the approval of the minister.

● (1545)

I could go into a lot more details of the act, obviously. There are some very important notions that we have to take into account to start with for the act to apply. As I mentioned at the beginning, in order for the act to apply, you need an acquisition of control, and those words and that expression are defined in the act. It depends very much whether you're acquiring assets or shares, how many of those you acquire, whether you're dealing with a corporation, a partnership, a trust. There are all sorts of rules on that. The acquisition has to be done by a non-Canadian. A non-Canadian is obviously somebody who's not a Canadian, and there are some fairly complex rules in the act that describe when an entity will be a non-Canadian, depending on the level of control, whether that control is through the ownership of shares or control in fact, and, in the case of controlled businesses, whether or not we're dealing with partnerships or with trust.

The other notion that is important is that you have to have an acquisition of a Canadian business. A Canadian business is an entity that has assets in Canada, employees, and a place of business. If all the conditions of all these expressions are not met, the act does not apply. There is a series of exemptions to the application of the act, as well. Again, we can go into a lot more detail.

In a nutshell, that's roughly how the act functions and works, but obviously we will be very pleased to answer any questions you may have.

The Chair: Thank you. And certainly that will, I'm sure, unfold.

Are there any comments by Mr. McInnes or Mr. Vermaeten? Yes, Mr. Vermaeton.

Mr. Frank Vermaeten (Director General, International and Intergovernmental Affairs Branch, Department of Industry): Thank you very much. I just wanted to add a couple of things—it might have been because I missed it, because I am a little tired.

I just wanted to emphasize the issue of the undertakings. I think it's a really important element that the process is one not simply of deciding whether the investment is a benefit or is not a benefit; it's not simply an on-off switch. Really, it's a process that allows us to try to shape the investment in a way that does provide a net benefit to Canada. Thank you.

The Chair: If there are no other opening remarks, we're going to go straight to questions. I have John Duncan first, then Paul next, Andy Savoy and then Brian.

John, please.

Mr. John Duncan (Vancouver Island North, CPC): Yes.

The Chair: We're going to go five minutes, or six, roughly.

Mr. John Duncan: If I don't take up the five minutes, one of my colleagues here can.

The Chair: Use up your five minutes, please.

Mr. John Duncan: Thank you for your presentation. I think it was pretty precise and concise.

I have a specific question. When one looks at other investment review mechanisms in other western countries, there are differences. If you look at the Australian model, the Australians look at foreign government or agencies of foreign government investments differently than we do, from the standpoint that any level of investment—in other words, a threshold of one dollar or more—kicks in their process, whereas we make no distinction.

My question is, if we were to collectively want to make a distinction, would that require a change to the statute, or could that be done by regulation?

Mr. Pierre Legault: So you're saying that if we didn't want to make any distinction on the basis of the value of the assets of the company and we wanted to review all investment, whether or not we would need—

Mr. John Duncan: All investment emanating from a foreign state.

Mr. Pierre Legault: The act does not make that kind of distinction. The act focuses very much on the non-Canadian making the investment and therefore on the fact that somebody is an investor from a different country. But the act does not focus on anything behind that investment.

Mr. John Duncan: I recognize that, but what I'm saying is Australia does. If we chose to go that direction, would it require change to the statute, or could we do it by regulation?

● (1550)

Mr. Pierre Legault: The regulation-making power under this act is not strong enough, I think, to establish that kind of distinction.

Mr. John Duncan: But we set the threshold by regulation, do we not?

Mr. Pierre Legault: The threshold? No. Well, the initial threshold was set by regulation back in 1985, but following NAFTA and WTO, an automatic mechanism was introduced into the act. Therefore, nowadays, in January of every fiscal year, on the basis of what's in the act, a calculation is made and then published in the *Canada Gazette*. But it's only a number.

Mr. John Duncan: Okay.

In the minister's review of a foreign investment, he or she must consider our national industrial, economic, and cultural policies. My question relates to the first two of those, the national industrial and economic policies. Is there one-stop shopping for that? Is there a collective umbrella that covers all kinds of policy statements of government? Or how specifically does that tie the minister?

Mr. Pierre Legault: It depends very much on the nature of the investment and the sector of the economy the Canadian business that's going to be taken over is in. For instance, if you're thinking of taking over a book publishing business, Canadian Heritage would look at whether or not there is a book publishing policy. If there is one, they will consider that, because it's a cultural policy.

Likewise, if the Minister of Industry has to consider investments in another sector, he will try to see if a national policy exists. If so, he will consult his colleague or the department that is in charge of that policy. He will do the same thing with the province. There may be a provincial policy that is applicable to that type of business, so he'd consult the province as well.

So there is not a single place where the minister can go and have a shopping list of policies. He does it on an individual basis.

Mr. John Duncan: If one had specific concerns about something like national security, there's no certainty of whether those are even covered under any of these categories, and if they are, there's no certainty as to whether that would be reviewable or not?

Mr. Pierre Legault: It depends on what aspect of national security. For instance, if the company to be taken over manufactures fighter planes, then it could have an impact, obviously, on defence. The minister would consult DND on whether or not it would have an impact on any of their policies when it comes to the manufacturing of fighter planes. He would do that kind of consultation.

The Chair: Thank you, John.

Paul Crête, please.

[*Translation*]

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Thank You, Mr. Chairman.

When was the last overhaul of the Investment Canada Act?

Mr. Pierre Legault: The major overhaul was done in 1995, when the act was initially adopted. The act was subsequently amended to bring it in line with the North American Free Trade Agreement and the agreement on the WTO. In 1993 an amendment was also made to take into account de facto control, as opposed to other types of control, technically speaking, in the case of cultural industries.

However, these were not comprehensive changes. Although increasing thresholds and introducing some specific mechanisms in accordance with NAFTA and the WTO agreement were nevertheless major changes. So, the last comprehensive overhaul of the act dates back to 1985.

Mr. Paul Crête: So you are telling us today that the act is consistent with our obligations under the WTO and various international agreements.

● (1555)

Mr. Pierre Legault: Yes.

Mr. Paul Crête: In the notes provided by the Library of Parliament, there is a table on the source of investments. It contains a list of countries: the United States, Japan, the United Kingdom, France, Germany and other EC countries, as well as “other countries”. These countries are not identified. Twelve percent of investment come from these other countries.

Can you give me a list of these countries. It does not necessarily have to be exhaustive. For example, I want to know if you have evaluated investments from countries like China, or Cuba, which did not have market economies all that long ago.

[*English*]

Mr. Pierre Legault: Simon, could you please answer?

Mr. Simon McInnes (Deputy Director of Investments, Department of Industry): Thank you.

[*Translation*]

I do not have the numbers here.

Mr. Paul Crête: I'm asking you for the names of the countries.

Mr. Simon McInnes: The countries that are investing in Canada?

Mr. Paul Crête: The countries that were part of the investigation but that are not named on the table. It mentions the United States, Japan, the United Kingdom, France, Germany and other European Community countries. I do not have a problem with those ones. But the table also mentions other countries and it shows that 12% of investments come from these countries. Are there four, five or six countries, or 50 countries in that category?

Mr. Simon McInnes: We have the numbers and we can give them to you. For example, last year investments from China represented $422 million. In terms of the percentage or the share—

Mr. Paul Crête: I simply want the name of the countries and the order of magnitude of their investments.

Mr. Pierre Legault: We will obtain the information and send it to you.

Mr. Paul Crête: Perfect.

As regards the size of the transactions, you talk about the current threshold, which is $237 million. Do you have many transactions in the $6 billion range?

Mr. Simon McInnes: We may be able to give you those numbers, but it depends on the provisions of the act with respect of confidentiality.

You are right. From time to time in the past, there were major transactions like the ones with Seagram or Westcoast Transmission, a gas transmission company. Most transactions as not as large, but two or three times a year, we have a rather large case in terms of the profile and the value.

Mr. Paul Crête: I do not want the names of the companies. How many transactions worth $6 billion and more have you had each year over the past five years?

Mr. Simon McInnes: I will try to get that number for you.

Mr. Paul Crête: Can you give me an approximate number? Are we talking about two or 50 transactions?

Mr. Pierre Legault: It would be more like two, if any.

Mr. Paul Crête: If any!

There is a list of a number of commitments that can be required of an investor: "promises to employ a certain number of Canadians, keep factories open, or keep the corporate head office in Canada." Can you go as far as imposing conditions on the way these companies outside Canada operate?

For example, could you require a company to provide guarantees that it has taken adequate steps in terms of the environment and working conditions outside the country? Could these conditions be imposed as part of the review?

Mr. Pierre Legault: If you look specifically at Section 20 of the act, which addresses the factors we review, you can see that most subsections refer to the way things work in Canada. Generally speaking, the plan we receive deals with the corporation in Canada. The Minister must determine if there are net benefits to Canada. If there is a gap between what is proposed and what the Minister considers to be an acceptable minimum standard, it is generally in Canada that the gap must be closed.

Mr. Paul Crête: In your opinion, does the act prevent you from imposing conditions that would cover behaviour outside Canada? I'm speaking from a legal perspective. If you had this type of case to assess, you would want to know if it is possible to impose this type of conditions under the current act. In the context of globalization, that comes into play in many ways. Do we have the means to ensure that people are on a level playing field throughout the world?

Mr. Pierre Legault: As I said, the act stipulates that we must review investments in Canada. As a result, the requirements will deal with the corporation in Canada.

● (1600)

Mr. Paul Crête: On average, how long does this analysis or do these reviews take? Can you tell us if they take two months, six months, one or two years, and if they are linked to the size of the investment?

Mr. Pierre Legault: I will provide you with a partial answer. Simon, please correct me if I am mistaken.

Mr. Simon McInnes: That is a very interesting question. In fact, I do not think that we have ever put those figures together. In most cases, these reviews are completed within 75 days. There are very few reviews that last longer, but it does happen sometimes. In a very serious or highly complicated case, when a sizeable amount is involved or an operation takes place in several provinces all at once, the consultation processes is longer. In a case like that, the review lasts much longer than 75 days. In the past, we have had cases where the review has lasted 12 months or more.

[*English*]

The Chair: Merci, Paul.

Andy, then Brian.

Mr. Andy Savoy (Tobique—Mactaquac, Lib.): Thank you, Mr. Chair.

Thank you for the presentation.

In looking specifically at state-owned entities and investments by state-owned entities in other western nations and how they've handled that under their own investments acts, have you seen any reforms recently in their legislation? Certainly John had mentioned Australia, but have any of the western nations been revising or reforming their investment acts? Have you seen anybody take into account the situation of a state-owned entity, and perhaps the record of the state in question, the country in question? As you know, we speak primarily to quantifiable entities in our investment act, but in terms of non-quantifiable entities or issues, such as social and other issues, have you seen any development or are you aware of any developments in other countries that would look at those issues specifically and try to look at calculating those into the net benefits of the specific transaction?

Mr. Simon McInnes: If I understood your question, sir, it was what are the standards other countries are applying towards investments by state-owned enterprises into their own countries, and whether they consider those to be a factor in making their decision. A brief answer is that we are not aware that any countries specifically have such provisions. Of course, all countries have national security provisions, and where a particular case would raise that, such as in the regime in Australia or in the United States, there is a potential. In the European Union, the primary screening device they use is competition.

I should note that all European countries, and even the United States, have had some state-owned enterprises making investments in their countries, which have gone through. So in considering or dealing with the net benefit under section 20 of the Investment Canada Act, it does not distinguish between whether the investor is privately owned, publicly held through stocks and shares, or whether it is owned by a government of another country.

Mr. Andy Savoy: But obviously in looking at if it's state-owned versus a private entity making the investment, you have a separate situation in terms of calculating the net benefit to your country, because you have to look at more than just the quantifiable. In terms of individual companies, for example, you obviously have to look at, as we put forward in the act, the level of economic activity, previous significant participation, and a number of issues. Then you go to the compatibility of the investment with national industrial, economic, and cultural policies.

I understand it's fairly broad in terms of an individual company. But in looking at a state-owned entity making an investment in Canada, should we not broaden this net benefit calculator or this net benefit equation to in fact take in the other aspects of the non-quantifiable part of this net-benefit equation? Shouldn't we be looking at other things?

Mr. Pierre Legault: Unfortunately, that's a question we cannot really answer. We can talk about the act, but not about what the act could or should be.

Mr. Andy Savoy: Yes, absolutely. That's for us to decide; that's right.

In terms of other countries, you're unaware of any country that can in fact provide us with guidance on this issue of state-owned entities? We would be breaking new ground?

● (1605)

Mr. Pierre Legault: We're not aware.

Mr. Andy Savoy: You are not aware about it, okay.

That's all for now, I think, Mr. Chair.

The Chair: Thank you, Andy.

Brian Masse, then I have Brad next.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

Thanks for your presentation.

One of the things I can carry on with is that it has been almost 20 years since the act was created in 1985. Do you think it can be updated in terms of the changing world from then till now? Do you think that would be of benefit to the act?

Mr. Pierre Legault: Well, again, the act has not been static since 1985. As I mentioned before, it has been modified a certain number of times to take into account what has been happening in the world with the WTO and NAFTA and the FTA. So the act has evolved over time to meet our international obligations, and has evolved with the policies the Government of Canada has taken over time in terms of trade.

As to whether or not it could or should be amended to reflect different policies or different approaches, again that's something we're not equipped to answer.

Mr. Brian Masse: That's too bad. You are the ones making the decisions and working with the act. I think really we should have your opinion on whether or not it works for Canadians. You're the people who are actually working on it on a regular basis.

The point is, the definition in the act says “non-Canadian” means “an individual, a government or an agency thereof or an entity that is not a Canadian”. So it anticipated government or state-owned intervention into the Canadian market. Things have changed since 1985. I think about the nations of the world that existed then—some don't even exist—and what some of them are now.

I notice that the presentation you've submitted to us doesn't show any actual refusals. Have there been any refusals in all the reviews you've done?

Mr. Pierre Legault: No investment has ever been rejected outright. However, you have to consider what I explained before; that is, sometimes the minister will make a preliminary decision that there's no net benefit and will give a chance to a non-Canadian to better their proposal by offering undertakings and additional benefits to Canadians that will lead him to conclude that there is then a net benefit. This has happened in many cases.

The other thing is that sometimes after the minister has done his review and has decided that a company would not offer a net benefit to Canada, we inform the company of that, and the company will decide that under these circumstances, when they know they will be rejected, they prefer to withdraw their application and will not come to Canada. This has happened in the past as well.

Mr. Brian Masse: How many withdrawals have we had?

Mr. Pierre Legault: I don't have the information.

Mr. Brian Masse: Maybe you can provide that for us.

Mr. Simon McInnes: I'm sorry, for purposes of confidentiality under the act, we don't provide any data on that, the reason being that some companies withdraw to lick their wounds and then decide to come back six months or a year later with a fresh proposal. Withdrawals are not part of our database.

Mr. Brian Masse: Why couldn't we, since we know who is going to come to take over Canadian companies, have at least the intention? I'm not talking about their specific plans. Why wouldn't there be entitlement for the Canadian public and other businesses to know at least where there was interest? Why would we shelter that?

Mr. Pierre Legault: One of the reasons why the provision on confidentiality under the Investment Canada Act is so strong is because many of these transactions contain privileged information of an economic or financial nature. But also, sometimes when it is made public that company A will acquire company B, it can have an impact on the stock market. If the company were to face a refusal by the minister, it's possible that publicizing that information would have an impact on the market; therefore companies don't want that information to be made public. It is for these reasons, again, that we have these kind of provisions.

Mr. Brian Masse: Right now we have a situation with Noranda out there. There has been a very well-aired discourse with the Chinese government about it.

The Chair: As I mentioned at the beginning, that's just news. It's in the news, but there's not an official application yet.

Mr. Brian Masse: No, but the Chinese foreign minister is talking about it, not just me. I'm just using it as an example: that they're open about it. I think we could take something from that.

I'll go to another question. There's an 18-month period that can be reviewed after the act, and then there's no review after that.

Mr. Pierre Legault: It's monitoring as opposed to review. It's to make sure that the undertakings are being respected or being implemented. If need be, the minister can decide he's going to extend that and take more time to make sure the undertakings are respected.

● (1610)

Mr. Brian Masse: Has there ever been an audit going back five or ten years, say, and taking a case sample to find out whether the undertakings are still being adhered to, and what's happened since then? Has there ever been an audit of the work you've done? You have 1,100 here. Has there been an audit on it?

Mr. Simon McInnes: I believe the short answer is no, but let me elaborate my answer by talking just a little about the net benefits process, because if I can explain this it will provide a greater context for your question, which is a very good one.

As soon as an application comes in, a case officer is assigned to it. That case officer works with the legal counsel of the investor, over that period of the 45 days plus 30 days extra, to turn the unenforceable plans, which usually come in a big, fat binder, into a series of very specific undertakings related to the six factors listed in section 20.

For example, if the company being purchased has, let's say, 5,000 employees, we want an undertaking. How many employees are they going to keep on over the next 18-months-to-three-year period or longer? What are their plans for investment in new technology to bring the company up to world-class standards? What are their intentions on doing R and D? What are their intentions about keeping the existing Canadian senior management? How many Canadians will be on the board of directors of the company once it's taken over?

There's a “to-ing and fro-ing”, a back and forth, between the case analyst and the legal counsel of the investor to firm up a package of strong net benefits so that on balance the minister will be able to say it's of net benefit.

What generally happens is that most of the companies deal with the national law firms whose senior partners deal with Investment Canada Act cases and who know how the process works. They persuade the investor to turn unenforceable plans into some firm undertakings. That then makes the case much more likely to be approved. What happens then is that the company has to report back 18 months later on each of those undertakings, on specifically what happened, and has to justify or offer an explanation if it has failed to meet any of those undertakings.

Sometimes, of course, there could have been a downturn in the market for the particular product that company makes, so its plans for expansion might have been cut short. On the other hand, for instance, when Wal-Mart came into Canada it promised to open up so many stores, and it easily surpassed the undertaking it had committed to. It can work both ways.

The process of verification can go on for as long as necessary. In some cases we've asked companies to report back for a 10-year period.

The Chair: Brian, we'll make sure you get back on the list.

Brad Trost, please.

Mr. Bradley Trost (Saskatoon—Humboldt, CPC): Let me do a little follow-up on my colleague John Duncan's questions, specifically looking through the act. It says “consideration of industrial, economic and cultural policies”. Following up, you said with national security questions there are certain areas that are obvious, such as fighter jets, for example. But looking through this, national security is something that's often very difficult to define; it's large and fuzzy. Industrial and economic policy is often closely linked to it and tied in.

A couple of questions naturally flow from that. Is it strictly the minister who defines these national security criteria, which seems to be somewhat implied but is not said there? Is the national security thinking totally in there? Is it implied or direct? Is it the minister who makes that decision totally on his own?

Mr. Pierre Legault: The answer to that is yes, it's up to the minister, with the assistance of the director of investment, to decide who needs to be consulted and what those factors are that have to be taken into account with respect to a given investment project.

Mr. Bradley Trost: Then it is strictly the minister. It would not be, say, the minister of defence or anyone. There's always lobbying to and fro; I understand that, but...

Mr. Pierre Legault: The Minister of Industry, if he believes there is a policy that is the responsibility of another minister, will go to that other minister and ask if there is a policy on the topic that would apply to this company or that investment. If the answer is no, he obviously won't do anything. If the answer is yes, he will consider it.

● (1615)

Mr. Bradley Trost: Okay.

Following up a little more on what is said about the criteria to determine the investment, and specifically on the criteria... Governments change, and things change: how are the long-term criteria set?

Forgive me; I'm absolutely no lawyer—a rookie member of Parliament and a mining geophysicist by trade—but is there the equivalent of, shall we say, case law for specific criteria that builds over the years for national security, or again for the industrial and the economic criteria? What I'm thinking is this: is there something that can give the investment community more certainty when they apply about what will and what won't be accepted, based on precedent? How do they get to know that? How would we as parliamentarians be able to use that to review things to know what's going through and what's not?

Mr. Pierre Legault: The answer to your question is yes and no. Yes, the department has been administering the act—along with the minister, obviously—in a very consistent manner over the years. As I said before, to a given set of facts you apply the same solution because we have to be predictable in some ways for the business world. This process has to be fair; we try to treat everybody fairly and submit them to the same rules. We adopt the same interpretation of the expressions that are found in the act, and in that respect we work on the basis of precedent.

Now, that being said, when it comes to the factors enumerated in section 20, it's also something that is organic. Policies will come and go at any given time, and it depends very much on what type of business we are dealing with. In 2004 some policies may exist that did not exist in 1993, so we have to keep current that way and indeed inquire.

Mr. Bradley Trost: So this is done primarily, again, through previous rulings rather than direct publishing of regulations to enunciate the criteria.

Mr. Pierre Legault: I don't think there is a list of—how should I say—what policies fit under the national industrial policies per se. Again, every time there is an investment you look at the nature of the business. You say, well, is there is a policy that exists at this time with respect to this type of business? If it's yes, you go and get the info and you get the views and the representations of the responsible minister or the province, as the case may be.

Mr. Bradley Trost: Following up there, I find that leads nicely into the next question.

It says "or legislature of any province likely to be significantly affected by the investment". I have two questions. What are the criteria to determine "significantly" how a province or more than one province... I think we understand that if it's fisheries, Saskatchewan is not going to be consulted, and if it's uranium, Prince Edward Island is not going to be consulted. What are the criteria to decide if a province will be consulted, and does the province have some leverage to say yes or no? What is the input and what is the direction a province can give, again, seeing that provinces and the federal government may have very different objectives different parties, etc.?

Mr. Pierre Legault: Generally, each province where a company has assets or employees will be consulted; this is fairly general. A province does not have the power to say yes or no to an investment. They may make that representation to the minister, but the minister is not then bound by that representation. If you look at the act, you will see that the minister will take into account the representations that are made to him either by a province or by any other party, but he makes his own decision.

Mr. Bradley Trost: So the powers of the provinces are strictly the powers to lobby and put political pressure—

Mr. Pierre Legault: It's not so much lobbying as making their views known, making representations, and so on.

The Chair: Denis.

[*Translation*]

Hon. Denis Coderre (Bourassa, Lib.): Thank you, Mr. Chairman.

I would like to go back to the issue of criteria. In Section 20 mention is made about the effects, about compatibility, but it is not necessarily clear, particularly when the acquisition is made by a public corporation rather than a private business. You're telling us that's covered by Section 20 to some extent. We can also talk about other sections that deal with the so-called qualitative component.

Do you believe there are additional criteria, for example should a foreign country acquire a Canadian business? Section 20 remains very broad. It's not a matter of giving us qualities to determine whether it's good or not, but within the analysis grid, do you have additional criteria in cases where it should not be so much a foreign business but a foreign country that would acquire a Canadian business?

● (1620)

Mr. Pierre Legault: Traditionally, there hasn't been a distinction between who actually owns or controls the company that's taken over a Canadian business.

Hon. Denis Coderre: So it's not covered, or is it treated the same way.

Mr. Pierre Legault: It is treated the same way. That's how the legislation works.

Hon. Denis Coderre: So if the purchasing company plays by the rules in Canada while at the same time not respecting what's done elsewhere in the world or within its own jurisdiction, there's absolutely nothing we can do about it.

Mr. Pierre Legault: Section 20, in several areas, specifically says "in Canada". It is quite limited.

Hon. Denis Coderre: So it is clearly "in Canada". We do not have to look at what is done elsewhere. As long as you abide by what is done in Canada, Investment Canada says that you are playing by the rules.

Mr. Pierre Legault: That is absolutely what Section 20 says.

Hon. Denis Coderre: So the MInister has his work cut out for him.

You indicated that there have not been major overhaul of the legislation, but that there have been adjustment periods to NAFTA and WTO. If for example a foreign country buys a Canadian business, that will have an impact on the overall world market. It does not necessarily have to be in mining. It could be an airline company for example. According to the WTO program where there is the whole notion of subsidies, can an acquisition be perceived as a form of subsidy and therefore an unfair competitive edge over the overall market place? Has the issue being considered at all?

Mr. Simon McInnes: That's a question that you should ask Minister Peterson's officials; Minister Peterson is responsible for our international obligations under the WTO and other treaties. Your question is quite hypothetical, and I couldn't answer it.

Hon. Denis Coderre: You said earlier that Section 20 covered everything, because it's a matter of adjustment. You said that there had been no major overhaul given that this applies in the new economic reality. Basically, you're saying that the Investment Canada Act doesn't have to cover WTO consequences since that doesn't come under your department. Right?

Mr. Simon McInnes: No. When we signed agreements that impose obligations on us during the Uruguay Round, in 1995, the Investment Canada Act was already in place. So there was a reservation. We have obligations, and everyone knows how the Act works.

If I understood correctly, your question had to do with the impact on the international market of a country making acquisitions that could affect the competitiveness of an industry. I don't know if the WTO is entitled to make decisions on that, to decide whether it's a subsidy or something else. However, every member of the WTO is entitled to submit a request for an issue to be examined by a panel. If you want more detail, I would encourage you to put those questions to the officials who work on our international obligations all the time.

Hon. Denis Coderre: The reason I asked the question is that it could be a takeover. If so, there could be an impact on the market, on prices. It could also be what's called goodwill. They're determined to have the business and they buy it up, but just to increase their market share, and this could be perceived as a subsidy or something illegal by the WTO.

I'm trying to see whether there is any compatibility between what the WTO is examining more and more—acquisitions by foreign countries through Canadian companies—and the application of the Investment Canada Act.

● (1625)

Mr. Pierre Legault: I have two points to add. First, the act as it currently stands meets our international obligations. Your question is hypothetical, but one of the factors set out in section 20 is: "(f) the contribution of the investment to Canada's ability to compete in world markets." That is something that the Minister of Industry can also consider.

Is the example you gave covered by that? Maybe. That's something that the minister could consider. Does it go beyond the framework? That would also have to be considered.

Hon. Denis Coderre: You said earlier that there was a review. Under the provisions of the act, if those who are taking over the business don't comply with their undertakings, what was given to them can be taken away. First of all, has that ever happened? Second, what are the timelines? If they're told that they have up to 18 months, from the 19th month on, they can do whatever they like. Have I got that right?

Mr. Pierre Legault: No. If a non-Canadian investor doesn't comply with its undertakings, by the end of the 18 month-period, the Minister of Industry will ask it some questions, namely why it hasn't complied with its undertakings. Depending on the circumstances, he may recognize that there was something beyond the investor's control and could grant it more time to comply. Everything doesn't fall through in the 19th month. The minister may continue monitoring.

If ever an investor refuses to comply with one of the undertakings agreed to, the minister has the power under another provision of the act to send it a demand requiring compliance. If the non-Canadian, for one reason or another, were to ignore the demand, the minister could take the non-Canadian to court and seek to have the undertaking enforced, through fines of $10,000 per day or other relief set out in the act.

[*English*]

The Chair: Thank you very much.

Paul Crête, please.

[*Translation*]

Mr. Paul Crête: Thank you.

Earlier you said that Section 20 sets out factors for a situation in Canada. But you also mentioned that the factor set out in subsection 20(f) is "the contribution of the investment to Canada's ability to compete in world markets".

For instance, a company that would take control of the commodity market could affect Canada's competitiveness on world markets. If you control the commodities, you export them to another country, a buyer country, where they are processed under terms that eat into the Canadian manufacturing sector, for instance. Could the department consider such an interpretation?

Mr. Pierre Legault: I cannot really answer your question. I would have to look at the specifics of a case and see if they meet the criteria of the subsection.

Mr. Paul Crête: Here, we're talking about commodities or natural resources from any sector. If you're talking about natural resources extracted from the ground or some other way and that, for this reason, would...

Hon. Denis Coderre: It's not copper, zinc or nickel. It could be iron, though.

Mr. Paul Crête: I would like to know if the minister could invoke this section.

Mr. Pierre Legault: The act refers to the contribution of the investment to Canada's ability to compete. If a non-Canadian takes control of a Canadian business, will it maintain its ability to compete in world markets? This is the core issue. Do the facts bear that out? It remains to be seen.

Mr. Paul Crête: You mentioned other pieces of legislation that govern other departments that could allow what this act does not, in matters of security, for instance. Are they listed somewhere?

Mr. Pierre Legault: No, there is no such list. We're talking about policies, here.

● (1630)

Mr. Paul Crête: Are you aware of any legal provision that would empower the Departments of National Defence or Public Security to block a transaction when you could not?

Mr. Pierre Legault: Listen, once again...

Mr. Paul Crête: I just want to make sure that my question is clear. If the Industry Minister is of the view that a transaction is economically attractive, would another department have the authority to oppose it for other reasons?

Mr. Pierre Legault: Under the act, the minister has so to speak absolute power; in other words, the decision is his or hers. He may take into account other considerations but he has the power to decide. Is there legislation elsewhere that would authorize other ministers to say no? Each act is administered separately and independently. What another minister could do would not necessarily fall under this act.

Mr. Paul Crête: No, but it could... If you do not have the answer, I would like inquiries to be made to the government, the Privy Council or somebody else to see if other departments have legal powers allowing them to block a transaction for reasons other than competitiveness or other criteria under the responsibility of the Industry Minister.

Mr. Pierre Legault: This is a very wide ranging question. This act is self-administered. We consult other people, and other departments apply their own legislation. Under this act, nothing can force the Industry Minister to decide one way or the other. Other ministers have other responsibilities. I'm talking about federal legislation and all the powers that ministers have. You have to check if they are relevant to the transaction you are thinking about.

Mr. Paul Crête: When we were selling CANDU reactors to other countries, Canada could set some conditions, for example that uranium be utilized for peaceful purposes only. Can we make this type of recommendation in this case? We can deem a transaction to be economically of net benefit to Canada while still imposing conditions to the buyer, for example that all uranium be utilized only for peaceful purposes. Could that be part of the conditions required by the Minister of Industry?

Mr. Pierre Legault: I have some difficulty answering your question because it is so broad. It depends on the type of investment.

Mr. Paul Crête: My question must be broad enough to avoid the chair telling me that it is out of order.

Mr. Pierre Legault: Which is why it is difficult for me to answer it. We are, so to speak, caught between a rock and a hard place, Mr. Crête?

Mr. Paul Crête: I would like to ask one last question about job protection. It's says specifically that there could be conditions regarding the protection of jobs. Is there a limited duration that is required?

Mr. Pierre Legault: It varies according to each investment.

Mr. Paul Crête: For each request, it can—

Mr. Pierre Legault: Yes, it can vary.

Mr. Paul Crête: Okay. I would like to deal with one last feature of the legislation, after the Minister has made his decision. I have checked and the bill identifies a number of persons or entities that can obtain the information or part of the information on which the Minister based his or her decision. Would the parliamentary committee be entitled—I did not find it in the list of identified groups—to obtain from the Minister the detailed information on which he based his decision?

Mr. Pierre Legault: I imagine that the committee could do so if, for example, the investor was to instruct the Minister in writing to forward the information to the committee. That is one of the exemptions contained in the legislation.

Mr. Paul Crête: It is an ideal situation.

Mr. Pierre Legault: Okay.

Mr. Paul Crête: Let us say that the investor is not prepared to do this and that the committee considers that it is necessary either to ask the Minister to appear on this issue or to obtain the information. Would the Minister be required to comply?

Mr. Pierre Legault: He could not comply under the legislation.

Mr. Paul Crête: Okay.

[*English*]

The Chair: Now we're going to go Brian Jean.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you.

I promise my question will be quite a bit less than that.

I know the U.S. and other jurisdictions, including Australia, have moved towards reciprocal legislation, such as in the wine industry between states and different things like that. One state may impose a 20% duty on wine, for instance, and the other state will impose that same duty because they have reciprocal legislation. It's nowhere in the act, but has that ever been considered for this particular act? If not, why wouldn't it be, especially for state-owned enterprises or for enterprises in essence owned or controlled by the state?

● (1635)

Mr. Pierre Legault: Well, I think that what you see is what you have. This is the extent of the legislation applicable to the review of foreign investment. When it comes to some of the issues you've just raised, we have to look into trade issues, and that's the responsibility of the Minister of International Trade. Whether or not they've ever considered having some other types of agreements with other countries or on different topics is a different thing. It's a different issue, and I don't think we can provide an answer to that.

The Chair: Brian Masse.

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

Let me try to give a specific example, because I want to make sure I understand how the process could be different. Say, for example, a private entity in a democratic country like the United Kingdom wants to buy a uranium company in Canada; there's a certain process. But what would be different, for example, if a state government like Iran wanted to buy a uranium company in Canada? What would happen in your department that was specifically different in those two circumstances when you took that information to the minister to make a decision? What are the specific questions and processes that would be different, or is there a difference?

Mr. Pierre Legault: I think the only difference under the act, if I'm not mistaken, is that Iran is not a WTO country. In that case, it means that when it comes to the acquisition of Canadian business, the lower threshold of $5 million would be applicable, as opposed to the $237 million that is applicable to Britain. That's the only difference on the face of it.

Mr. Brian Masse: So if it's a non-democratic country that's a member of the WTO, there's no difference between the two situations.

Mr. Pierre Legault: Except for the threshold.

Mr. Brian Masse: Okay.

Mr. Pierre Legault: There are other policies that are applicable. I think there's a uranium policy, for instance. The minister would consult the minister responsible for that policy.

Mr. Brian Masse: This is where we're trying to get some specifics. I guess there's nothing related, then, to different types of governments—democratic, totalitarian, communist. Government state intervention makes no difference, whether it's a democracy or something else.

Mr. Pierre Legault: No. The real test is whether an investor is a member of a WTO country.

Mr. Brian Masse: Moving from there, what review has happened in your department with the installation of the Patriot Act? Have you done any due diligence related to American takeovers and Canadian privacy related to the Patriot Act?

Mr. Pierre Legault: To my knowledge, we haven't done anything in relation to the Investment Canada Act. That's one thing. We are responsible at Industry Canada as well for PIPEDA. As you may have seen, it has been an issue, especially in British Columbia. So in the context of PIPEDA, Industry Canada has been interested.

Mr. Brian Masse: Okay, but this act still hasn't.... I guess I'm surprised, because the privacy commissioner has called for public debate. I thought that would have triggered something, especially if we have a foreign takeover by a U.S. corporation right now. All that private information is susceptible to the Patriot Act.

What would trigger your department to do a review related to the Patriot Act? Have you flagged any of those instances for the minister? We're talking about a situation here where a province in this country is starting to address it with legislation. Second to that, we don't even have a right to know what information is provided to the FBI or other department agencies.

Mr. Pierre Legault: First, unfortunately I cannot tell you the advice that we have provided to the minister, especially the advice that I have provided or may not have provided to the minister. But when it comes to the application of the Patriot Act with respect to the Investment Canada Act, we have not studied, at the departmental level, the impact of that act on this one.

Mr. Brian Masse: So this act really is a sieve for Canadians' privacy information, then. because it doesn't protect whatsoever, or it doesn't even attempt to.

Mr. Pierre Legault: As I said before, I think section 36 of the act is a very strong provision. The files we have pertain to a specific investment, by a non-Canadian, of a Canadian company. Everything in that file is protected under this act. This is not being made public.

Mr. Brian Masse: No, but section 215 of the Patriot Act requires American foreign subsidiaries to provide information upon request without the knowledge of those companies, or of our Canadian citizens, I should say. So this act does not trump the Patriot Act by any means.

Mr. Pierre Legault: I think we're talking about two different things here. I'm talking about the administration of this act here, and the fact that the information that's in the possession of the government, that comes from these companies, is protected. That information is not divulged.

When it comes to the impact of other legislation on a Canadian and non-Canadian company that may be involved in a transaction, this act does not touch on that. It's outside the ambit of this piece of legislation.

● (1640)

Mr. Brian Masse: For example, we know that there might be some telecommunications investment by American companies if we free up foreign direct investment on the telco side of things. Your department then wouldn't raise the issue of the Patriot Act, and would then provide access to telecommunication usages, whether it be e-mails or conversations, of all Canadian customers to the U.S. government, without any notification of Canadians, be it the citizens or the government.

Mr. Pierre Legault: If I may respectfully say, what we're here to describe and to talk about is the application of this act and how we administer it. I think the kinds of questions you're asking are outside the ambit of what we're here to talk about. It may be part of the mandate of Industry Canada generally speaking—

The Chair: When discussing future business, that may be part of an argument for a briefing with somebody other than these gentlemen here.

Mr. Brian Masse: Well, what it proves to me is that this act is outdated again, because there's another piece of legislation.

As I say, I'm not trying to be argumentative. I'm trying to get at specifically whether or not they take the Patriot Act into account when a foreign American company purchases a Canadian company. They don't right now.

The Chair: It's not our act, anyway.

Mr. Brian Masse: No, but it affects us.

Thank you, Mr. Chair.

The Chair: Thank you, Brian.

Michael Chong, then Denis Coderre.

Mr. Michael Chong (Wellington—Halton Hills, CPC): Thank you, Mr. Chair.

I'm not sure if you have this information, but would you be able to clarify, out of the 1,439 companies that were reviewed and approved over the last 19 years or so, how many have been required by the minister to make undertakings? And out of those companies that were required to make undertakings, how many were subsequently given a demand by the minister? How many companies were subject to this? And of those companies given a demand, did the minister subsequently go to Superior Court to seek an order to enforce either the demand or the undertaking? I don't need exact numbers, but if you just give us an idea of those numbers....

Mr. Pierre Legault: Let me start from the end, perhaps. We've never gone to court under section 40 of the act. We have used section 39, which is the section saying that the minister can send a demand letter to a non-Canadian on a certain number of occasions. I don't have the number, and I don't know if it would be possible for you to get that number.

I know for a fact that we have drafted and sent letters to non-Canadians. In all of the cases, the non-Canadians have responded to the demand letter, and the minister has been satisfied that the actions taken by those companies as a result of those demand letters were in conformity with what he was asking.

As to the first part of your question, how many cases did we ask for undertakings or what was the the percentage of cases where we asked for undertakings, I don't know if we have more recent numbers, but I think in the past it was about 15% to 20% of cases that would have undertakings—but that goes through the whole history, I think, of the Investment Canada Act. I would think the proportion of cases where we have undertakings these days is higher than that, because the cases we have nowadays are bigger in nature, as the threshold has been going up to $237 million. That's been going up over the years, from $5 million and now to $237 million, so the transactions are bigger. Normally, they are more significant and more important to Canada, and therefore it's likely that there will be undertakings.

But I don't know if we have fresh numbers.

Mr. Simon McInnes: I've never heard the question put that way. Certainly, out of the 11,000 or so cases that have come in, about 13% have been reviewable—and certainly in recent times, over the last four years, nearly all of them have had undertakings. But I don't have exact figures going back to 1985.

The Chair: Is that something you could get?

Mr. Michael Chong: Just to clarify, you say that more recently a very high percentage of the 1,400 or so of the reviewable transactions have had undertakings. What percentage or roughly what portion of those have subsequently been asked by the minister to follow in compliance with the undertaking through a demand?

● (1645)

Mr. Pierre Legault: I don't have a number, but it would be a very low number, because most cases are in compliance to start with.

The Chair: Do you have anything else, Michael? Thank you.

We're going to go to Denis, and then Jerry.

[*Translation*]

Hon. Denis Coderre: Thank you. I have two brief questions.

When you do the screening or the analysis, do you work with other agencies? Obviously, when foreign companies are doing takeovers in Canada, national security can be an issue, as we were discussing earlier. Do I understand that you work in collaboration with the Canadian Security Intelligence Service? Do you also do a security investigation on future investors?

Mr. Pierre Legault: To my knowledge, there is no security investigation as such. The Minister consults with departments that are interested in this type of businesses, but there is no screening as such on the security aspects of the non-Canadian and its identity.

Hon. Denis Coderre: It could be done, but the issue of security is not a criterion for takeovers in the evaluation grid.

Mr. Pierre Legault: Unless the company's activities are in a field that is linked with security, which could bring the Minister to find out whether there might be something applicable in this area, as in the example I gave earlier.

Hon. Denis Coderre: So, if I understand you correctly, the puck stops there. The Minister makes his decision and consults with some of his colleagues to see if that applies. If it is only a matter of applying the legislation, no further action is required. That means that the Canadian Environmental Assessment Act, for example, does not apply to the Investment Canada Act. The two are entirely separate. The Section 20 criteria are broad to the point of being virtually meaningless, other than regarding cultural issues, because if I am not mistaken, you have a direct link with the Minister of Canadian Heritage.

Mr. Pierre Legault: Depending on the nature of the investment and the business activities of the Canadian business, the Minister consults with interested colleagues. This interest varies for one case to the next. If the Canadian business is involved in economic activity which has a significant effect on the environment, it is only natural that the Industry Minister would consult with his colleague from Environment Canada to see if there is a policy which applies to the particular business.

Hon. Denis Coderre: But we only take into consideration the Canadian-based activities of this new business.

Mr. Pierre Legault: We take into consideration the activities of the Canadian business which is already operating in Canada and any plans that the company planning the takeover may have for the business in Canada.

Hon. Denis Coderre: That was the purpose of the question I asked you at the start. They can do whatever they please outside of Canada provided that they respect environmental legislation when operating in Canada. They could be the worst environmental criminals elsewhere, but if they respect our legislation while in Canada, then that is enough for you.

Mr. Pierre Legault: I would simply say that once a business has been accepted into Canada under the legislation, it must comply with all other applicable Canadian legislation in all sectors. To come back to something else that you said, Section 20 is primarily concerned with what happens in Canada.

[*English*]

The Chair: Thank you, Denis.

We're going to go to Jerry, Paul, Lynn, and then Brian Masse.

Hon. Jerry Pickard (Chatham-Kent—Essex, Lib.): Thank you, Mr. Chairman.

Thank you, gentlemen, for coming in.

As I look very briefly at how the minister administers the act, it appears to me there is a lot of latitude in the hands of the minister. He can look at the net benefit to Canada under several terms. He has the flexibility, from what I see here, to deal with the issues that may be outstanding issues for all Canadians. He probably has the latitude—and I don't know if this occurs or not—to negotiate with any corporation certain restrictions or certain levels of activity, if he feels those are required to be of benefit to Canadians. He could limit certain things, or he could require certain elements or components of labour to be added or the numbers of people to come in, or the type of investment that goes into that industry or acquisition.

It sounds to me as if this is a pretty solid piece of legislation that gives latitude and gives opportunity to Canada to move forward. I guess we have to measure this over the track record of what has happened over the last several years. Is the legislation problematic in its administration, or have you found that you have the latitude to make business acquisitions and directions in Canada on a positive base for our country? How do you view what is happening within the structure of the Investment Canada Act?

● (1650)

Mr. Pierre Legault: There may be two parts to your question. From a technical point of view, the act functions well as it is. It is true that the Minister of Industry has lots of discretion under the act to decide what is the net benefit based on the factors and the terms of the act.

Hon. Jerry Pickard: Lots of discretion?

Mr. Pierre Legault: Yes, he has lots of discretion to decide whether or not there's a net benefit. He is guided in his decisions by the information he will get and by the tests that we find in the act—but he has lots of discretion.

As to whether or not the act is adequate to fulfill all the policies of the Government of Canada and everything else, that's a question we're not in a position to answer.

Hon. Jerry Pickard: You are in a position to look at what has happened on the administration of that act over the last several years, and you are in a position to suggest problematic issues that have arisen or not arisen by the application of the act, I believe.

Mr. Pierre Legault: That is why at the beginning of my answer I said that the act, as it is, has been functioning well.

Hon. Jerry Pickard: Okay, so it is a well-functioning act, doing what—

Mr. Pierre Legault: From a technical point of view, yes.

Hon. Jerry Pickard: Okay, “a technical point of view”. Could you clarify that?

Mr. Pierre Legault: In terms of the test that we have and the way the expressions are defined and the way the process works, on the basis of what we find here, it's a process that has been working well. That's what I mean by “technical”.

Hon. Jerry Pickard: So it gives the minister a lot of latitude to work with companies, negotiate. Whatever terms there are, it gives him latitude in order to bring in provisions that would make sure Canada's best interests are served, and yet technically it has all of the machinery we require to deal with corporations. In a nutshell, is that what you just said?

Mr. Pierre Legault: Again, I think the act functions well. If I try to understand your question, whether or not it would work in any possible circumstances in the future, who knows?

Hon. Jerry Pickard: Nobody can know that.

Mr. Pierre Legault: Exactly. But certainly it has been working well.

Hon. Jerry Pickard: I'm simply asking that question, if the functioning of this act has been good.

Mr. Pierre Legault: Yes.

The Chair: Okay, Jerry?

Hon. Jerry Pickard: Yes. Thank you.

The Chair: Thank you.

Paul Crête, please.

[*Translation*]

Mr. Paul Crête: Should the Minister wish to take into consideration a criterion which is not enshrined in the Act at the present time, what recourse would a non-Canadian investor have?

Mr. Pierre Legault: One would first have to determine if the MInister's decision was in favour of the investor.

Mr. Paul Crête: Let's say, for the sake of argument, that we are talking about a negative decision. It would be somewhat surprising for an investor to be unhappy about a decision in his favour.

Mr. Pierre Legault: As the law stands at the moment, an investor who is not satisfied with the Minister's decision cannot appeal based on ministerial discretion. It is possible, however, to question whether, in terms of process, the Minister has acted in compliance with the Act. Depending on how the Minister has acted, on what elements he has taken into consideration, and so forth, the investor could have ground for going to court and asking that the decision be revised. The request would be based not on ministerial discretion, but on the way things were carried out.

● (1655)

Mr. Paul Crête: Would it be possible to seek recourse by means of international tribunals or international boards such as the WTO, for example? Perhaps through something similar to what is described in chapter 11 of NAFTA.

Mr. Pierre Legault: Once again, if I am not mistaken, the legislation respects our international obligations. As long as the Minister is acting within the confines of the Act, it is not possible to seek recourse from a foreign tribunal.

However, should you require a more detailed answer, you should put the question to the department of International Trade As far as we are concerned, we are unable to give you an answer.

Mr. Paul Crête: So, what you are saying is that the Minister makes his decisions based on certain criteria set out in the Act, but that there is room for a fairly broad interpretation of these criteria. An investor who is unhappy with a negative decision has no recourse to appeal it. I you allow me an analogy, I would like to say that the Minister's power is similar to that of an immigration officer in an embassy dealing with a potential immigrant. When the embassy immigration officer decides to deny an individual's request, virtually no appeal is possible. Would you say that the Minister is in a similar situation regarding foreign investors?

Mr. Pierre Legault: I'm afraid I will have to confess my ignorance on the subject. I do not know the immigration system. I can tell you, however, that it is up to the Minister to determine whether there is a net benefit to Canada or not. The Minister cannot be substituted in this responsibility because he is the one who has all the facts. The question is whether the Minister did respect the Act and the process.

Mr. Paul Crête: The Minister has a degree of latitude regarding the criteria. It is not black and white. There is room for interpretation on the part of the Minister. At the end of the day, he can interpret the criteria to best suit his needs.

Mr. Pierre Legault: You are referring to Section 20, aren't you? The list is clearly defined. The factors to be taken into consideration are stated. Obviously, there is always room for some interpretation regarding the wording of the different factors listed. However, existing industry and trade policies must also be taken into consideration. These policies change over time. With time, the Minister does have a certain latitude, but he must take into consideration this sort of issues.

Mr. Paul Crête: Could we go so far as to say that these criteria exist to ensure the protection of human rights?

Mr. Pierre Legault: I can only speak to the factors listed here. It remains to be seen if there is a link between what you are saying and the factors mentioned here.

Mr. Paul Crête: Thank you.

[*English*]

The Chair: Merci, Paul.

I have Lynn and then I have Brian Masse.

Mr. Lynn Myers (Kitchener—Wilmot—Wellesley—Woolwich, Lib.): Thank you, Mr. Chair.

I want to thank the witnesses. I think your comments here today are very interesting and timely in light of some of the developments we see happening.

I wondered, when you were talking about net benefit analysis to Canada—and I was listening carefully to your comments—if you are aware of you having done it yourself or any other department on that net benefit analysis to Canada. I wondered whether or not there was any sort of quantitative analysis, or qualitative analysis for that matter, let's say over the last five or ten years, with respect to numbers of jobs created in Canada, things like balance of payments, perhaps, in trade areas, impacted GDP taxes paid, those kinds of things. It seems to me that if you are talking net benefit, that might be something worthy and interesting to note.

That's my first question, then I have a supplementary, Mr. Chairman.

Mr. Simon McInnes: We have not done a study specifically answering all of those questions related to the act. We deal with each case on its own merits. I do not recall that there has been a study that has looked at all of the cases over a certain period with a view to making an assessment whether, in balance, all of the cases have led to a net benefit, and if so, where. I don't believe that analysis has been done.

Mr. Lynn Myers: Might it be worth doing some time?

● (1700)

Mr. Simon McInnes: That's something that could be taken into consideration. It would involve going through the archives and going through each case with a fine-toothed comb. I guess that leads to one of the earlier questions as to how well the act has been working, and it's our view that on a case-by-case basis and given the implementation reports we receive after the decision has been made, after 18 months or after three years or even longer as required, the act has performed well.

Mr. Lynn Myers: That actually leads into my second question. I listened very carefully to how you answered my colleague, Mr. Pickard, in terms of how well the act is working, and I appreciate you being circumspect in terms of whether it is or is not working well and your supposition that it is.

I guess it surprises me a little bit to hear you say it so strongly, because in light of the changes, for example, in the world over the last ten years, NAFTA, the globalization and everything that has occurred, wouldn't it be prudent to at least review the act to see if it's sort of keeping up with the modern times and whether it's keeping up with the kinds of changes we've seen, not only in Canada but in the world?

I'm not trying to bait you or trap you into answering something that you think is best left for parliamentarians, but I am interested in your view in light of the changes that we have seen over the last little while, whether or not it might be worth while, and prudent actually, in light of things happening in Canada, to take a hard and fast review of this act and see whether or not it has kept up to what should be taking place.

The Chair: I doubt they can answer that, but it's up to—

Mr. Lynn Myers: I said I didn't want to trap them.

The Chair: Yes.

It's in your hands whether you want to try that.

Mr. Pierre Legault: When I said the act worked well, again, certainly my answer and my view, with all due respect, was in respect of the technical application of the act.

As to, again, whether or not the act should be modified to take into consideration this or that happening in the world, I'm not in a position to answer that.

Mr. Lynn Myers: Thank you.

The Chair: Okay, Lynn. Thank you.

Brian Masse, and then back to Brad.

Mr. Brian Masse: Thanks.

In that vein, have there been any studies internally about modernizing the act? You mentioned NAFTA and WTO before. What triggered the updating of those pieces to the legislation?

Mr. Pierre Legault: Obviously in the case of the amendments following the WTO, it's because there was an international agreement, a trade agreement, to which Canada was acceding. We had to adapt the act so that it would conform to that trade agreement, and the same thing for FTA and for NAFTA.

Mr. Brian Masse: Was that internal, though? Was it an internal decision of the department to say "We have to amend the act because of these circumstances", or did that come from political direction?

Mr. Pierre Legault: No, but the political direction comes from this decision to be a signatory of an international agreement. Okay?

Obviously, if Canada adheres to one of those international agreements, we then have the obligation to change our law so that it would respect those international obligations. So it is a government-wide exercise, not directed only at this but at all legislation that needs to conform to those international agreements.

Mr. Brian Masse: Okay, so what are you doing on Kyoto, and how does it affect your plans?

Mr. Pierre Legault: The act is not affected by Kyoto.

Mr. Brian Masse: Why wouldn't it be affected? It's an international treaty that Canada signed on to.

Mr. Pierre Legault: But it depends whether or not it has a direct impact, whether this agreement contains provisions that are against or would not conform to Kyoto. You have to look at the content of those international trade agreements to decide whether you need to change anything in your legislation or regulations.

Mr. Brian Masse: Given already this committee's study of Kyoto and the effects on it and the industry across our country, I thought that would have precipitated at least discussion of it.

It seems my colleague here, Mr. Pickard, has really defined it. Really what is driving this act is political ideology. It's the minister of the day, whether back in 1985, who was holding office then, or up to right now, who is holding office currently.

I think it would be helpful if we had an act that wasn't driven by ideology or even more specifics. I just want to confirm, then, that there is nothing specifically in the act that triggers your department to come forward and say you have to make changes, other than your opinion as to whether something affects Canada or not, be it WTO or NAFTA, and apparently Kyoto doesn't count.

● (1705)

The Chair: I think you imputed something there, though. He didn't say Kyoto didn't count. He simply said if a global treaty impacts the investment act, then they have to do something, or if it impacts a Canadian statute, then they have to do something, but if it doesn't, the statute doesn't have to be changed.

You suggested that—

Mr. Brian Masse: This is like a cloud here. We're just trying to get specifics on the operation.

Hon. Denis Coderre: You're going to have to change your press release again.

Mr. Brian Masse: Well, I think there'll be many more to come if it's going to continue going on this way. This is just incredible, though.

At any rate, I have one last question. We are getting confirmation that we are going to get at least a listing of all other countries and investments. That's going to be provided to us, as committee members, then?

Mr. Pierre Legault: Yes.

Mr. Brian Masse: Okay. Thank you very much.

Mr. Pierre Legault: If I may, though, you said the act was driven by political ideology. The minister has discretion to come to a decision on the benefit, but what will drive him is analysis of the information that he obtains in relation to the factors in the act, section 20, and the information that will be provided to him by the director of investments under section 19 as well. So that's his framework. As such, it's not ideology. There is a framework under which he works under the act.

Mr. Brian Masse: I disagree. Each minister comes from a different background and represents different views, so it is driven by ideology. The context may be the same, but the lens the minister's looking through will be different. That's going to change on a yearly basis, depending upon who's sitting in that seat.

The Chair: Thank you, Brian.

We'll go to Brad, and then Denis.

Mr. Bradley Trost: I have just a very short question, out of curiosity. Looking through my Library of Parliament briefing notes, it says that for sensitive sectors—uranium production, financial services, transportation services, etc.—there are special rules. I was wondering if you'd elaborate on some of the special rules and circumstances, and if some of these industries are bought out, give some examples of how they would apply differently than for some other companies.

Mr. Pierre Legault: The only special rule that exists for the type of business you are describing is that the threshold I was talking about would be lower. The higher threshold of $237 million would not apply. The $5 million threshold would apply, which means that anything below $5 million would not be viable, and everything above $5 million would have to undergo a review.

The only other factor then is whether or not you have policies that would apply in those sectors. Policies can exist in any of the sectors of the economy, but there may be some policies in those sectors that have to be considered. Other than that, in terms of how the act functions by itself, only the threshold would be different.

Mr. Bradley Trost: So that is the only special rule included in there.

As a follow-up here, companies are multi-headed—I'm thinking particularly of my mining background here. A company could easily have a $5 million uranium property mixed up with gold, and so forth.

How does one always define one of these small-threshold companies? It isn't always clear. You could have $3 million worth of investment in uranium property, and $20 million in gold. Would it qualify or not?

The financial area is another one that can get mixed in, if you have a financial spin-off of a smaller company, etc. I wonder if you might clarify that.

● (1710)

Mr. Pierre Legault: That's a most interesting question. I think we could go into lots of technical detail as to how the value of assets is calculated. Generally, the value of a Canadian business that is taken over is the value of that Canadian business as a whole—all of its assets, whether or not they are mining nickel, iron, or whatever—in the audited financial statements, in the year preceding the year in which the investment is made. So that's how assets are calculated.

Mr. Bradley Trost: So if they have one dollar's worth of investment in uranium, a $5 million mining company would be subject to the special rules.

Mr. Pierre Legault: What special rules are you talking about?

Mr. Bradley Trost: I mean the $5 million threshold that kicks in if you have one dollar of investment in uranium.

Mr. Pierre Legault: In uranium—yes.

The Chair: Okay, Brad?

Denis, and then Jerry.

[*Translation*]

Hon. Denis Coderre: Turning to part IV, Section 14, what is said about investment reviews—

Mr. Pierre Legault: Are you referring to the way in which assets are calculated?

Hon. Denis Coderre: I'm talking about active, GDP, and all the rest. Is that pertaining to assets?

Mr. Pierre Legault: Investment Canada regulations also apply. There are more rules on asset calculation.

Hon. Denis Coderre: Okay.

I only have one question. When you analyze a consortium, and it could turn out to be a holding company, you carry out an in-depth analysis of its assets and of other companies which it owns. Does this analysis tell you if the consortium holds Canadian interests elsewhere. If it already has Canadian interests, that would mean that it is not in compliance with the Act and could therefore not buy the company. Am I correct?

Mr. Pierre Legault: I'm not sure that I fully understand your question.

Hon. Denis Coderre: I cannot think of a specific company right now, but let's take the example of what Brad called a multiheaded company. Obviously, that would represent a net benefit for us, in terms of the calculations—

Mr. Pierre Legault: Are you talking about a Canadian business?

Hon. Denis Coderre: I am talking about a non-Canadian holding company which has businesses all over the place. Given that we are talking about a large consortium, we may well find out that it owns Canadian assets. Even if the Canadian interests are very limited, does that mean that it would not apply?

Mr. Pierre Legault: There are perhaps a number of distinctions that need to be made here. First of all, the Act applies to the acquisition of a Canadian business. In the case of a consortium you are talking about, it is not the company that is doing the acquiring; it is the company that is acquired by a non Canadian. A Canadian company may already be controlled by a non Canadian or it may be Canadian. The Act applies the same way in both cases. A company is Canadian when it has assets, a place of business and employees in Canada. That is what is important.

When a foreign business acquires a Canadian company that has several subsidiaries, there is acquisition of controlled and direct acquisition. Moreover, if a non-Canadian business acquires another business located in another country with a subsidiary in Canada, we would consider that an indirect acquisition of the Canadian business.

In the case of indirect acquisitions, the rules are a bit different. We do not review indirect acquisitions, unless the business is in one of the privileged sectors like transportation or culture. In the case of an indirect transaction, only notice is given.

Hon. Denis Coderre: That was my question.

[*English*]

The Chair: Thank you, Denis.

Jerry Pickard, please.

Hon. Jerry Pickard: Thank you, Mr. Chairman.

I wish to go back to the idea that ideology drives the minister's decision. It's my understanding that non-political department staff analyze the pros and cons of any acquisition, and it is not the political staff that does it. Point number one. They lay out the facts to the minister; the minister in reality is the head of that department. Those discussions go on within the department; the recommendations come to the minister from the department.

To clarify this, it is in many cases driven by those public servants, who serve this country in a non-political base and who make those recommendations. So we have a consistency in that department; whether the minister changes or not, there is still the analysis process, which works the same under each and every minister.

Is that correct?

● (1715)

Mr. Pierre Legault: You're right, sir.

Hon. Jerry Pickard: Therefore, the statement that because a new minister comes in with a whole different set of experiences.... He has the experience of that department to guide him and recommend to him what should be done under the act and what is appropriate.

Mr. Pierre Legault: Yes.

Hon. Jerry Pickard: Thank you.

Mr. Pierre Legault: The director of investment will do the research, get the information, and make a recommendation to the minister.

Hon. Jerry Pickard: So there is consistency here, and there always has been under the act?

Mr. Pierre Legault: In the administration of the act, yes.

The Chair: Jerry, have you concluded?

Hon. Jerry Pickard: That's it.

The Chair: Colleagues, seeing that there are no more questions at this point, I would like very much—

Hon. Denis Coderre: I have maybe just a small one.

[*Translation*]

There is a possibility that the minister will not accept it and that Cabinet will. Are there any measures whereby the Cabinet could still accept the decision? Could there also be a refusal to ratify the decision by Cabinet? Is it the Minister alone who decides, or is it possible for the Minister to say yes, but for Cabinet to not necessarily agree?

Mr. Pierre Legault: Under the Act, the decision is in the hands of the Minister.

Hon. Denis Coderre: There is no additional ratification. Thank you.

[*English*]

The Chair: Thank you, Denis.

Just before I thank our witnesses, there was a question that Paul asked and on which I want to be sure I understood the answer. Paul was asking whether there was another minister who could hold the hammer and hold it up, or was it only the industry minister who could say yes, and that no other minister could say no. I understood that if the industry minister says yes, notwithstanding that another minister might say no—if that were to happen—it would still be a yes.

Mr. Pierre Legault: The Minister of Industry has the discretion; he's the only one who can make a decision under this act. In my view, the other minister may have powers of his own under different legislation, but that would be a different issue.

The Chair: A different issue. Okay.

On behalf of the committee, I'd like to thank you gentlemen very much for being here. As part of our discussions at another time on future business, this may certainly stimulate thinking about what steps may appropriately follow from here. So with that, you can feel free to leave.

We just have about two or three or five minutes of work to do before we conclude. I want to let you know that on the four major items, on Thursday we're having Mr. Lussier in on the smart regulations, and then next week we'll do the other two.

Brian Masse had sent a letter to all colleagues. He had mentioned that at the future business meeting.

A point of order?

Hon. Denis Coderre: I don't know if it's a point of order, but, just for the record, we had a tremendous meeting last Thursday, and I read in the *Globe and Mail* that it was only the Liberals who voted against Mr. Masse's motion. I would like to say that everybody was in agreement that we were not for that.

The Chair: I'm not sure it's a point of order, but I'll invite you to speak to the media yourself and clarify that.

Paul.

[*Translation*]

Mr. Paul Crête: I would like to hold off on a decision regarding M. Masse's letter until we have had our four sittings. It is additional information regarding the committee's future business. If we adopt it today, you will start receiving letters every day on a host of topics.

[*English*]

The Chair: It's not my plan to do any adopting. Basically I'm only informing you that we have handed out to you the testimony, the summary of evidence from a previous Parliament's work by that committee, and this is before you. At some future business meeting you can decide what you want to do.

So, Brian, in my opinion—and you did mention it last week at the future business meeting—it will be up to you to convince your colleagues at some future time to do something. This is a public document. As far as I'm concerned, it probably satisfies 95% of your question, because it is a summary of testimony.

● (1720)

Mr. Brian Masse: There is just some information that's missing from that, but I agree, the intent was so that I could as least provide in public prior notification for members, as opposed to giving something to them at the last minute.

The Chair: I want to ask the clerk, am I correct that this is okay?

Lalita is telling me that the Library of Parliament doesn't tell members what they do with something when they have it in their hands. This is not in any way the position of the committee; it's simply the Library of Parliament's summary of testimony. No member is under any restrictions, I suppose.

This may satisfy what you were raising, Brian. If not, you can raise it in a future business meeting. As far as I'm concerned, for the time being this is dealt with.

Mr. Brian Masse: I'd like to say thank you.

Mr. Lynn Myers: Mr. Chairman, on a point of order, some may wish to tell parliamentarians what to do with it.

That was a joke.

The Chair: Yes.

If there's nothing else, we're concluded for today. Thank you all for the great set of questions.

The committee is adjourned to the call of the chair.

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