HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

44th PARLIAMENT, 1st SESSION

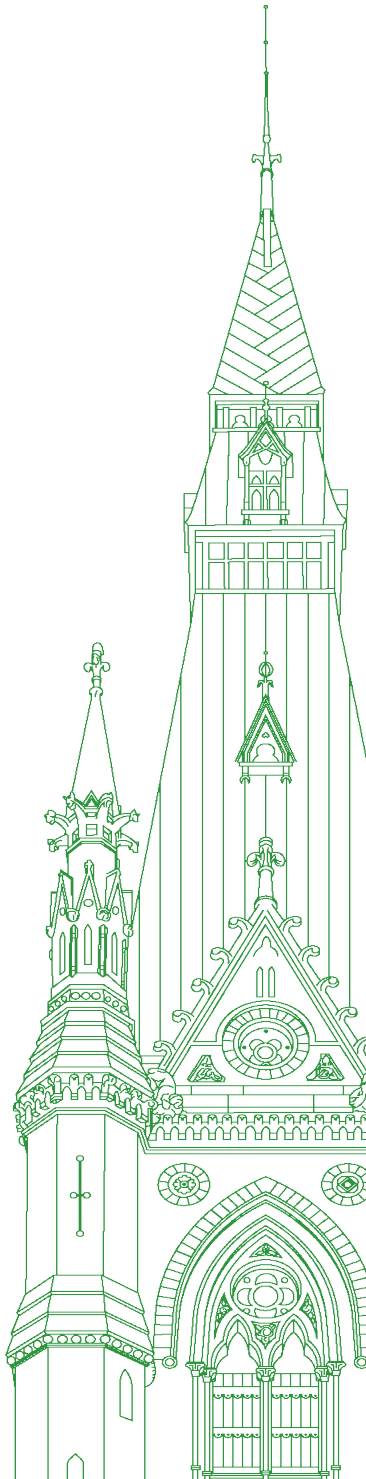
Standing Committee on Industry and Technology

EVIDENCE

NUMBER 074

PUBLIC PART ONLY - PARTIE PUBLIQUE SEULEMENT

Monday, May 15, 2023



Chair: Mr. Joël Lightbound

Standing Committee on Industry and Technology

Monday, May 15, 2023

● (1555)

[*English*]

The Vice-Chair (Mr. Rick Perkins (South Shore—St. Margarets, CPC)): I call the meeting to order. As you'll note, I'm not the usual chair. Joel is having some transportation issues today and I will be filling in. I hope you will bear with me.

Welcome to meeting number 74 of the House of Commons Standing Committee on Industry and Technology.

Today's meeting is taking place in a hybrid format pursuant to the House order of Thursday, June 23, 2022.

Each witness gets five minutes to start. We have four witnesses today.

We'll start with Mr. Bhattacharjee.

Mr. Subrata Bhattacharjee (Partner and National Chair, Competition and Foreign Investment Review Group, Borden Ladner Gervais LLP, As an Individual): Mr. Chair and members of the committee, thank you for the invitation to appear this afternoon.

I chair the competition and foreign investment practice at the Canadian law firm Borden Ladner Gervais LLP. My comments today are made in my personal capacity and not on behalf of the firm or its clients.

I have practised Canadian competition law and foreign investment regulation for over 25 years. I've previously taught competition law, including foreign investment regulation, at the Dalhousie law school as a part-time faculty member for about 10 years. I'm also currently appointed by the commissioner of competition as a non-governmental adviser to the International Competition Network.

My remarks on the bill today are going to focus on the issue of prescribed business activities. I'm also going to refer to them as sensitive sectors. There's been considerable discussion, I think, both within this committee and among stakeholders, about what a prescribed business activity should be for the purposes of what the bill proposes to be a mandatory pre-closing notification requirement. It is essentially an early warning system for sensitive-sector foreign investments in Canada.

As an aside, I do note that the minister has suggested that these sectors will be reflected, to some degree, in the regulations to the new act. In response to some questioning I had reviewed in some of the other sessions, I agree that it is preferable, by the way, to leave those sectors for inclusion in regulations, as opposed to within the act itself, to preserve a degree of flexibility.

Having said that, my remarks today won't really be about what should specifically be on the list or not. My primary concern before you this afternoon is really to discuss how we ensure clarity and comprehensiveness in how that list is expressed in the regulations.

I have two things to say about that. The first is that we need to ensure we describe each prescribed business sector in a meaningful way and certainly beyond what we presently have in the existing guidance and policies that have been issued by industry.

If you look at the existing guidance, what we have done to date is set out very broad buckets with varying levels of context. That's because that list currently is for the purpose of evaluating the application of the substantive test to be applied by the minister or the Governor in Council in making a national security determination. If you look at annex A to the national security review guidelines, it lists 15 sensitive technology areas without a lot of elaboration. Those areas include aerospace, biotechnology, medical technology and quantum science. That's fine for that purpose, but for the purpose of implementing a mandatory and suspensory notification system that's going to be triggered, really, by tying an activity to one of these prescribed business sectors, as the bill proposes, we'll have to make this a bit more detailed, as some other jurisdictions have done.

I am personally a little cautious about importing ideas from other countries' regulatory regimes holus-bolus into our policy architecture, especially in foreign investment regulation, where in fact Canada has been active for a longer time than many of our major trading partners. There are many things we learned on our own that we should be quite ready to deploy. However, I will make an exception here. I will invite the committee to review what the U.K. has done in their approach to identifying the sensitive sectors under their National Security and Investment Act. Their regime actually identifies 17 sensitive sectors, which are sort of similar to those contemplated in our guidelines.

The U.K. government did two things beyond just listing them. The first thing was that they had fairly comprehensive—I think it's about 50 pages' worth—regulations where they set out 17 schedules, like a schedule per sector, with definitions accompanied by technical detail. Then there's a requirement that within three years after implementation—I think within a three-year period after—the minister has to review the schedules to make sure they are achieving the U.K. Parliament's objectives. That, I think, is a useful thing they have done.

The second thing they did, in addition to the regulations they had, was to issue accompanying guidance that fairly comprehensively interprets the scope of each one of those 17 schedules. Actually, when you go to the website, you will see they even outline a series of evaluative considerations that are particular to each one of those silos. I would suggest to you that this approach, which combines reasonably comprehensive sector descriptions with the detailed guidelines and on top of that has a requirement that the government review the list periodically, is a good thing for us to look at in Canada.

● (1600)

My second observation is maybe a bit more substantive. It's to simply note that we should maintain a calibrated approach to identifying prescribed business activities as opposed to a more reflexive one. That's for two reasons.

First, our approach to identifying sensitive sectors should be broadly consistent with the positions taken by our allies, not just in the Five Eyes, which I know folks have talked about in committee, but also in bilateral relationships like our Canada-U.S. joint action plan on critical minerals, where we are coordinating our approach to that supply chain to some degree with what the U.S. is contemplating.

My second and final point is simply that national security obviously requires a whole-of-government approach. It’s probably good to remember that, though the Investment Canada Act is a way we can assess and address potential national security concerns, it’s unrealistic, in my view, to assume that the legislation can accommodate the entire universe of legitimate national security concerns that may emerge, and will no doubt continue to emerge, in the future. It's really just one piece of the puzzle. Obviously it's a very important piece of the puzzle that we want to get right, but again, it is just one piece.

With that, I'm done. I thank the committee for its time. I'm happy to answer further questions as required.

Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Bhattacharjee.

Mr. Hersh, you're next.

Mr. Chris Hersh (Partner, Norton Rose Fulbright Canada LLP, As an Individual): Thank you, Mr. Chair.

Members of the committee, thank you for having me participate today.

I am the head of the Norton Rose Fulbright LLP Canada competition and foreign investment group, and I am appearing here in my individual capacity. As with Mr. Bhattacharjee, my views are my own and not those of any clients or the firm.

I want to start off by saying that as a Canadian, I think the national security review provisions of the Investment Canada Act are probably some of the most if not the most important provisions of the ICA, from my perspective. While it's important to ensure we protect national security interests, it's also important to ensure we don't do so in a way that creates an unnecessary or overly onerous burden for the vast majority of investments that are compatible with Canada's foreign investment strategy.

By way of details, ISED's 2021-22 annual report indicated that over the past five years, only 70 investments have been subject to the formal process at all and only 39 of those proceeded to a full review. Of those, 15 were allowed, 14 were withdrawn, seven required divestiture orders, two were blocked and one was ongoing. I think it's important that as we think about the best way to deal with assessing investments from a national security perspective, we also understand that the vast majority of investments are in line with Canada's foreign investment policy. Also, I think it's very important that any regime is as clear as possible, understanding that national security, by definition, involves information and not being able to share all the information that might otherwise be the case. It's important for investors to understand the rules and how to apply them.

Touching on some of the areas that Mr. Bhattacharjee touched on, the notion of “prescribed business activity” and the notion of a mandatory premerger or pre-implementation regime I think acknowledges that there are situations where it's important to be able to assess and potentially stop certain types of investments before they happen—in particular investments relating to sensitive technology, data or intellectual property—and especially where not taking a proactive approach might actually impair the ability to take effective remedial action.

I think there's a real concern with the draft legislation that the term “prescribed business activity” is quite vague. As others have said, I think it's important to appropriately define this.

There are also other terms, such as “material non-public technical information” or “material assets”, that are quite vague. It's very important that people understand how the law will apply to them and understand, as they assess whether to make an investment or not, what regime will apply to them.

While Mr. Bhattacharjee talked about the U.K. approach, I think we have a lot to learn from the U.S. CFIUS approach. In particular, they have adopted an approach, a mandatory regime, to non-controlling investments in what they call “TID U.S.” sectors or “TID U.S. businesses”. Those are businesses that relate to critical technology, critical infrastructure and sensitive personal data. It's important to make it very clear for people whether an investment is subject to the mandatory process.

The other thing is that while it's important to focus on the types of industries where we believe out of the gate that there could be a national security concern, that's only part of the test. There's a two-sided analysis. There are the activities the Canadian business is engaging in and if those activities are potentially raising national security concerns, and there is also the identity of the investor.

I think it's fair to say that there are some investors whose investments are almost generally compatible with Canadian interests, and there are other types of investors who may be viewed as raising potential concerns from a national security perspective. To treat all investors the same way, forcing all investors to go through the same process, seems, quite frankly, to be an overly broad approach, an approach that is going to be wasteful of time and wasteful of resources.

● (1605)

One example, again drawing from the CFIUS experience, is their notion of foreign excepted states and foreign excepted investors, where investors are tied to a state or country that the U.S. has deemed to be a safe state or a trusted trading partner. They've so far designated Canada, Australia, the U.K. and, just recently, New Zealand as those exempt states. Certain investors who meet certain criteria are viewed as exempt foreign investors, and they do not have to go through the mandatory regime. I liken it to a NEXUS-type approach to foreign investment. You have a no-fly list, you have a trusted traveller or trusted investor list, and you have everybody else.

The Vice-Chair (Mr. Rick Perkins): I'm sorry, Mr. Hersh. That's a little over five minutes. Maybe you can get to some of the items that remain during the questioning time.

Mr. Joneja is next, please.

Mr. Navin Joneja (Partner and Co-Chair, Competition, Antitrust and Foreign Investment Group, Blake, Cassels and Graydon LLP, As an Individual): Good afternoon, Mr. Chair and honourable members. Thank you for inviting me to discuss the proposed amendments to the Investment Canada Act.

My name is Navin Joneja. I'm co-chair of the competition, antitrust and foreign investment group at Blake, Cassels and Graydon. I'm here as an individual and in my personal capacity, not on behalf of the firm or any of our clients.

I have been practising in the area of foreign investment, and the Investment Canada Act in particular, for over 20 years. As with my colleagues, I've had the opportunity to see first-hand the evolution of the ICA, from before we had a national security review regime to when the national security review regime that we currently have was enacted in 2009 to now the more recent trend of an increase in the number of national security reviews. I want to make a few brief observations on the proposed legislation based on these experiences. I look forward to any questions from the committee afterwards.

My comments are really directed at one of the key themes that have come up repeatedly in this committee's work on this legislation—that is, how to best balance the dual objectives of strengthening Canada's national security and, at the same time, encouraging the investment and capital needed to strengthen Canada's economy.

First, as a general matter, the framework set out in the bill contains, in my view, a number of very well-reasoned features directed at accomplishing both of these objectives. In particular, the mandatory pre-closing filings for certain sensitive sectors, if implemented properly, would allow the government to better screen for investments of concern from a national security perspective. Additionally, the improved information sharing with international counterparts should also allow Canadian government officials to make better-informed decisions on national security matters.

Another useful feature, and the one that I want to focus on more in my remarks, is the newly proposed authority for the minister to accept undertakings—in other words, binding commitments—to mitigate national security risks. In my view, this tool is lacking in the current legislation and has the potential to allow the Canadian government to do a much better job of balancing the two objectives of strengthening national security and encouraging foreign investment.

An undertakings process or undertakings regime would allow foreign investors to remedy the specific national security concern at issue without sacrificing the entire investment in the proper cases and in the appropriate circumstances. Potential undertakings could include safeguarding or restricting access to sensitive information, restricting certain lines of business or customers, or other more targeted and focused remedial measures. Other countries, such as the United States, have a more robust practice of using such mitigation measures to address national security concerns. It makes sense for Canada to have a similar tool to do so.

Furthermore, as we look at the proposed legislation as a whole, this tool will likely prove to be more useful and more important, as national security reviews will likely become more frequent. In other words, given the recent trends toward greater scrutiny and the increased powers contained in the bill—for example, in requiring mandatory pre-closing notifications for certain sectors—one can expect a greater number of national security reviews covering perhaps a wider range of industries. Having the ability to apply a more targeted set of undertakings in a regime that substantively addresses the national security concerns at issue will likely prove to be very useful going forward in balancing those two objectives.

That being said, there are also elements of the bill and its implementation that are of some concern and that could be improved in order to increase its effectiveness. My colleagues have spoken to a number of those points.

First of all, the bill allows the minister to impose interim conditions on the investor prior to the conclusion of a review. This particular aspect is quite novel and expansive. While its stated purpose is to prevent the risk of national security injury taking place before a review is complete, it also has the potential to be quite broad in application. In my view, it risks chilling otherwise benign and legitimate investments. In practice, foreign investors are typically accustomed to conditions being applied, if they are needed, to allow closing to occur. However, I do worry that a perceived threat of interim conditions prior to closing could actually deter investments from legitimate partners even signing on to an agreement to invest in Canada.

● (1610)

Second of all, the effectiveness of the bill and its implementation would be improved if there were greater disclosure and transparency to investors during the national security review process. There's no doubt a need to ensure that information sensitive to national security is protected, but from my perspective, there are ways to ensure that additional information is made available generally. Such disclosure and transparency also have the added benefit of allowing current and future investors to plainly recognize government concerns so they can be addressed at an earlier stage.

Finally, there are clearly a number of new and expansive elements contained in the bill. The investment review division will need to be adequately resourced and staffed in order to meet what appear to be considerably greater demands to review filings, conduct reviews and engage with investors.

In summary, in seeking to both strengthen protections for national security and encourage investment to Canada, there are a number of well-thought-out elements in the proposed legislation. There are also ways in which the legislation and its implementation could be improved and enhanced.

Thank you again for the opportunity to present today. I look forward to answering the questions you have.

● (1615)

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

Our final witness is Mr. Krane.

Mr. Joshua Krane (Partner, Competition, Antitrust and Foreign Investment, McMillan LLP): Mr. Chair and committee members, thank you for the invitation to appear today. I'll keep my opening remarks very brief.

My name is Josh Krane. I'm a partner in the competition and foreign investment group at McMillan. I've represented many foreign buyers and Canadian businesses in connection with investment transactions that have been subject to the ICA.

My comments will focus on the proposed judicial review amendment at proposed section 25.7. I'd like to start by offering some context.

All the foreign investors I encounter in my law practice are looking to make investments in Canada because they see an opportunity to tap into an educated workforce, expand their sales channels or find opportunities to grow their businesses. The people I meet are genuinely interested in building successful enterprises. They are receptive to feedback and sensitive to the political environment in Canada. I also appreciate that there are state forces at work that we cannot always see. I believe that Canada needs to be prudent about foreign state interference in our economic system.

The challenge I see is that the proposed amendments don't fix a fundamental issue with the ICA, which is that investors are not provided with sufficient information to decide whether to continue to pursue an investment caught up in a national security review or to withdraw their investment. This is the challenge for investors and their advisers because the pathway forward can become very unclear.

In a paper that I published last year, we proposed that the process include the creation of a national security amicus or intermediary to help bridge the communication and information gap between investors and the government. We recommended that this amicus be authorized to review a packet of confidential evidence used to make a security assessment, and then brief the investor on the strength of the government's position without disclosing sensitive information. This includes the benefit of encouraging investors to withdraw their investments before the government has to make a national security order. If a matter proceeds to judicial review, which the amendments now contemplate, the amicus could challenge the accuracy, reliability and sufficiency of the evidence collected to ensure that the government is appropriately held to account before a court of law.

The process we proposed is not without precedent. It's used in the immigration security certificate process, which also has national security dimensions. The Canadian International Trade Tribunal also allows external counsel to receive confidential information on the condition that they sign strict confidentiality undertakings with significant penalties for a breach. We've provided Mr. MacPherson with a copy of the paper, which I understand The Canadian Bar Association has endorsed in its brief.

Those are my submissions, and I look forward to addressing any questions you may have.

The Vice-Chair (Mr. Rick Perkins): Okay. Thank you very much.

We'll begin our questioning now. I appreciate the testimony from the witnesses.

We'll begin with Mr. Williams for the first round of six minutes.

Mr. Ryan Williams (Bay of Quinte, CPC): Thank you very much, Mr. Chair.

Thank you to all of our witnesses for joining us today.

This is actually great. Mr. Bhattacharjee and Mr. Hersh, you're right on our wavelength. You must have been listening intently to our discussions at our last meeting on these lists, on who manages the lists and on how we make the recommended changes in legislation to ensure that, when Bill C-34 is passed in the House, we're doing the bare minimum—what CFIUS and the U.K. are doing—but making it great for Canada. Mr. Krane, you touched on a important part: How do we ensure that we also maintain the maximum investment we can in Canada?

I want to focus, Mr. Bhattacharjee, on the comments you were making.

I agree with you to have a list that isn't baked into legislation and that couldn't be reopened in 22 years. I agree with you that we need to look at ways to make it flexible. What recommendations could you make, from a legal perspective, for the legislation that would allow at least a review of that list maybe once every three years? You could tell me if you feel it's different. What we heard before was to have that done.... I'm trying to remember the term right now. It wasn't “in council”. Perhaps it was “in governance”.

A voice: It's Governor in Council.

Mr. Ryan Williams: Governor in Council, yes, but there was another term we had. “In governance” I think it was.

We had staff here as witnesses last week as well. We're also asking them how they handle that.

I'm going to start my first round with that question, sir.

● (1620)

Mr. Subrata Bhattacharjee: I'm agnostic as to whether the ability to review the sufficiency of the list is in the act or the regulations. In the U.K. example I provided, it's actually in the regulations, not the act. For whatever reason, they chose to do that.

I feel strongly that the list itself should remain a regulation. I say this because my colleagues and I have all been at this for a while, and one thing we learned and can tell you is that the evolution of the landscape from 2009, when this power found its way into the law, to where we are now is really quite something. The preoccupations and concerns that we collectively, as a nation, were looking at in 2009 have obviously shifted since that time.

I think the list itself should be left flexible in regulations. I think there should be an ability for Parliament to order some sort of review or a report on the sufficiency of that list. That's the best you can probably do to have the balance of both worlds. You have a list that's flexible and the ability to go back and take a look at it.

Mr. Ryan Williams: Do you have a recommendation for specific wording? What section of Bill C-34 would you make recommendations on based on that?

Mr. Subrata Bhattacharjee: I do not presently, but I could certainly send one to the clerk.

Mr. Ryan Williams: That would be great.

Mr. Hersh, the other thing we talked about is the department looking after this. CFIUS is multi-agency. It's not just one. It's not Economic Development. It's across the whole spectrum. This legislation, Bill C-34, and RDI are only for ISED itself.

Do you think there's a recommendation that we need to expand that, just like CFIUS does, or is it okay for it to sit within ISED?

Mr. Chris Hersh: Whether it sits within ISED or other agencies.... First of all, I think a multi-agency approach is probably the right one. Analyzing and assessing the potential national security implications isn't just for ISED. There's the national security apparatus and a whole bunch of other things.

The most important thing I have found, in my experience with ISED, is that they don't have the national security experience. It doesn't reside in ISED, so they are often playing shuttle diplomacy or shuttle communication between the national security group and the investor. At the very least, I would house some of that expertise within ISED. I think having a multi-agency or whole-of-government approach to assessing these things and putting the right people in the right place so we can deal with this efficiently is the most effective way to assess national security risk and develop mitigation strategies, if those are appropriate.

I think a combined approach is the correct one.

Mr. Ryan Williams: On that note, would you have a recommendation on where that kind of wording would live in Bill C-34, as a change?

Mr. Chris Hersh: I'd have to think about that. I don't have the ability to draft a statute off the top of my head, unfortunately. I wish I did.

I don't know whether it's an issue that should be in this legislation or a construction of the agency. Certainly, if you wanted to do that, it could be.... I don't know whether that would be in this legislation or some other legislation, but I don't have a good sense of whether it's actually necessary. If it is necessary, it should probably go towards the front of the legislation, but I couldn't give you any specific guidance on that point.

Mr. Ryan Williams: Thank you.

Mr. Krane, we've talked about a list of certain critical technologies we want to protect in Canada. Certainly, we want to see maximum investment in that. Are there any changes you could recommend for Bill C-34 and the legislation, or anything you think needs to be removed, to maximize that?

Mr. Joshua Krane: Yes.

I think we should consider adding a special advocate provision to proposed section 25.7, which is included in the Immigration and Refugee Protection Act. There is a precedent or model there. If an investment goes into judicial review, we should consider having a similar process included in this statute as well.

I would direct this committee to look at subsection 83(1.2) of the Immigration and Refugee Protection Act as a good precedent for inclusion in proposed section 25.7 of the ICA.

● (1625)

The Vice-Chair (Mr. Rick Perkins): Thank you, MP Williams.

Go ahead, MP Lapointe.

Ms. Viviane Lapointe (Sudbury, Lib.): Thank you, Mr. Chair.

My question is for Mr. Bhattacharjee.

In your opening statement, you talked about the U.S. Inflation Reduction Act and the opportunities it presents for Canada's critical minerals and the mining sector.

In your opinion, how will the updated Investment Canada Act help encourage foreign investment while also mitigating potentially harmful foreign investments in critical minerals?

Mr. Subrata Bhattacharjee: I think that is the million-dollar question. What I was referring to wasn't the IRA, but our agreement with the U.S. on critical minerals. However, I think the principle is the same.

It goes a bit to what my colleague Mr. Hersh talked about in his remarks, which is that we have a system of foreign investment regulation that has a net benefit regime and a national security regime. We have made the decision to subject fewer and fewer investments to review under the economic test within the net benefit regime, while at the same time as expanding, I think, our views of the sorts of things we should be looking at under national security.

However, even under the national security regime, as Mr. Hersh pointed out, it is not a situation where we have a vast number of deals that are going through this process. They are significant matters that have raised issues and have obviously progressed through reviews, but many of them are cleared after a degree of appropriate scrutiny and allowed to proceed.

I think the challenge we have is in trying to have a national security screen that allows us to be a bit more proactive in order to find out what's happening in areas that are emerging so that we're not playing catch-up afterwards, after an investment has been completed. We have a lot more stuff now that we will have to look at in advance. Our hope is that we don't scare off legitimate investors because, for example, we have a mandatory filing policy that may reach out to an extraordinarily large number of sectors.

It's one of the reasons that I wanted to bring the committee back to the U.K.'s attempt to try to put some sort of guidelines around that. Their approach is, in fact, a little wackier than ours. It's not wackier, but it's much broader, because it also technically applies to domestic deals. It's not just a foreign investment review regime.

For them, it was particularly important to have that sort of structure. It's important for us as well, because it will help avoid the chilling effect that I think is implied in your question.

Ms. Viviane Lapointe: Are there other witnesses who want to respond to that question? I can repeat it.

As Canada looks at some pretty incredible opportunities with critical minerals, how can we encourage foreign investment while also mitigating potentially harmful foreign investments in critical minerals?

Seeing no one, my next question is for Mr. Bhattacharjee as well.

The bill proposes interim conditions that would allow the Minister of Innovation, Science and Industry, after consultation with the Minister of Public Safety, to impose interim conditions on investment. Do you support the need for interim conditions, and if you do, why?

Mr. Subrata Bhattacharjee: I think the caution that my colleagues have expressed in their comments is a valid one. It doesn't mean that we shouldn't have the power in there. I think the minister explained some of the circumstances the government is concerned about that would justify exercising that interim power.

If we do choose to proceed with that in the legislation, my recommendation would be that you spell out presumably the limited circumstances within which it would be deployed, to make clear to foreign investors that there is no chilling effect and that there will only be a particular type of investment that may justify the use of that sort of power.

That would be communicated either in guidance or, if not, in the actual text of the legislation itself, although I suspect that one is more likely to find its way into guidance as opposed to something in the legislation.

Ms. Viviane Lapointe: Very quickly, the bill will update penalties to strengthen deterrence. What is your advice about penalties for non-compliance, and how would these be beneficial to ensuring compliance?

Mr. Chris Hersh: I think we're unusual in the current Investment Canada Act. We don't have significant penalties, and the penalties come only if you continue not to comply. I think penalties that are of the correct magnitude are a very important tool for ensuring compliance with a regime like this, and they need to be calibrated.

For example, it's inappropriate I think to heavily punish somebody for failing to file when it clearly was accidental versus potentially deliberate. I believe it may be appropriate to have a bit of a grace period before you start to impose penalties for failing to make a premerger filing.

I think penalties and making sure they are sufficiently large are an important piece of having a robust regime and having some teeth to it to ensure that people behave in the way we want them to.

● (1630)

The Vice-Chair (Mr. Rick Perkins): Thank you.

Go ahead, Monsieur Lemire.

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chair.

Thank you to all of the witnesses, who are extremely knowledgeable.

One of the issues contained in the bill C-34, An Act to amend the Investment Canada Act lies close to my heart. I'll provide some context with the example of a transaction that was very significant for Quebec, namely the acquisition of Rona by Lowe's.

In fact, the minister had set conditions, but in the end, five years later, we realized that there was not much left of the company in Quebec. For example, Garant shovels can't always be found in Rona stores anymore. Before the transaction, the supply chain of Rona's suppliers included a Quebec ecosystem. In addition, the head office was located in Quebec, of course.

I would like each witness to answer my question in turn.

Do you feel that the conditions put forward by the minister, in terms of accountability and transparency, are an improvement? Should we go even further? Of course, we also have to think about national security.

[*English*]

Mr. Joshua Krane: It's an excellent question. We want to be encouraging investments, particularly in Quebec. Quebec has a burgeoning technology centre. It has a technology industry. It has a fantastic aerospace industry. There's a long history of mining in Quebec.

I agree with you, Mr. Lemire, that we want to make sure that changes to the Investment Canada Act continue to encourage investors from around the world to see what a great place Quebec is to make investments and what a fantastic workforce it has, and to see the contributions that the graduates of Quebec's fantastic universities are making to the economy. Again, sir, it's why we've recommended that we make sure that we're protecting Canada from foreign threats and from issues of national security, but also that this government and decision-makers are held to account so they don't unduly dissuade investments to grow jobs, to create businesses and to strengthen Quebec and other parts of Canada and the sectors they're trying to grow.

[*Translation*]

Mr. Sébastien Lemire: Mr. Joneja, would you like to add something?

[*English*]

Mr. Navin Joneja: I agree with Mr. Krane's comments. I would add that for this particular legislation, one thing that stands out is the mandatory pre-closing filing obligation. While I think it's important that the process still focuses on national security elements, one thing that will likely evolve out of it is a greater level of discussion between foreign investors and government officials in a wide range of areas. This is because what happens in practice when the government encourages that early dialogue is that foreign investors, who are very sophisticated and deal with governments all over the world, like to develop the kinds of relationships that encourage that kind of dialogue going forward.

That is one added benefit of the mandatory pre-closing filing obligation. It's also important that it be done properly and with some of the cautions that my colleagues have advised about making sure that we don't have a chilling effect and making sure that there is certainty, predictability and clarity in terms of how that process will unfold.

I think what we'll see, generally speaking, is a greater level of dialogue between foreign investors and government officials generally at the federal level and, quite frankly, at the provincial and community level as well.

● (1635)

[*Translation*]

Mr. Sébastien Lemire: Mr. Hersh, I'd be curious to hear what you think about the issue of transparency and accountability.

[*English*]

Mr. Chris Hersh: I think there are issues in your question that are far broader than the Investment Canada Act. I think it's important for the Investment Canada Act to be calibrated, including the national security provision, in such a way that it doesn't deter good foreign investment that's in line with Canadian national security interests.

I think some of your question is on the fate of Canadian manufacturing in some sectors, and that's about creating Canadian champions. For example, I know that the Quebec government is very involved in a strategic initiative to create a lithium value chain in the province. I think making sure we have domestic investment, whether that be with Canadian-based companies or government-supported investment where appropriate, is a key piece of that much larger discussion about how to keep Canadian industry and Canadian jobs strong and maintain control over certain assets.

That's far beyond the Investment Canada Act. I think the Investment Canada Act's role is through the net benefit process to make sure that from a practical perspective and commercial perspective, foreign investments are in line with those goals to make sure we have a national security process that is not an impediment to good investment. I also think there are many broader issues at play to fully address the type of question you've asked or the types of concerns you've flagged in your question.

[*Translation*]

Mr. Sébastien Lemire: Thank you.

You are very good at expressing yourself in layman's terms.

Mr. Bhattancharjee, I'll ask my question during the next round because my time is up.

[*English*]

The Vice-Chair (Mr. Rick Perkins): Thank you, Monsieur Lemire.

MP Green, you're next.

Mr. Matthew Green (Hamilton Centre, NDP): Thank you.

Thank you very much, gentlemen. I'm going to put a series of questions to you in a rather rapid-fire way. I'd ask that you answer the first round of questioning in a yes-or-no fashion so that I get a better sense of who I'm hearing from today. I'm a guest at this committee, and I'm just trying to familiarize myself with this.

I'll go down the list and start with Mr. Bhattacharjee.

Have you represented foreign companies acquiring Canadian corporations?

Mr. Subrata Bhattacharjee: Yes.

Mr. Matthew Green: Mr. Hersh.

Mr. Chris Hersh: Yes.

Mr. Matthew Green: Mr. Joneja.

Mr. Navin Joneja: Yes.

Mr. Matthew Green: Mr. Krane.

Mr. Joshua Krane: Yes.

Mr. Matthew Green: What was the size and scope? You don't have to name the company, but just in terms of the size of the acquisition, what kind of value did that represent?

Mr. Bhattacharjee, what was the largest one?

Mr. Subrata Bhattacharjee: I think after 25 years it's hard to give you a fast answer to that. There have been very large public deals that I have been involved in and also smaller ones that have just—

Mr. Matthew Green: Just give me a scope of what's a big deal.

Mr. Subrata Bhattacharjee: They range from $50 billion to smaller.

Mr. Matthew Green: Mr. Hersh, go ahead on the same question.

Mr. Chris Hersh: It's the same as Mr. Bhattacharjee.

Mr. Matthew Green: Mr. Joneja.

Mr. Navin Joneja: Yes, it's a wide range.

Mr. Matthew Green: Mr. Krane.

Mr. Joshua Krane: It's the same with me, yes.

Mr. Matthew Green: Okay. These are all big fish.

Have you represented foreign state-owned companies acquiring Canadian corporations? If so, from which country?

Go ahead, Mr. Bhattacharjee.

Mr. Subrata Bhattacharjee: I have. I advised the Abu Dhabi Energy Corporation in I think the mid-2000s.

Mr. Matthew Green: Mr. Hersh.

Mr. Chris Hersh: I have. Due to client confidentiality, that's all I can get into right now.

Mr. Matthew Green: You can't tell me the country.

Mr. Chris Hersh: It's a range of countries—Asia, China, the Middle East.

Mr. Matthew Green: Mr. Joneja.

Mr. Navin Joneja: Yes. It's the same for me as well.

Mr. Matthew Green: Which countries are they specifically, sir?

Mr. Navin Joneja: The Middle East—

Mr. Matthew Green: Which countries in the Middle East?

Mr. Navin Joneja: One was Kuwait, in the Middle East.

Mr. Matthew Green: Were there any other ones?

Mr. Navin Joneja: I don't recall any other state-owned foreign government ones.

Mr. Matthew Green: You don't recall.

Mr. Navin Joneja: No.

Mr. Matthew Green: Mr. Krane.

Mr. Joshua Krane: The major transactions that I've worked on are available in my bio on my website, Mr. Green. You're welcome to—

Mr. Matthew Green: I'm asking you right now in committee, sir, for the purpose of your testimony, thanks. I don't feel like googling.

Mr. Joshua Krane: Sure. That's no problem.

I've acted for state-owned companies from Asia, from Europe and from the Middle East as well.

Mr. Matthew Green: Specifically which countries.

Mr. Joshua Krane: They're from China, from Korea, from Norway—many countries.

Mr. Matthew Green: Okay.

Have you represented foreign technology or biopharmaceutical companies acquiring Canadian companies that did not trigger an Investment Canada Act review?

Go ahead, Mr. Bhattacharjee.

● (1640)

Mr. Subrata Bhattacharjee: I'm sorry. Could you repeat the question, please?

Mr. Matthew Green: Have you represented foreign technology or biopharmaceutical companies acquiring Canadian companies that did not trigger an Investment Canada Act review?

Mr. Subrata Bhattacharjee: I've advised foreign technology companies on transactions that were not subject to the Investment Canada Act and some that were.

Mr. Matthew Green: How many were not?

Mr. Subrata Bhattacharjee: I cannot say right now. I don't know.

Mr. Matthew Green: Mr. Hersh.

Mr. Chris Hersh: I have the same response as Mr. Bhattacharjee.

Mr. Matthew Green: You have but you can't recall.

Mr. Chris Hersh: Yes. Basically, I don't keep count.

Mr. Matthew Green: Mr. Joneja.

Mr. Navin Joneja: Yes. It's the same.

Mr. Matthew Green: I see that you all have the same counsel.

Mr. Krane.

Mr. Joshua Krane: I've worked on dozens of transactions, Mr. Green. I can't remember them all offhand.

Mr. Matthew Green: Okay.

We're trying to get a sense of this. You've all stated that you're here as individuals, but obviously you're representing clients. Obviously there are client interests in the framework of the act, for which we're trying to find adequate amendments. I'm just trying to get a sense, as I embark on this, of who you are speaking for in terms of your experience.

Did any of the companies that were acquired receive government funding for research and development or license Canadian universities' intellectual property?

Go ahead, Mr. Bhattacharjee.

Mr. Subrata Bhattacharjee: The first thing I'll say is I'm not here on behalf of any client interests, Mr. Green—

Mr. Matthew Green: No, I understand that. I'm—

Mr. Subrata Bhattacharjee: The answer to your second question is that I don't know.

Mr. Matthew Green: You don't know.

Mr. Hersh.

Mr. Chris Hersh: I have no idea.

Mr. Matthew Green: Mr. Joneja.

Mr. Navin Joneja: I also don't recall, and want to emphasize that I am here as an individual—

Mr. Matthew Green: Mr. Krane.

Mr. Joshua Krane: I don't remember, Mr. Green. I work on a lot of transactions, so it's conceivable that some of the businesses whose clients I've acted for have received some government funding.

Mr. Matthew Green: Okay.

In looking at some of the points that have been raised today, there is the issue, obviously, of finding out, when takeovers happen, what's going to trigger a review and what's not going to trigger a review.

I'll reference that from 2006 to 2022, IBM purchased 17 Canadian companies. Google then bought 13. None of these takeovers of Canadian tech companies were reviewed by the Investment Canada Act. All of them were innovative start-ups with significant intellectual property that was developed here in Canada.

Mr. Bhattacharjee, how would you respond to that as a potential concern related to this bill?

Mr. Subrata Bhattacharjee: I'm not familiar with the pattern of transactions you've identified, but I will tell you that, initially, we only had one test in the Investment Canada Act, which was a net benefit test that ran, at that time, on the basis of asset-based thresholds. You only had a review process that would kick in if you had a deal that exceeded asset thresholds.

Mr. Matthew Green: Do you believe this legislation strengthens that or weakens it?

Mr. Subrata Bhattacharjee: I'm going to finish my answer first. What we did was then put in the national security test to try to allow ourselves a chance to do transactions that were not dealt with under those asset thresholds. That's why we are where we are right now.

I'm sorry. You had a follow-up question, Mr. Green.

Mr. Matthew Green: I think my time is up. Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Green.

Mr. Généreux, you're next.

[*Translation*]

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Thank you to the witnesses.

My colleague asked you questions as if you were in the dock, but don't worry, nobody is in danger here.

Mr. Hersh, you said earlier that the United States used the expression "*TID*".

What is the definition of "*TID*"?

[*English*]

Mr. Chris Hersh: In the U.S., the definition in the regulations is a U.S. TID business, with TID being short for sensitive technology, infrastructure and data. That is defined under the regulations that are applied through the CFIUS process.

[*Translation*]

Mr. Bernard Généreux: Can this be seen as a way of defining the economic sectors in which a foreign investment should potentially be reviewed?

What is Canada's answer to that? Your colleague was saying earlier that our business sectors were not properly defined.

Are the *TID* sectors in the United States better defined than in Canada?

● (1645)

[*English*]

Mr. Chris Hersh: Yes.

I think there are two things. One, it is in a regulation. All we have are guidelines on the application of the national security review provisions. The guidelines are non-binding. They are very high-level, so I think we should, if we are going to provide much-needed clarity and transparency, adopt something similar to what's been done either in the U.S. or, perhaps, in the U.K.

[*Translation*]

Mr. Bernard Généreux: Mr. Bhattacharjee, your presentation earlier was excellent.

In today's society, the development of new technologies is extremely rapid. This is particularly the case for artificial intelligence, which is turning the technological world upside down.

How do we define, within such a bill, even if it is in the appendix, a technological sector that is emerging, but that is playing a fundamental role in our society, so that, in 5, 10 or 20 years, we have a relevant definition to review acquisitions or transactions?

Would you suggest that, in a bill like this, we insert the ability to review this definition on a regular basis, annually or tri-annually, whatever, so that we can adjust to how these technologies evolve?

[*English*]

Mr. Subrata Bhattacharjee: I think it is absolutely the case that we want the ability to revise that list frequently. I think the only counter-argument to it is that if you revise it too frequently, it reduces certainty for investors. I'm sure it's one reason that, for the CFIUS process and the U.K. process, they review on a multi-year basis, as opposed to every year. I agree that there is a balance.

The other part of this is that our process under the Investment Canada Act is only one way for the federal government to be aware of emerging trends and things of concern, so we also have the benefit of that part of it to help tell us that these sectors are emerging and that we may need to protect or watch for developments in them, including in foreign investment.

[*Translation*]

Mr. Bernard Généreux: Is there anything else the other witnesses would like to add? In light of Mr. Bhattacharjee's response, doing so each year...

[*English*]

Mr. Navin Joneja: I would like to add one point.

Mr. Bernard Généreux: Go ahead.

Mr. Navin Joneja: I think there's an opportunity for a feedback loop in how the list is updated and how often it's updated. I think the idea of having greater transparency through supplements to the annual report regarding how many of the sectors that have been identified are actually leading to extended reviews or national security concerns, and having that disclosed in at least an aggregated way, provides further information that can help to keep the list updated.

[*Translation*]

Mr. Bernard Généreux: You've probably read a bit about our previous meetings. Mr. Balsillie, formerly of BlackBerry, appeared here and told us very clearly that we are way behind new technologies, particularly because of the way the law is written today.

Do you agree with Mr. Balsillie?

[*English*]

Mr. Navin Joneja: I think there is always a challenge in government and in oversight in keeping up with the pace of technology. I think that is a fair statement and a fair issue that has to be confronted. I think that at an overall level there is the ability to try to keep the list updated.

I agree with Mr. Bhattacharjee that if you do it too often it reduces certainty, but that's where the additional transparency, the additional disclosure and the feedback loop in terms of that information can be helpful as well.

[*Translation*]

Mr. Bernard Généreux: I'd like to hear from you on artificial intelligence in particular, because I'm very interested in this topic right now. It's evolving extremely rapidly and is going to be an extremely important part of our society tomorrow.

The technologies that are being developed and emerging in Canada will potentially be coveted around the world. Are you concerned that foreign companies will want to acquire intellectual property rights to these technologies or to Canadian companies that own them? Do you see this as a danger? If so, will the current bill be strong enough to prevent these companies from being bought by competing countries?

● (1650)

[*English*]

Mr. Navin Joneja: If I understand the question, I think the bill is an important step forward. I think it tries to do a good job of balancing the concerns about advanced technology with the need to continue the investments so we have the ability to develop technology in Canada and then protect it. I think the bill does try to do a good job. I think the implementation of it in the details is going to be important as well.

[*Translation*]

Mr. Bernard Généreux: Mr. Hersh, you have the floor.

[*English*]

Mr. Chris Hersh: I think Canada is a bit behind. I don't think we're so far behind that we can't catch up. I think the issue, from a national security perspective, isn't so much the impact of AI on the Canadian economy or individual Canadians, but is rather about making sure that investment in AI is done by people who are compatible from a national security perspective. That's the limited role I see for the Investment Canada Act. There are much broader issues with AI that I think are outside the ambit of the Investment Canada Act.

The Vice-Chair (Mr. Rick Perkins): Thank you. We've gone a little long.

MP Van Bynen, go ahead.

Mr. Tony Van Bynen (Newmarket—Aurora, Lib.): Thank you, Mr. Chair.

I was interested in the comments made by Mr. Bhattacharjee with respect to the U.K.'s approach to sensitive sectors.

I think you referenced that there were 17 sectors identified that also had a regulation and a guideline. Wouldn't getting more of this defined constrain the reviewing authority? How would we overcome that?

Mr. Subrata Bhattacharjee: That's a very good question.

When we refer to the situation we have now, we have to cut ourselves a bit of slack. I think the reason the government wanted those technologies and areas to be taken broadly was that we had to look at all of the potential relevance of that to determine whether there was a national security issue.

The problem is that once you put in a system that requires investors to do something in advance, with the risk of sanctions if they fail to comply, you have to spell it out a bit more clearly so that they know what they're responding to, where they might have an issue and where they might need to engage the government. Although I take the point that spelling it out in detail may exclude things, I think, on balance, if you're mandating people to come in before and engage with the government, you have to have that clarity so they know what to do.

Mr. Tony Van Bynen: I believe it was Mr. Hersh who referenced concerns about the skill sets that were in the innovation group.

Mr. Chris Hersh: I'm not suggesting that the folks employed by or who staff the IRD are not very qualified. What I think is that they have a particular skill set. To make the IRD more effective, if the IRD is going to have a bigger role in assessing national security issues, you have to ensure that additional capacity and capabilities are brought to the IRD.

I believe the question was whether it should be multi-agency or IRD. I think the key is that there should be a group of people who can assess this who are housed under the same organization or working in tandem, perhaps, more so than they are today.

Mr. Tony Van Bynen: Should the minister be required to consult with other stakeholders such as the Canadian Security Intelligence Service, the Royal Canadian Mounted Police or the Communications Security Establishment in the national review of process?

Mr. Chris Hersh: The minister is already required to consult with the national security apparatus in assessing whether a transaction could raise issues. The issue is that right now—and this is the perception, because I'm not an insider—sometimes there is a bit of a disjoint or disconnection between the two and that perhaps the process, because of that, is not as efficient as it could be. Again, that is an outsider's view based on perception as opposed to how the system works in reality.

Mr. Tony Van Bynen: The skill set of the agency should be there.

I would like to come back to the U.K.'s model one more time.

You indicated that it also reflected acquisitions internally. What were the criteria for that? To what extent would that benefit Canada? Should that fit inside this legislation?

● (1655)

Mr. Subrata Bhattacharjee: Thank you for letting me correct my view that the process was wacky. It is not wacky. It is a choice that the U.K. legislature has made because they believe, I believe, that national security issues can arise in the review of domestic transactions.

I'm not really aware of the other circumstances for why they have done that, but it is a very different approach than what we've chosen to do here in Canada.

Mr. Tony Van Bynen: Would there be concerns about industry concentration and those types of things that could be created internally?

Mr. Subrata Bhattacharjee: I can't comment further on the thinking of the U.K. government on that.

Mr. Tony Van Bynen: Okay.

Have any other countries amended their foreign investment regulations in recent years? What could we learn from them, in addition to what you've highlighted? Is there anything you'd like to add to your comments?

Mr. Subrata Bhattacharjee: If I can follow up on that, one jurisdiction that I think gets a lot of attention in Canada for regulatory policy is Australia. Like Canada, Australia was fairly early in the game in examining inbound investment from an economic screen and then later from more of a national interest or national security screen. I'm sure the experience of our Australian colleagues under their FIRB regime no doubt was taken into account by folks both proposing the bill and probably within industry.

Mr. Tony Van Bynen: I have one more question for all members here.

Would the amendments in Bill C-34 adequately protect us regarding intangible assets such as intellectual property as well as from foreign investments that could be injurious to national security? If not, what recommendations would you make to compensate for that?

The Vice-Chair (Mr. Rick Perkins): Does anyone want to answer? It's your choice.

Mr. Tony Van Bynen: I'll ask Mr. Bhattacharjee.

Mr. Subrata Bhattacharjee: I think it's a step.

If you take a look at how we approached this pre-2009, that stuff was clearly not covered by the review requirements. We have added a test that is designed to allow more flexibility in the type of investments that the government is allowed to scrutinize.

At the moment, I think it is still the case, as I read the bill, that it requires certain threshold structures to be in existence before the review requirement can kick in. It may be the case that certain types of intangibles are not caught by the bill, but I don't know. I haven't thought about that carefully. However, I would also urge the committee, again, not to think that the Investment Canada Act is the only way we can look at or address those concerns. We have other federal mechanisms in various areas that allow for some degree of scrutiny.

I don't think we have to pack it all into the Investment Canada Act. Even if it isn't there, we may have other ways to deploy this to protect those interests.

The Vice-Chair (Mr. Rick Perkins): Thank you. We've gone a little over the time.

Go ahead, Mr. Lemire.

[*Translation*]

Mr. Sébastien Lemire: Thank you, Mr. Chair.

Thank you for asserting your authority, that's important for the committee.

Joking aside, I have a question for Mr. Bhattacharjee. I would like to go back to transparency and accountability, which ministers are asking for in transactions, as part of the Investment Canada Act.

With respect to national security and net benefits, should this bill go a bit further?

[*English*]

Mr. Subrata Bhattacharjee: First of all, I'm going to focus my comments on national security, not on net benefit, because the amendments that we're really talking about here are focused on the national security test.

I think you raise a very good question. Actually, the question, for example, with respect to Quebec's own significant involvement in the EV chain and critical minerals means that Quebeckers have an interest, as they should, in ensuring that foreign investment rules apply so as not to scare away legitimate investment and to protect the position of the Quebec entities that are involved.

I know this is funny. You have four lawyers here talking about technical stuff in the act, and almost all of us are talking about very procedural sorts of things. However, it is exactly the procedural issues we have raised that will help provide a bit more transparency, certainty and stability, and will allow, at the same time, the government to step in where it believes it is necessary.

I chose to talk about sectors. The sectors are important because we need to know what the government will get an advanced look at. My colleagues have talked about other changes that may increase transparency and a judicial review function. All of those things combined mean that you have a better balance between encouraging investment and, if you get the procedure right, making sure people feel that if the national security process is being deployed, it's done in a way that's appropriate and doesn't scare away legitimate inbound investment.

● (1700)

[*Translation*]

Mr. Sébastien Lemire: Thank you very much, Mr. Bhattacharjee.

I'll stop here, Mr. Chair, and wait for the third round of questions.

[*English*]

The Vice-Chair (Mr. Rick Perkins): Okay.

Mr. Green, you're next.

Mr. Matthew Green: Thank you very much.

Mr. Joneja, in your opinion, based on your understanding of this bill, if a Canadian company is taken over by a foreign investor and is approved by ISED, and if that foreign company is then taken over by a state-owned company, would the new reforms in the bill allow the minister to force divestment or any further undertakings afterwards?

Mr. Navin Joneja: They would. They would allow the minister to review that investment and, if the process unfolded that way, to conduct a national security review. The specific enforcement measures that the act allows for could then be deployed.

Mr. Matthew Green: In your opinion, is this robust enough to protect against any potential takeovers from a foreign state actor?

Mr. Navin Joneja: It is a positive step forward in terms of strengthening the national security review process as it relates to a variety of types of investments, including the example you mentioned.

Mr. Matthew Green: Mr. Krane, in your opinion, if a takeover is proposed for a Canadian company that has received government funding to develop technology, would these reforms allow the minister to claw back that intellectual property?

Mr. Joshua Krane: Quite possibly, Mr. Green. That is one of the conditions the minister might be able to impose on a foreign buyer. We've recently seen that universities are also being much more prudent about the contracting practices they're engaging in, as has the government.

There are opportunities in those contracts to put in change of control provisions that would allow the government or a university to exercise its rights over intellectual property prior to a takeover transaction. There are also other commercial ways that Canada and our universities can protect our intellectual property in the event of a foreign takeover.

Mr. Matthew Green: I'm sorry. Just so that I'm clear, am I to understand that it should be in the contract, or would the minister have the ability to claw it back?

Mr. Joshua Krane: I'm saying both options are available, Mr. Green. The minister has that prerogative under the new statute, but universities and the Government of Canada could also ensure that in their funding contracts, they have the commercial rights available to them to make sure they own the IP that has been jointly developed, or to ensure they receive the payout of funding, either prior to closing or before closing.

Actually, I want to address one more point you raised earlier—because I think we left it hanging—on the acquisition of small tech companies. There are other government bodies that review those transactions or could review those transactions. The Competition Bureau does have jurisdiction to review takeovers of small businesses, and there is a consultation process under way to look at changes to the Competition Act that may address some of the concerns you raised in your questions. If this committee convenes a session on Competition Act reform, those are some of the topics you may wish to raise there.

Mr. Matthew Green: Thank you.

The Vice-Chair (Mr. Rick Perkins): Thank you, Mr. Green.

Mr. Vis, you're next.

Mr. Brad Vis (Mission—Matsqui—Fraser Canyon, CPC): Thank you, Mr. Chair.

Mr. Bhattacharjee, a recent Borden Ladner Gervais article that you co-authored, “Investment Canada Act aims to protect national security: How to enhance foreign M&A success”, states, “Mergers and acquisitions are now much more likely to be blocked by the Canadian government if they seem to impinge on Canada’s ‘national integrity’ and may be blocked simply because of the potential buyer’s country of origin.” Further down it notes that with the proposed legislation, Canada “will also likely target big data, artificial intelligence, significant intellectual property and other strategic industries.”

Can you provide some examples of cases where the country of origin might be the deciding factor?

Mr. Subrata Bhattacharjee: The guidance on this has already come from the federal government, so we already have a policy that basically restricts, if not prohibits, inbound investment from Russian entities, at least under the Investment Canada Act rules.

There are a bunch of other sanction regimes that also govern that, but Russia is an immediate example. That's just one example that comes to mind.

● (1705)

Mr. Brad Vis: The same article says, “investors, company management teams and boards are finding it difficult to properly assess the risks of a deal and are subsequently being subjected to government rejections with little, if any, explanation.”

First, do you think there needs to be greater transparency when deals are rejected? Second, how does Canada's approach to providing explanations compare to those of other jurisdictions?

Mr. Subrata Bhattacharjee: I will answer your questions in reverse order.

Although we have had this process since 2009, I would say that, in comparison to the U.S., for example, at least in my experience—and my colleagues may feel differently—our process is probably a bit more black box in terms of communicating concerns. That is reflective of how we have set up the process and how we have set up the consultation with Public Safety Canada.

That may just be a decision we have made. I think that in some areas we are probably not as detailed, but in others.... We talked about the U.K. as an example. I am led to understand that when you apply under this process in the U.K., you can just do it through an anonymous box.

I just think that each jurisdiction seems to have its own approach. In some aspects of dealing with a review, we are more black box than others.

Mr. Brad Vis: Okay, thank you.

How much time do I have left, Mr. Chair?

The Vice-Chair (Mr. Rick Perkins): You have two and a half minutes.

Mr. Brad Vis: Okay.

This question is open to anyone.

In June 2020, in his testimony before this committee—he also recently appeared—Charles Burton from the Macdonald-Laurier Institute stated that some enterprises controlled or owned by a foreign state “use multiple firms with multiple investments to get under the wire of our thresholds, but they actually violate what I would regard as the intention of our act.”

Do the amendments to the Investment Canada Act address the concerns raised at that meeting, yes or no? Why or why not?

How would the enactment of Bill C-34 affect prospective acquisitions of Canadian businesses by foreign state-owned or state-controlled enterprises?

The Vice-Chair (Mr. Rick Perkins): Whoever wants to go first may do so.

Mr. Joshua Krane: I'm happy to take a cut at that.

Prior to this bill, a filing was mandatory if there was an acquisition of control. When you're dealing with a target corporation, that threshold can be as low as 33.3%, so you don't actually need to own a majority of the voting shares of an entity to trigger a filing requirement. Even in the case of acquisitions below 33.3%, the government has the ability to call in an investment on national security grounds. In fact, there was a change in the law last year that allows the government to do that for up to a five-year period, unless the investor goes in and files a voluntary form and seeks pre-clearance of that investment.

Really, the problem that Mr. Burton identified was largely fixed in the last round of amendments to the ICA. This particular proposed bill creates a second layer of notification requirements: When you have a minority transaction but it's in a prescribed sector, there will be a mandatory filing. My colleagues have spoken to you about that at length, so I'm not going to reiterate what they have to say.

However, I'll just go back to the point I made earlier. There was no using disparate pieces before. As soon as you had an acquisition of control, you had a mandatory filing. Now we have a voluntary process that allows minority acquisitions to be notified early so that other investments get caught.

Mr. Brad Vis: Thank you, Mr. Chair.

The Vice-Chair (Mr. Rick Perkins): Go ahead, Mr. Gaheer.

Mr. Iqwinder Gaheer (Mississauga—Malton, Lib.): Thank you, Mr. Chair.

Thank you to all of the witnesses for making time for the committee and for your testimony.

My first question is a bit of a precursor question and it has two parts. First, what can Canadian companies and non-Canadian investors do to ensure that the investment screening process is as efficient as possible?

I'll ask that one first, and then I'll go to the second part. It's open to anyone.

● (1710)

Mr. Subrata Bhattacharjee: I'll start.

One of the things the government requires in this process is the provision of information up front in terms of what's required to start the process. However, more importantly, if a transaction is subject to a review, as that continues there is often a back-and-forth between the investor and ISED, for example, where questions are asked and answers have to be given. The amendments sort of formalize that process a bit.

Even if we aren't looking at what's in the bill, most foreign investors who are trying to do this efficiently are those who can answer those questions fully, completely and quickly. They tend to, I think, have a much more productive process in a review than others who don't do it that way.

Mr. Iqwinder Gaheer: In line with that, with the investment screening process and doing it as efficiently as possible, has the federal government provided sufficient guidance in this regard? Is there additional information the federal government could provide in order to improve this new process?

Mr. Chris Hersh: I think the government has improved its guidance historically, but I still think there is probably room for further improvement. It's difficult to come up with guidance, but I think if you look at jurisdictions like the U.K., Australia and the U.S, my view is that they have far more and more detailed guidance than has historically been the case with regard to the Investment Canada Act.

Mr. Iqwinder Gaheer: I think that has been brought up a couple of times, with witnesses pointing to other countries. Can any of the witnesses come up with any specific points on what guidance we're not providing that other countries provide? Are there any examples of that?

Mr. Subrata Bhattacharjee: Certainly the identification of the sectors.... My initial remarks were really directed at that, so if you're interested, you might want to take a look at it.

Mr. Chris Hersh: Here is a 33-page national security guidance document from the Australian regulator. It's very detailed guidance—

The Vice-Chair (Mr. Rick Perkins): Perhaps you can table that with the committee, and we can have it for the record.

Mr. Iqwinder Gaheer: Thank you.

We know that Bill C-34 will also allow the Minister of Innovation, Science and Industry to disclose specific information regarding national security reviews to foreign states.

What are your views on this approach? Do you think it will adequately facilitate collaboration and information sharing between countries to combat national security threats? Would you amend this part of the bill in any way?

Mr. Subrata Bhattacharjee: I'll start.

I think the reality is that for those of us who have been involved in these reviews for some time, there is a degree of international communication that already goes on in the review, at least on the national security side. A lot of that is particularly acute when it's an investment that engages the interest of the Five Eyes. What I think the amendments really try to do is formalize that process.

To some degree—to address a question I heard earlier today about what happens if you get an investor who's trying to do different things in different jurisdictions—this sort of information exchange protocol will allow us to communicate to try to manage some of those situations in a more effective way than is currently the case.

Mr. Iqwinder Gaheer: Mr. Chair, how much time do I have?

● (1715)

The Vice-Chair (Mr. Rick Perkins): You have one minute.

Mr. Iqwinder Gaheer: Thank you.

We know the minister has said that with Canadian businesses and how we attract investment in this country, it's stability and predictability in the rule of law that are very important for investors to know what's going on in the country. In your view, how will the proposed legislation impact the competitiveness of Canadian businesses and, in particular, businesses that are looking to secure additional investors?

Mr. Joshua Krane: As I've said, I think the rule of law is very important. My comments have really focused on the rule of law.

One of the downsides of the proposed bill is that it allows for secret proceedings to occur in Federal Court regarding national security issues, and investors don't really have an opportunity to test the sufficiency or the reliability of the government evidence. I don't propose that we give national security information to investors directly, but I do believe we have other tools available that we already use to make sure that investors are given due process, that investors believe Canada is a fair place to do business and that, if decisions are made on the basis of national security, they have an ability to understand why.

Mr. Iqwinder Gaheer: Thank you.

The Vice-Chair (Mr. Rick Perkins): That concludes the formal rounds.

I will do a sort of a “Joël Lightbound” in case anyone else wants to ask a few questions before we let the witnesses go.

I want to thank the witnesses for their fine testimony on this important bill.

Monsieur Lemire, do you have anything?

[*Translation*]

Mr. Sébastien Lemire: I still have some questions.

However, if I'm the only one, I'll respect your wishes, Mr. Chair. I won't insist.

The Vice-Chair (Mr. Rick Perkins): Thank you very much.

[*English*]

That being it, thank you very much—

Mr. Matthew Green: You're not the only one.

The Vice-Chair (Mr. Rick Perkins): —for your testimony.

Mr. Green, did you have something?

Mr. Matthew Green: I did have one quick question.

The Vice-Chair (Mr. Rick Perkins): Go ahead.

Mr. Matthew Green: I would concede to my friend from the Bloc if he wanted to put his question first.

The Vice-Chair (Mr. Rick Perkins): Go ahead, Mr. Green.

Mr. Matthew Green: Thank you.

This question is for Mr. Krane.

National security concerns can be very difficult to fully identify. Certain technologies in the consumer space, and the companies that develop them, are focused on consumer purposes. These same technologies, such as AI and facial recognition, can be redeployed in defence systems or even cyber-weapons development.

How would you address the potential dual use of technologies? For example, ISED established an expert panel. What would be some of your inputs?

Mr. Joshua Krane: It's an excellent question, Mr. Green, and I thank you for raising it.

It's one of the biggest challenges that advisers have for investors. Investors may believe they are buying a business or investing in a technology for perfectly benign use. However, that technology, as you know, could have military or other applications. That's where the gap often lies in these situations.

My advice to the government is that trying to resolve that gap early is going to be helpful for both sides. Either the investor knows they're not going to do this because there is a risk that this technology could fall into hands they don't want it in, or there's an opportunity for the government to understand the investor's position and possibly put some parameters around where this technology is going. Are there aspects of the technology that could be licensed or sold that are not problematic? Are there ways that investors could shift investment into Canada so that we become a leader in that technology?

I agree with you, Mr. Green. That is the problem.

Finding ways to bridge the gap between the investment community and the government is the fundamental way we can increase investment in that space and can avoid the embarrassment of having to tell investors, "I'm sorry, but you can't invest in Canada."

The Vice-Chair (Mr. Rick Perkins): Thank you.

I think Monsieur Lemire has one.

[*Translation*]

Mr. Sébastien Lemire: Thank you, Mr. Chair.

I'll intervene because I just reread the question and find it interesting.

Mr. Hersh, you know Abitibi-Témiscamingue, which is a mining region. You have taken an interest in it. Last week, Osisko Mining sold half of its Lac Windfall project in Lebel-sur-Quévillon in northern Quebec to the South African mining company Gold Fields for $600 million. As a result, two companies will own 50% of the joint venture.

We're seeing more and more joint ventures in the mining business, especially in gold. Do you think that this type of partnership, once established, could raise national security issues if a foreign mining partner decides to sign an agreement with an authoritarian country, like Russia or China? This country was an ally not so long ago and is becoming a bit more of a risk.

What would happen under these circumstances? Could something be triggered? Can it be rolled back? How would the Investment Canada Act apply? Can we defend against that?

[*English*]

Mr. Chris Hersh: It depends on the interest that the non-Canadian has. Again, the goal is not a critical mineral.

I believe the acquisition of a controlling non-Canadian stake in a Canadian mining operation, in many cases, would be or could be subject to the Investment Canada Act, whether that be the general provisions or the national security provisions. Especially with regard to something like the lithium industry, these provisions assist in that regard by making sure that a joint venture with a trading partner who's viewed as safe from a national security perspective is potentially prohibited from being taken over—that interest being taken over—by somebody we believe raises national security concerns. I think in many cases that would be subject to the Investment Canada Act, under either the new provisions or the existing provisions.

● (1720)

[*Translation*]

Mr. Sébastien Lemire: Thank you, Mr. Hersh.

Thank you, Mr. Chair.

[*English*]

The Vice-Chair (Mr. Rick Perkins): Thank you.

Go ahead, Mr. Van Bynen.

Mr. Tony Van Bynen: Mr. Chair, thank you for allowing one additional question.

I have a question for all three of you, but I'll start with Mr. Hersh.

A big part of the consideration in evaluation is including intangibles. Is there a discipline that you can use to validate the intangibles in order to determine that they fairly reflect the value being exchanged? Is there a discipline that's accepted in the industry?

Mr. Chris Hersh: That's a challenging question.

In many cases, it's actually an accountancy question. Different companies book intangibles differently. Sometimes they're booked as an asset. Sometimes they're booked as an asset at a fairly low value. Then there's also the notion of fair market value. If you were asking me which is the correct approach that might better capture intangibles, it's probably a fair market value approach. That's versus, potentially, a book value approach if we want to set thresholds.

Mr. Tony Van Bynen: How is that fair market value determined?

Mr. Chris Hersh: Again, that's an accountancy question. Generally speaking, it is often for the purpose of the sale, or it's the transaction value, which will in some cases be a more realistic assessment of fair market value than, perhaps, a low book value. In many cases, companies have to prepare reports or do a detailed accounting prior to engaging in a sale, or the purchaser may do a fair market value assessment of the intangible assets.

Mr. Tony Van Bynen: Is that a discipline you'd like to see at ISED as well?

Mr. Chris Hersh: Again, this is different from the national security provisions, which would apply to sectors regardless of the value.

This is more of what might trigger a net benefit review in terms of that, but I think in many cases, for the enterprise value test that's used under the net benefit test, the thresholds capture the fair market value versus the book value of the assets. In fact, that's why the enterprise value thresholds were introduced. What's interesting is that the thresholds applicable to state-owned investors are asset-based, as opposed to enterprise value-based.

Mr. Tony Van Bynen: Thank you.

Are there any comments from the other members?

The Vice-Chair (Mr. Rick Perkins): Would any of the witnesses like to comment on those questions, the online witnesses in particular?

No, apparently not.

Thank you, witnesses. I appreciate your testimony before the committee. I'm sure I speak for all the members. Thank you for coming in.

If you'll bear with us, we're going to switch over to an in camera session for a few moments. It will take us a few moments to do some committee business.

Thank you again.

[*Proceedings continue in camera*]