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Chair

Mr. Lee Richardson

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● (0855)

[*English*]

The Chair (Mr. Lee Richardson (Calgary Centre, CPC)): Good morning. This is the 47th meeting of the Standing Committee on International Trade. This morning we're going to have a discussion on the AbitibiBowater settlement.

To help us through that, we have witnesses from the Department of Foreign Affairs and International Trade. We welcome Don Stephenson, who has been with us many times. He is the assistant deputy minister of trade policy and negotiations. With Mr. Stephenson is John O'Neill, director of investment trade policy with the Department of Foreign Affairs and International Trade.

I will ask Mr. Stephenson to begin with a brief opening statement, after which members will be invited to ask questions of witnesses.

Mr. Don Stephenson (Assistant Deputy Minister, Trade Policy and Negotiations, Department of Foreign Affairs and International Trade): Thank you, Mr. Chairman.

Good morning. Thank you for the opportunity to address the committee.

As the assistant deputy minister for trade policy and negotiations, I'm responsible for managing the negotiation of Canada's international trade agreements, and their management and operation, including the management of disputes under the agreements.

My colleague John O'Neill is responsible for the management of negotiations and litigation under Canada's investment treaties.

The subject of the committee's discussions today is an investor-state dispute, pursuant to the provisions of chapter 11 of the North American Free Trade Agreement, arising from an action taken by the Government of Newfoundland and Labrador.

On December 16, 2008, the Newfoundland legislature passed legislation to expropriate certain of AbitibiBowater's assets in the province. Those assets included AbitibiBowater's Grand Falls-Windsor newsprint plant, the Exploits River hydroelectric facility, and the Star Lake hydroelectric facility, as well as certain related water and timber rights.

As stated by Danny Williams, the then premier of Newfoundland and Labrador, the province chose to take these measures as a result of the announcement of AbitibiBowater's decision to close the Grand Falls-Windsor newsprint plant in March 2009.

After Newfoundland passed the act, the company and the Government of Newfoundland and Labrador had extensive discussions regarding the question of appropriate compensation for these assets, but they were unable to reach a mutually agreeable settlement.

It is clear in the act and in their public statements that the Government of Newfoundland and Labrador understood that it was not a question of whether compensation was due to AbitibiBowater as a result of this expropriation, but rather a question of how much compensation the company should receive.

The public record shows that one of the principal points preventing an agreement between the company and Newfoundland was the valuation of assets in light of the potential environmental remediation costs that might arise in the context of properties owned or operated by AbitibiBowater over the last 100 years in Newfoundland. It is important to note that most of the potential remediation costs were related to properties other than those that were the subject of the expropriation.

As it was unable to reach agreement with Newfoundland, in April 2009 AbitibiBowater filed a notice of intent to submit an investor-state claim against Canada under the dispute settlement provisions of chapter 11 of the NAFTA, claiming damages of at least $300 million.

[*Translation*]

NAFTA chapter 11 and Canada's other international investment treaties do not prevent the government from expropriating private property for a public policy reason. However, these treaties oblige governments to provide compensation for the expropriated assets based on fair market value.

Moreover under the domestic law of most provinces, including Newfoundland, the government has the right to expropriate property for public purposes but must pay compensation. It is important to note that even if there were no investor-State dispute settlement provisions in the NAFTA, companies have legal recourse through the domestic courts to seek compensation for expropriation. Furthermore, providing compensation for the expropriation of foreign-owned property is an obligation arising under customary international law, irrespective of the NAFTA.

[*English*]

In the spring of 2009, AbitibiBowater was in a difficult financial situation. Consequently, on April 16, 2009, the company filed for creditor protection under chapter 11 of the United States Bankruptcy Code, and for protection under Canada's Companies' Creditors Arrangement Act the following day.

During the year following AbitibiBowater's notice of intent, settlement discussions towards an agreement on the amount of compensation due to the company were pursued. On February 25, 2010, as no agreement had been reached among the three parties, AbitibiBowater took the next step in the arbitration process and filed a notice of arbitration against the Government of Canada under NAFTA chapter 11, increasing its damages claim to at least $500 million.

AbitibiBowater alleged that the provincial legislature expropriated both its and its Canadians affiliates' assets in a discriminatory manner, without due process or valid public purpose, in contravention of Canada's obligations under NAFTA. It further claimed that the provincial legislature did not comply with NAFTA's compensation requirements.

● (0900)

[*Translation*]

The company alleged that, through Newfoundland's actions, Canada had contravened the national treatment and most-favoured nation treatment provisions of the NAFTA, as the act explicitly targeted and singled out the Canadian operation of AbitibiBowater, rather than apply generally to all local companies or foreign investors that have also closed facilities in the province, and that the approach to compensation was equally discriminatory and precluding that company alone from accessing the courts.

AbitibiBowater also claimed that the act violated the principle of fair and equitable treatment of Canada's minimum standard of treatment obligation in the NAFTA, alleging that expropriation was arbitrary, irrational and discriminatory, in violation of AbitibiBowater's legitimate expectation of a stable business and legal environment, and of equal treatment vis-à-vis other investors.

Furthermore, the expropriation and compensation provisions of the NAFTA provide that no party can expropriate an investment except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of compensation. The company claimed that the act did not meet any of these criteria for such an expropriation to be lawful.

[*English*]

By the spring of 2010, it had become evident that the Government of Newfoundland and Labrador would or could not contribute financially to a compensation package, due to outstanding claims for environmental remediation at current or former AbitibiBowater sites in the province.

After reviewing its options, the Government of Canada decided to continue settlement discussions with the company, which continued through the spring and summer of that year. On August 24, 2010, the Government of Canada and AbitibiBowater announced that an agreement had been reached to the mutual satisfaction of both parties, without recourse to arbitration.

The agreement was structured so that it did not come into force until the company's plan of restructuring in the United States and Canada had been approved by the courts. This happened in December 2010. Through the settlement agreement, AbitibiBowater irrevocably and permanently withdrew its $500 million NAFTA chapter 11 claim against Canada, and the Government of Canada made a payment of $130 million to AbitibiBowater.

The Government of Canada did its due diligence by ensuring that all the conditions of the settlement agreement had been met. For the settlement agreement to come into effect, the U.S. and Canadian bankruptcy courts had to first approve the settlement agreement itself, and then these courts had to also approve AbitibiBowater's general plan of restructuring.

Finally, according to the terms of the settlement agreement, once the court approvals had been secured, the settlement agreement only took effect when all of the relevant appeal periods had lapsed. This ensured that the payment was made to a Canadian entity that had continuing operations in Canada. The $130-million payment was based on an assessment of the fair market value of the company's expropriated assets in Newfoundland and Labrador. As a result, the settlement agreement fully complied with Canada's commitments under the 2006 softwood lumber agreement.

The Government of Canada, which is constitutionally responsible for Canada's international relations, resolved this dispute for the benefit of Canada's long-term economic interests. In reaching this agreement, the government has avoided potentially long and costly legal proceedings which, in the end, would have ended with Canada providing compensation to AbitibiBowater for the expropriated assets. Moreover, this approach reaffirms the Government of Canada's commitment to maintaining a rules-based business environment that facilitates free trade and encourages investment.

● (0905)

[*Translation*]

In summary, the payment of $130 million to AbitibiBowater was not a question of whether government and Canada had or have the ability to regulate in the public interest. Rather it was a question of providing equitable compensation for property expropriated by a government in Canada. There is no question of the government's right to expropriate the properties for a public purpose, as long as adequate compensation is provided.

I trust that the Committee will find the information I have provided today useful. I welcome the opportunity to address any questions you may have on the matter.

[*English*]

The Chair: Thank you very much, Mr. Stephenson—fascinating.

We're going to begin—

Mr. Scott Simms (Bonavista—Gander—Grand Falls—Windsor, Lib.): Well, what a delight—on division.

Voices: Oh, oh!

The Chair: —with a proud son of Newfoundland and Labrador.

Mr. Scott Simms: Oh my goodness, not on division.

The Chair: Mr. Simms.

Mr. Scott Simms: I'm stunned by your overwhelming comments, very simply stunned. Thank you very much.

It's good to see everybody, and thank you, Mr. Chair, for having me as a witness. As you know, I have an interest in this because the mill and assets in question are in my riding.

Very quickly, what were the discussions beforehand? When I look at this issue.... We have a situation there with this mill: it's going to need a serious cleanup to remediate the area and the lands. I know there's an ongoing court situation now with the province going to the Supreme Court. But in the meantime, before this money was transferred, and during these lengthy discussions, was there the idea of the federal government's being involved in two things such as, for example, environmental cleanup or even with the pension transfer of some employees that went from the company over to the province? Were any of these discussions made or was it simply "we did bad and we're going to pay you"?

Mr. Don Stephenson: The only matter in which the Government of Canada was directly involved in discussions was with respect to the settlement of the expropriation under the terms of the NAFTA. We were not engaged directly in discussions between the firm and the province with respect to either pension payments or environmental remediation costs.

Mr. Scott Simms: Because my understanding was—and this is through many sources—that the company had approached the federal government about environmental remediation as a way of settling the much larger dispute.

Mr. Don Stephenson: Well, I don't know, John, whether you're aware of any such...?

Mr. John O'Neill (Director, Investment Trade Policy, Department of Foreign Affairs and International Trade): No. I'm not aware of any discussions with the company on environmental remediation. It certainly was an issue that entered into the trilateral discussions, but not in specifics, more in terms of the money that Newfoundland would be willing to contribute to a settlement. But the specifics of who does what to clean it up were between the province and the company.

Mr. Scott Simms: And no discussion whatsoever...? The federal government was not engaged in that discussion in any which way, shape, or form?

Mr. John O'Neill: The Department of Foreign Affairs and International Trade was involved. I'm not aware of any other department being involved.

Mr. Scott Simms: When they started out, you said there was an investor-state claim of $300 million. Explain again how it goes from $300 million to $500 million. What's the situation there? How do we come to the final number of $130 million to pay off? I mean, obviously you're assuming guilt here.

Mr. Don Stephenson: There was an expropriation—

Mr. Scott Simms: I appreciate that, but at the same time—

Mr. Don Stephenson: That was hard to deny.

Voices: Oh, oh!

● (0910)

Mr. Scott Simms: Trust me: it is hard to deny.

Mr. Don Stephenson: With respect to the values that the company put on the various claims they made under the NAFTA, it's impossible for us to know exactly how they came to the determination. As I explained, there were several parts of that claim. When it came to the question of how we evaluated the assets that had been expropriated, we studied as best we could the fair market value of the actual assets, and that was the basis on which the determination was made.

Mr. Scott Simms: You mentioned that they could go through the courts as well, so why didn't they go that route? Was that discussion had by them as opposed to chapter 11...? You said that through the normal course of the courts, they could have taken the province to court. Is that correct?

Mr. Don Stephenson: In the normal course of events in Canada, yes, you can prosecute in domestic courts for compensation for expropriation by governments. In this particular instance, the province passed legislation closing off access to the provincial courts in the matter.

Mr. Scott Simms: Very interesting.

So at this stage now, where we are now, obviously they've come out of bankruptcy and we've paid them the $130 million. Are there any more discussions taking place with Abitibi beyond what is happening right now or are we clear of this now and that's it?

Mr. Don Stephenson: Well, we're clear of the NAFTA challenge. Whether or not there are discussions between other government departments and AbitibiBowater on other matters, I don't know.

Mr. Scott Simms: You're not aware of any discussions that are taking place at this point?

Mr. Don Stephenson: No.

Mr. Scott Simms: Thank you.

Did you want to...?

Ms. Martha Hall Findlay (Willowdale, Lib.): Thank you.

Thank you very much for being here this morning.

I'm just a little confused. You said there was no discussion and there was no involvement by the government at all until the settlement. Can you just elaborate a little?

I know that it's all part of the chapter 11 process, but it still strikes me as a little bit odd that the province was able to take such a drastic action—expropriations don't happen every day in Canada—for which the federal government, and Canadian taxpayers, I would say, have such significant responsibility, with apparently absolutely no involvement in the decision in the first place.

It seems a bit striking to me that Canadian taxpayers would be exposed to that without any prior involvement. Can you elaborate on that? Feel free to throw in your opinions—

Voices: Oh, oh!

Mr. Don Stephenson: I have no opinions—

Ms. Martha Hall Findlay: —as opposed to just the lines.

Mr. Don Stephenson: Well, first of all, I wonder whether it's actually factually correct to say that expropriations don't happen every day in Canada, because I think if you look at all levels of government, they do in fact expropriate very often in the normal course of the conduct of their business.

Ms. Martha Hall Findlay: To be clear, an expropriation of a large business by a government when it's not making room for a highway or the kinds of things that we're normally used to.... Other than those, this kind of expropriation does not happen every day in Canada, just to be clear.

Mr. Don Stephenson: I take the point. I only make mine to suggest that there are laws in Canada and a practice of norms in Canada with respect to compensation for expropriation.

In this particular case, we understand that there had been discussions between the firm and the province in respect of the closure of their operations in Newfoundland, but we were not party to those discussions, and we were not party to a discussion with the Province of Newfoundland prior to their decision to expropriate and their passage of the legislation. This is a provincial measure.

Ms. Martha Hall Findlay: I won't add to the question. I'll just point out that's what you said in your earlier testimony, so that didn't actually answer my question.

Mr. Don Stephenson: Well, we were not party to discussions with respect to this expropriation.

Ms. Martha Hall Findlay: It was a question about the commentary. It was a question about the ability of the federal government and its taxpayers to be on the hook and to be liable for such a significant compensation without having been involved in the conversation beforehand, but thank you.

Thank you, Mr. Chair.

The Chair: Thank you, Ms. Hall Findlay. We'll perhaps have an opportunity to ask that in the second round.

Right now we're going to go to Monsieur Laforest.

[*Translation*]

Mr. Jean-Yves Laforest (Saint-Maurice—Champlain, BQ): Thank you, Mr. Chair.

Good morning, Mr. O'Neill and Mr. Stephenson.

Mr. Stephenson, you said that, aside from the chapter 11 provisions, there were provisions of international law that would allow businesses to start legal proceedings. Could you provide us with further explanations? I took notes, but...

● (0915)

Mr. Don Stephenson: Unfortunately, we did not bring a legal expert, a departmental lawyer, to explain the standards and the international laws. I do not know any more than what I said in my presentation, which is to say that it is customary.

Mr. Jean-Yves Laforest: In broad terms, does that mean that, if there were no chapter 11 in the NAFTA, it would still be possible for AbitibiBowater to file suit?

Mr. Don Stephenson: Absolutely, especially by starting in a national court, under national law.

Mr. Jean-Yves Laforest: Does that also mean that chapter 11 is useless if businesses have a remedy under international law anyway? Why was chapter 11 included in the NAFTA? Is it more to protect businesses or more to protect governments?

Mr. Don Stephenson: Primarily, it is more to protect Canadian investors who invest in other countries, and to guarantee that they will be able to defend their rights before national courts elsewhere. It also provides those who might wish to invest in Canada the assurance that they have various options to defend their rights.

Mr. Jean-Yves Laforest: In international trade, are you responsible for the supervision or the verification of compliance with agreements under chapter 11? Is it the Department of Foreign Affairs and International Trade that has to oversee everything that comes under the NAFTA, the agreements, the expropriations?

Mr. Don Stephenson: No, the Government of Canada and my department do not oversee the actions of all of the provinces and municipalities regarding expropriations or other issues. As the signatory of international agreements, we are responsible for the protection of these rights in Canada, but we have neither the ability nor the responsibility to oversee all of the decisions of provincial, territorial and municipal government.

Mr. Jean-Yves Laforest: So there is no list of all of the major expropriations that have taken place.

Mr. Don Stephenson: No.

Mr. Jean-Yves Laforest: We are obviously not talking about a lot that is expropriated by a municipality or some level of government, we are rather discussing businesses that invest in Canada or in Quebec.

Mr. Don Stephenson: Precisely.

Mr. Jean-Yves Laforest: So hundreds of such events could have taken place without the Department of International Trade being informed about them. Also, when there is a dispute, it is because a company has gone to court.

Mr. Don Stephenson: That is right.

Mr. Jean-Yves Laforest: Likewise, you are not always aware when something like that happens.

Mr. Don Stephenson: No. We are aware when a business challenges under the NAFTA, but we are not necessarily aware if the suit is brought before a provincial court.

Mr. Jean-Yves Laforest: In all of the NAFTA provisions, is there a mechanism that allows for renegotiation when problems occur? As with chapter 11, do the NAFTA countries agree that they could better define the concepts of expropriation, of an investor or of investment? Is this a subject that has to be renegotiated?

Mr. Don Stephenson: Yes. A few years ago, the three NAFTA signatories agreed on the clarification of certain clauses or procedures within the NAFTA. They were interpretations.

[*English*]

What was the phrase that was used, John? Were they clarifications or interpretations?

● (0920)

Mr. John O'Neill: The term was “a note of interpretation”.

Mr. Don Stephenson: It was a note of interpretation.

[*Translation*]

This is to say that the three parties agreed on the interpretation of a clause and produced a note of interpretation that courts must follow.

Mr. Jean-Yves Laforest: According to our analysis, the definition of expropriation is quite vague. This could even be to the benefit of investors who might want to challenge almost any social or environmental law of a government or one of the contracting parties. We feel that, in a sense, this limits the possibilities of provincial governments and the Government of Canada to pass legislation.

I am well aware that you are neither the signatories nor the negotiators, but I wanted to express my view nevertheless.

Perhaps Claude could finish.

Mr. Don Stephenson: Could I answer or make a comment?

[*English*]

The Chair: I think that will have to be in the next round.

Thank you. *C'est tout*.

[*Translation*]

Mr. Jean-Yves Laforest: He has a comment.

[*English*]

Mr. Don Stephenson: May I respond?

The Chair: Sure.

[*Translation*]

Mr. Don Stephenson: The NAFTA has not changed the definition of expropriation in Canadian law. Canadian law already contained the concept of direct expropriation, as in this case, or of indirect expropriation, which involves other kinds of measures that result in you losing your investment. That has not changed with the NAFTA.

Also, people may, for indirect reasons such as an environmental regulation or some other regulation, challenge government measures either under the NAFTA or before the country's courts. However, if they do so under the NAFTA, they will not be successful. I have not seen any situation where government regulations intended to protect the safety of individuals or of the environment have been restricted.

[*English*]

The Chair: *Merci*.

Mr. Julian.

Mr. Peter Julian (Burnaby—New Westminster, NDP): *Merci, monsieur le président.*

My thanks to our witnesses for coming here today.

This is a pretty disturbing case from a number of different standpoints. There's a series of questions I'd like to ask.

Could you confirm that the Newfoundland and Labrador government had to pay or did pay about $30 million in severance pay that AbitibiBowater should have paid and how that entered into the evaluation of giving $130 million to a company that projects profits over the next four years of $1.5 billion? It seems a poor use of taxpayers' funds, when you when you have projected profits in that scope and the Newfoundland and Labrador government picking up severance pay, to have Canadian taxpayers foot the bill for this situation.

The other question I'd like to ask is about compensable rights. Water rights, under Canadian law, are not subject to compensation, and I'm wondering again to what extent the evaluation took place.

You have the Newfoundland and Labrador government picking up severance pay. You have rights that are not compensable. How did the department evaluate this? I'm assuming they recommended payment. How did the department evaluate the payment of $130 million on that basis?

Mr. Don Stephenson: Well, to the first part, with respect to the $30 million paid by the province to cover severance, this was a decision made by the provincial government, not the federal government. We were not directly involved in that discussion or decision. It was a matter that was legally separate from the question of expropriation of assets. That was the issue under the NAFTA and we did not take it into consideration in respect of settling the expropriation.

● (0925)

Mr. Peter Julian: Just so I understand: Canadian taxpayers, through Newfoundland and Labrador, picked up moneys that AbitibiBowater owed to its workers, and that didn't in any way enter into the equation for the $130 million paid out to AbitibiBowater.

Mr. Don Stephenson: It did not enter into the equation of the Government of Canada's decision to provide $130 million in compensation for the expropriation. It may—and I underline the “may”, because you'll have to ask someone who represents the Government of Newfoundland and Labrador this question—have entered into their discussions and considerations when they decided not to pay or participate in compensation to the firm.

With respect to the second—

Mr. Peter Julian: Were there other payments made by Newfoundland and Labrador?

Mr. Don Stephenson: No. One of the considerations that was clearly involved in their decision whether or not to pay compensation—and this was stated publicly by the premier—was the liability for environmental remediation costs down the road.

As to the second part of the question with respect to the assessment that was made, we conducted an assessment of the fair value of the assets. As there are continuing settlement discussions going on today between the province and other investors in the same facilities, I wouldn't want to get into a detailed discussion of the evaluations we made of those assets. Moreover, they were part of a confidential settlement negotiation and would involve commercially confidential information.

Mr. Peter Julian: So we're now up to $170 million and counting that the Canadian taxpayers picked up for AbitibiBowater. This is very relevant to our committee report, of course, and I think we'll need to have a discussion as a committee to see to what extent we can get that evaluation, that information.

The second disturbing aspect of this, I think as you'll understand, is that the AbitibiBowater headquarters is in Canada. So now we have another situation where a Canadian company is using investor-state provisions to flip its ownership.

Could you confirm that NAFTA chapter 11 provisions were originally designed to protect foreign companies? Whether or not it was wise to put those in place I guess is open to question, but now we have a situation where Canadian companies can access chapter 11 provisions if, for tax reasons or whatever else, they have filed incorporation papers outside Canada.

That of course is very disturbing when you think of the Canada-Europe trade agreement and basically allowing companies anywhere in the world to access chapter 11 as long as they file their incorporation papers in the appropriate place. This is another aspect that's disturbing to many Canadians.

Can you confirm that the AbitibiBowater headquarters is in Canada and that chapter 11 wasn't designed to have Canadian companies use it against the Canadian government?

Mr. Don Stephenson: I'll let John answer that part, but, yes, NAFTA was to protect foreign investors in Canada and Canadian investors in the other two countries.

In the case of AbitibiBowater, they were legally established in another NAFTA country and therefore had access to the dispute settlement under NAFTA, including chapter 11. I'm uncertain about the history of the ownership of the company, and maybe John can provide more detail, but a Canadian and an American firm merged into AbitibiBowater, Abitibi being the original Canadian company and Bowater being the American.

Mr. Peter Julian: But the headquarters is in Montreal?

Mr. John O'Neill: The company headquarters are in Montreal. AbitibiBowater is a merger of Abitibi Consolidated, which was primarily a Canadian company but did have some operations in the U.S., and Bowater Incorporated, a U.S. company that also had some operations in Canada. Under the merger agreement, the new company, AbitibiBowater, was incorporated in Delaware and its head office is in Montreal.

It carries on substantial business operations both in the United States and in Canada. So for the purposes of NAFTA chapter 11, it was a foreign investor that did have substantial business operations in its home country, the United States.

● (0930)

The Chair: I'm afraid we'll have to get to the next round, but it's a great line of questioning and very useful. Thank you. I'm sure many Canadians would be interested.

Mr. Keddy.

Mr. Gerald Keddy (South Shore—St. Margaret's, CPC): Thank you, Mr. Chairman.

I welcome our witnesses.

I was a bit disturbed by the line of questions, actually, but maybe that's just my inherent bias coming out.

Mr. Chairman, when I look at this whole situation, I think—and with respect for my colleague from Newfoundland—this was a protracted issue between the Province of Newfoundland and AbitibiBowater that, unfortunately for the workers in Newfoundland, was not able to be resolved. There were two opportunities there, as I understand it, and I'll ask for some clarification.

Without chapter 11 ever existing, you could have gone through the courts in Canada. Or you could have gone through chapter 11 and, I expect, found hopefully a more streamlined and faster process and a ruling made with respect to Newfoundland and the Government of Canada that quite frankly I think would have ended up benefiting the Province of Newfoundland. However, those jobs are still lost, and that's the real shame here.

Had that not happened—and I realize you don't have legal advisers here—had we not had chapter 11, I would expect that this would still be in court. Do you have an opinion on that?

Mr. John O'Neill: It's hard to say.

Mr. Gerald Keddy: Not really...?

Mr. Don Stephenson: No. My guess is that it would have been challenged somehow in the courts, but as I said, the Province of Newfoundland passed legislation closing access to the normal procedure for pursuing these rights in the provincial courts.

Mr. Gerald Keddy: Fair enough; and you had mentioned that before.

The other question that came up involved the pension buyout and the environmental remediation that came to be settled between the company and the province. I don't see anything unusual with that, and I don't know why the federal government would be involved in that, although some of the questions from my colleagues seem to be headed in that direction.

If we have chapter 11 in place for a reason...and let's be fair and up front here: that reason is to have a dispute mechanism settlement for two entities with different opinions that have no other avenue left but to go to the courts. Hopefully those courts are unbiased and take into consideration all existing laws that are on the books. We ended up, in this case, paying out from the Government of Canada $130 million.

I just don't see what other venue, what other avenue, is available to go through that.

I'm not sure my colleagues aren't suggesting that perhaps this should have been the Province of Newfoundland. I'm a little surprised to hear that, especially from the NDP.

I don't think we have a choice but to respect federal law in Canada and to follow it. Unfortunately, in this case we ended up to be found in contradiction of the rules of international trade, and paid.

Am I oversimplifying this?

Ms. Martha Hall Findlay: It's a big “we”.

Mr. Gerald Keddy: Well, it's a big we, but at the same time, that's what we're left with here.

Mr. Don Stephenson: I guess some parts are simple and some parts are not so simple in respect of the matter. The simplest part is that a company was expropriated, and that compensation was due—

Mr. Gerald Keddy: Absolutely.

Mr. Don Stephenson: —in some way, shape, or form.

There were several complications in respect of this particular matter.

Just as I go past it, John was reminding me that you may wish to check whether or not the province made a claim for the money that was paid in severance under the bankruptcy proceeding in Canada, the CCAA proceeding. We're not aware of whether or not that claim was made. It would have been, it seems to me—I'm not a lawyer—a legitimate claim by the province in a bankruptcy proceeding. So just that fact should be checked.

In the simplest terms, under the law and under international arbitration procedures, companies can take disputes against other companies to international arbitration all the time. The London Court of International Arbitration is there for companies to pursue their disputes, their commercial disputes, with other companies.

What the NAFTA did—as we do in all of our investment protection agreements, and as most countries do in respect of their bilateral investment protection agreements—was to allow investors to access those same international arbitration procedures in respect of the decisions taken by governments. That's the novel part. The rest does seem somewhat straightforward.

● (0935)

Mr. Gerald Keddy: Yes.

Just to be clear, I think all of us have spent a fair amount of time looking at chapter 11 and trying to understand all the intricacies within it. But—and again, maybe it's an oversimplification—you have to have a dispute settlement mechanism. This one is not there solely for foreign entities. It's there to protect Canadian investment abroad as well, and Canadian investment in Canada.

So I don't see the great resistance to chapter 11, which is a dispute settlement mechanism that actually works to benefit Canadian investors and to treat foreign investors fairly. We may not be happy with the outcome of every settlement, but there has to be a rules-based process to settle these very thorny and often difficult international disagreements, or disagreements that take place domestically here in Canada, because of rules, regulations, or laws that governments have passed or companies refuse to obey.

You have to have a system. Maybe there's a better system there, but I'm not aware of it.

Mr. Don Stephenson: I agree with the question.

The Chair: We're going to round two. These will be five-minute rounds. We're hoping to keep the questions and answers in each case to five minutes.

We're going to start with Ms. Hall Findlay.

Ms. Martha Hall Findlay: Thank you, Mr. Chair.

I hope to be very quick, because I want to turn it over to my colleague Mr. Simms.

The issue, for my colleague Mr. Keddy, is not that we disagree with chapter 11 and the rules. We fully understand that you need to have them. The key is that with any legal action there is always opportunity to engage in negotiations beforehand.

So where was the federal government, in discussions with the provincial government and AbitibiBowater, in recognizing that there were opportunities to deal with the liabilities of Abitibi with regard to remediation, for example? Perhaps there was an opportunity. So instead of just cutting a cheque for $130 million after the fact, that federal money could have been used to address Abitibi's liabilities for remediation, and thus help the remediation process, not just the company.

My point was not a dispute with the issue of chapter 11 or the existence of the rules. I understand that completely. But if we can't do anything about this now, maybe we've learned that we need to be much more involved beforehand.

I think my colleague Mr. Julian has raised an interesting question about the applicability of chapter 11 and the nationality of different companies. I think that's worth looking at.

Mr. Simms.

● (0940)

Mr. Scott Simms: Yes. I couldn't have said it better myself.

Normally I like to get down to the meat of the situation, but we kind of got waylaid by some of the comments here.

I understand what you're saying, Mr. Keddy, but when it comes down to it, for the average citizen involved in living around this land, this expropriated land, that is to the benefit of society in general, I would rather have seen—and I think it was possible—$130 million paid to have much cleaner soil, even that alone, as opposed to $130 million to get someone off your back.

I mean, you can always talk about jurisdictions, but we found jurisdiction in Nova Scotia to clean up the Sydney tar ponds. We found it, and I think in this case we could have found much the same, but it does open up a broader discussion about industrial remediation and the lack of involvement. Because right now we're still in the courts over environmental remediation, and its price tag could take it somewhere in excess of $500 million. So someone still has to pay that, and we're still out $130 million.

I'm happy for the investors of AbitibiBower, but at the same time it's hard if you're an average citizen living amongst the waterways and so on and so forth. And there was the justification that, okay, in the beginning, the origins of the company were such that they were given free access to anything for the sake of jobs. Now, we're talking 100 years ago, I appreciate that, but at the same time, some of that has to be factored in.

That was my point of discussion from the beginning, and the question was, was there any open discussion about getting involved? Because all I'm looking at is a value for money, which is.... Yes, the Newfoundland government paid severances. They also paid a certain percentage of money that was owed to people who were local creditors.

But in the meantime, I want to launch into a quick question about what was said, and I think the discussion is about who exactly is where. I agree in protecting our investors overseas. As Mr. Keddy would know, I'm a free trader myself, but I do believe in the protections that are in the institutions.

But I think he brings up a good point, which is that I don't know who is what anymore. That mill was always a Canadian mill, owned by Canadian people, right up until the time it was closed—always. And now we find ourselves in some sort of situation where there was $130 million going to a foreign company and there is nothing coming back to us in return.

Anyway, I don't know if there's any comment on that. It's just my own little comment. Perhaps you can understand my frustrations. I don't know.

Mr. Don Stephenson: First of all, I understand that this was just a turn of phrase, but to say that $130 million was paid to get somebody off your back I think is the wrong characterization or understanding of the issues involved. It was a payment—

Mr. Scott Simms: Well, certainly you can see it from our perspective—

Mr. Don Stephenson: Agreed, but this was a payment for someone's assets that were expropriated by a government and that seems perfectly normal. The issue of the environmental remediation is a legally separate question—legally separate—from the question of the compensation for those assets. This wasn't *Let's Make A Deal*. This was a straight question—

Mr. Scott Simms: But it should have been *Let's Make A Deal*. That's what I'm saying to you.

Mr. Don Stephenson: Okay—

Mr. Scott Simms: I mean, you can lecture me on the jurisdictions all you want.

Ms. Martha Hall Findlay: It's not legally separate because the value of assets is tied to liabilities.

A voice: Exactly...[*Inaudible—Editor*]...different assets.

Mr. Don Stephenson: That is another point that might be useful to you.

● (0945)

Mr. John O'Neill: With respect to the assets that were expropriated and the properties about which there are allegations of enormous environmental remediation costs—and I don't know whether or not they're true, but I suspect they are—they're different assets.

For one asset that was expropriated—the newsprint mill—certainly there are environmental remediation costs that will have to be undertaken by the province, from our discussions with the province, but the other assets, the hard assets, that were expropriated are hydroelectric facilities. The remediation costs that the Government of Newfoundland was talking about didn't relate to those facilities. They related to other properties that Abitibi had either owned or operated in the last 100 years in Newfoundland, but they weren't the subject of an expropriation.

The Chair: Thank you.

Unfortunately, we're at the hour, we have still Mr. Holder to wrap up.

You have five minutes, in and out, as they say.

Thank you, Mr. Holder.

Mr. Ed Holder (London West, CPC): Thank you, Mr. Chair.

I would like to thank our guests.

I have had the privilege to be in the great province of Newfoundland and Labrador three times in the last year, and I have a great affection for the province. I say that because whenever there are these kinds of issues with provinces, it strikes me that this was probably the most probable and expedient resolution to this circumstance.

Ms. Hall Findlay made some comment about the negotiation process and it prompted some thoughts in my mind in terms of jurisdictional responsibility. When do we get in and at what time?

I got a sense, Mr. Stephenson, through your comments, that it looks as though we get in once the deed is done, obviously, and we have to deal with it. You made a very interesting comment when you said that clearly a company was expropriated and compensation was due. I understand that.

When does the federal government get involved? Can you just clarify that for my understanding, please?

Mr. Don Stephenson: Well, legally and in practice the Government of Canada typically will not get involved until there is a notice of intent in respect of NAFTA chapter 11 or one of our other investment treaties.

I take the point, at least at the level of simple logic, that the Government of Canada might wish, as the one responsible for the exercise of international treaties and the financial liability in the end that might accrue, to participate in discussions with the provinces or with investors prior to a notice of intent.

But legally, these are decisions that are made by provinces, territories, and municipalities, and I think it's a really tricky question at best as to when the Government of Canada should involve itself in those decisions.

Mr. Ed Holder: Because it really comes to, I guess, Mr. Simms' question, when he said—and I think we would all agree with this as a general concept—wouldn't it be great to put the dollars into remediation if that were our situation.... I'm even wondering if that isn't the cart before the horse, as we say in Cape Breton. I'm trying to understand. Could we have put federal dollars into remediation first? Would that even have been an option for us? Or does it really have to wait until chapter 11 comes into play and then we would deal with the part that we are compelled to deal with?

Mr. Don Stephenson: Well, the Government of Canada, I suppose, was certainly at liberty to make an investment in addressing the remediation costs with regard to these facilities. Whether or not that would have avoided a challenge under NAFTA in respect of the expropriation of these assets, I don't know.

Mr. Ed Holder: So one is clearly separate from the other, then. There is no causal connection between the two. If one were to choose to take a remedial approach, as it were, as desirable as that may well be, that has nothing to do with the challenge under chapter 11 in the negotiations we had to deal with.

Mr. Don Stephenson: Not legally, and whether or not these things could have been negotiated as a settlement is at this point speculation.

Mr. Ed Holder: Can we talk about that settlement for a moment? It strikes me that this was the most expeditious approach to take, it seems, at least from the testimony you've provided.

This is hypothetical. I guess as I ask the question I'm thinking, had we not settled as we did, what would have been plan B?

Mr. Don Stephenson: To defend ourselves before a NAFTA tribunal in respect of the issue, and that issue would have been exactly the same one, the value of these assets, because compensation would surely have been awarded.

Mr. Ed Holder: Is it fair to say that had that been the approach it would have been a much more extended process and potentially more costly?

Mr. Don Stephenson: Well, certainly in respect of the litigation, it would have been costly. They are costly procedures and they would typically take many months to prosecute.

Mr. Ed Holder: It's interesting. I think this is about fairness under the rules we have. Mr. Keddy made the point about this being a rules-based process, and I think whenever we've argued anything, whether it be on dealing in free trade with other countries or in this case here of provisions in terms of disputes under chapter 11, it is a rules-based process. It's great that at least that's in place to expedite, and at least we had the option to deal with that.

I have this question, because you made some passing comment. I'm not sure if it was in your question and answer period with Mr. Julian. Do we have a history of supporting provinces in other disputes like this? I'm just trying to get a sense in terms of your experience with that. Is this an absolutely uncommon practice or would you say this is on some kind of regular basis?

● (0950)

Mr. Don Stephenson: There have been only a handful of challenges under NAFTA that relate to provincial measures. This is the only case in which compensation was provided for a provincial measure, so there are very few precedents to go by.

I suppose in respect of international trade more generally—WTO matters, for example—it is standard practice for the Government of Canada, as the signatory to the international treaty, to defend provinces.

Mr. Ed Holder: It would seem to me, then, that the great Province of Newfoundland and Labrador would have been glad that the Government of Canada was there in this kind of circumstance.

The Chair: You're over time.

Mr. Ed Holder: I'm sorry, I didn't realize it. It's such an interesting dialogue with our guest.

The Chair: Oh, was it a dialogue?

Mr. Ed Holder: Yes, sir.

The Chair: I'm sorry. I thought it was a monologue.

Mr. Ed Holder: We were sharing. It was good.

The Chair: There you go.

In any event, we have run out of time.

I want to thank our witnesses for giving us a great start to this and enlightening the panel on this important issue.

I'm going to take a two-minute suspension while we bid farewell to these witnesses and welcome a second round of witnesses.

Thank you.

● _____ (Pause) _____ ●

● (0955)

The Chair: We will resume.

We welcome back to our committee, from the Council of Canadians, Steven Shrybman, who has been with us several times before. He is an international trade and public interest lawyer. From the Macdonald-Laurier Institute, we have Brian Lee Crowley, managing director. As an individual, we have Gus Van Harten, associate professor, Osgoode Hall Law School, York University.

We're going to again have brief opening statements. We won't have a lot of time for questions, because we're going to have an opening comment from each. I'm going to ask you to keep them as brief as you can.

Let's begin with Mr. Van Harten.

Prof. Gus Van Harten (Associate Professor, Osgoode Hall Law School, York University, As an Individual): Thank you very much, Mr. Chair. It's an honour to present to you today.

My name is Gus Van Harten. I'm an associate professor at Osgoode Hall Law School. I previously taught and studied at the London School of Economics, where I did my doctorate in law on investment treaty arbitration and public law.

I have four main points to make about the AbitibiBowater case and settlement.

First, the case and settlement are examples of how NAFTA chapter 11 and other investment treaties concluded by Canada that provide for compulsory investor state arbitration may, by their operation, conflict with a basic principle of Canada's system of constitutional democracy. This is the principle that Parliament or a provincial legislature is supreme and that it may legislate or regulate on any matter within its constitutional authority without payment of compensation to private parties whose economic interests are affected by the legislation.

This is a longstanding principle of parliamentary democracy and the common law tradition as recognized by A. V. Dicey and others. By ratifying NAFTA, the federal government in effect determined that this principle would be subordinated to decisions of arbitrators who are appointed in cases brought by private parties under the treaty.

To date, there have been 28 cases against Canada under NAFTA chapter 11. A number of these cases never led to the establishment of a formal tribunal; however, a number of these cases have arisen from legislative acts or from decisions adopted pursuant to broad statutory schemes.

For example, there is an ongoing Dow Chemicals claim against Canada involving a challenge by a U.S. chemical company to the Quebec prohibitions on the cosmetic use of pesticides pursuant to Quebec's Pesticides Act. The Gallo claim arises from legislation introduced in Ontario to end, finally, a scheme to dispose of Toronto's garbage at a quarry in northern Ontario. The Centurion Health Corporation claim arose from a challenge to the Canada Health Act by a U.S. private health care provider. The Ethyl claim was one of the first under NAFTA claims that arose from federal legislation that put restrictions on a gasoline additive. That case was settled by the federal government for, amongst other things, payment of compensation. All those cases involve legislative acts.

The second point I would like to make is that this constraint of the authority of Parliament or a provincial legislature could have major implications for the federal-provincial division of powers if it were to lead to affirmative orders issued by arbitrators against a provincial government, or if it were to lead the federal government to seek payment by a province of international awards issued against Canada.

As a matter of international law, it was the federal government on behalf of Canada that ratified NAFTA. So it is the federal government on behalf of Canada that is responsible for Canada's treaty obligations under NAFTA.

As a matter of Canadian constitutional law, which of course is a distinct source of law, since the federal government did not seek the consent of the provinces and passage of provincial legislation in order to implement NAFTA chapter 11 awards where they arise within matters of provincial responsibility, it is the federal government that is very likely responsible for those awards as issued against Canada.

This is so because of the constitutional principle recognized in the Labour Conventions case of 1937, which is that the federal government cannot avoid the federal-provincial division of powers in the Constitution merely by entering into treaties with foreign countries that could encroach on provincial authority.

The third point I would like to make is that sometimes the word “court” is used to describe the dispute settlement process under NAFTA chapter 11, and I would just like to clarify that the decisions are made by arbitrators. We should not confuse the arbitrators with the courts or tribunals, both domestic and international, that enjoy certain institutional safeguards of judicial independence. On the contrary, the arbitrators who decide the NAFTA chapter 11 cases lack such safeguards in important respects, especially the safeguards of judicial security of tenure, prohibitions on outside remunerative activities by the judge, and an objective method of appointment of individual judges to particular cases.

In the absence of such safeguards, reasonable perceptions may well arise that the arbitrators have been influenced inappropriately by the financial incentives that arise to please prospective claimants, to respond to the interests of executive officials in the appointing authorities for the arbitrators as well as the major governments and other actors that have the greatest influence over whether or not to include arbitration clauses in the treaties.

● (1000)

This makes it all the more significant that arbitrators, quite exceptionally in this regime of international adjudication, have been given the authority—in fact, to a greater extent than any other international court or tribunal—to decide public law claims by private parties, without a requirement to resort to the domestic courts or tribunals before an international claim is brought, and without a robust review process by an international or domestic court, and also to award public compensation to private parties for legislative, executive, or judicial acts. This is a quite different dispute-settlement process from anything that you would find in customary international law, or indeed under any other international treaty, including treaties that allow private claims against states.

The fourth point I'd like to make is to simply highlight the experience to date of the Canadian government and Canadian investors seeking protection in arbitrations pursuant to investment treaties. The information is drawn from a database of known investment treaty cases, as maintained by me and others at Osgoode Hall Law School.

Overall, the experience to date of Canada as a respondent has been average. For NAFTA chapter 11 arbitrations against Canada that have led to a final resolution on the merits, either by way of an award against Canada, or in favour of Canada, or by a settlement, the result was four wins for Canada and four losses. That's an average result and it compares to the experiences of other countries, although one might expect a little better, given that Canada is a mature democracy with mature domestic judicial institutions and so on. But it's not a lot of data.

More striking, however, is that in known cases brought by Canadian investors against the United States under NAFTA chapter 11, as well as in some cases brought against other countries under bilateral investment treaties, Canadian investors have zero wins and 16 losses. There are many possible explanations for this poor record. It could be that Canadian investors brought bad cases or had bad lawyers. It could be coincidence. There's not a lot of data.

But more worrying is that the investment arbitration industry, which is based in Paris, London, Washington, New York, and the Hague, may not be a particularly favourably forum for Canadian interests. I suggest only that it's an issue that warrants greater attention and scrutiny by policy-makers and treaty negotiators.

I also have a summary of all the known cases involving claims against Canada or by Canadian investors, which I will happily share with the clerk of the committee.

Thank you for the opportunity to speak to you today.

● (1005)

The Chair: Thank you, Mr. Van Harten.

We'll now hear from the Council of Canadians and Steve Shrybman.

Mr. Shrybman.

Mr. Steven Shrybman (International Trade and Public Interest Lawyer, Council of Canadians): Thank you, Mr. Chair.

Good morning, members of the committee.

I am going to address the impact of Canada's decision to settle this claim under chapter 11 on public ownership and control of natural resources, and in particular, water, a principal concern of the Council of Canadians.

I've provided a copy of my remarks to the clerk. Unfortunately, they were prepared only yesterday, so I don't have them translated, but he has indicated that they will be translated and placed on the record. I commend them to you. I'll give you a short *praecipe* of that paper. It begins with the following summary.

The settlement by the Government of Canada of an investor-state claim by Abitibi effectively allows foreign investors to assert a proprietary claim to Canadian water, including water in its natural state, where those investors have acquired a right to use water resources by permit or otherwise. By doing so, the Government of Canada has essentially transformed Canadian freshwater resources, most of which are owned by the provinces as a public trust, into a private property right, to the benefit of foreign investors that have acquired a right to use water by provincial permit.

It would be difficult, in my submission, to overstate the consequences of such a profound transformation of the right that Canadian governments have always had to own and control public natural resources. Moreover, by recognizing water as private property, the government has gone much further than any international arbitral tribunal has dared to go in recognizing a commercial claim to natural water resources.

For this reason, not only will the AbitibiBowater settlement invite similar claims against Canada, but it is likely to also be taken up internationally by corporations seeking to establish proprietary rights to water in a world where this non-renewable resource is becoming increasingly scarce.

That's the summary and introduction.

I go on to describe briefly the circumstances that gave rise to the claim. I know that the committee has considered them in some detail this morning and I won't repeat or try to cover that ground, but I will say that I have reviewed Bill 75. It clearly did expropriate some of the assets that belonged to AbitibiBowater, but also, it recovered to public use water and forest licences that were never the private property of AbitibiBowater.

It's in asserting a claim to those rights, the right to use resources for a particular public purpose—in this case, to create employment in Newfoundland—that the government settlement of the claim gives rise to the concerns that I have just summarized.

I'll just note one point in regard to Bill 75 that may have been overlooked this morning. Bill 75 did not take Abitibi's property without the consideration of compensating the company for that taking. The legislation explicitly provided the government the opportunity to compensate Abitibi for property; it simply didn't set out a value for the property that was taken or the compensation that might be paid to the company.

That is the way our Constitution works in Canada. Governments have always had the right to appropriate private property for a public purpose, and whether or not or the extent to which compensation would be paid was a matter for governments to determine. That's the way our Constitution works.

When it was proposed in the early 1980s that we incorporate to the Constitution a protection of private property, Canadian governments rejected that norm, a norm which you know is embedded in the U.S. constitutional framework.

So what we've done is effectively transform the constitutional landscape of the country by writing into an international agreement a right to compensation in all cases that property is taken—and to the fair market value of that property. That's not our constitutional arrangement, but it is the rule that Canada agreed to when it negotiated, first, the Free Trade Agreement with the United States in the mid-eighties, and then consolidated that commitment with chapter 11 in NAFTA, which also established for the first time the right of foreign investors to assert a claim for compensation should Canada violate the norms of that international agreement.

● (1010)

The settlement of the dispute between Abitibi and Canada is set out in a consent order of the arbitral tribunal. You can find that on the NAFTA secretariat website. The committee may have already done this, but if you review the terms of the settlement, you will find in article 5 this statement: “As consideration for the above-cited final settlement” with AbitibiBowater “relating to the assets and rights cited therein...”.

You'll have my remarks, and I re-cite this provision of the settlement agreement, but what's important about it is that it's clear from the terms of settlement that compensation is being paid not just for the assets of the company—the power plant and the mill—but also for the rights that it was asserting. If you look at the company's claim, you will see a long list of water licences, forest permits, and other interests the company had acquired over the years, and in fact over decades, under various political administrations and through various transactions with other companies: rights to use provincial forest resources and provincial water resources.

The settlement clearly indicates that compensation is being paid on account of those rights, but doesn't distinguish among them in any way. So in effect, on the face of the settlement itself, every assertion of right made by Abitibi is deemed worthy of compensation by the Government of Canada, because it made no attempt to exclude from its settlement agreement any of the rights that Abitibi was asserting. Moreover, by recognizing a proprietary claim to water-taking and forest-harvesting rights in this manner, Canada has gone much further than any international tribunal established under NAFTA rules or, to my knowledge, under the rules of any other international investment treaty.

What's even more problematic about the settlement is the precedent it will create. If you look at the terms of the settlement, you will find a provision that stipulates that.... I'll read it for you:

> This Settlement Agreement shall not constitute a legal precedent for any person, and shall not be used except for the sole purpose of giving effect to its terms, and shall not prejudice or affect the rights or defenses of the Parties or the rights of any other person except to the extent provided herein.

Now, that proviso is entirely ineffective, and the Government of Canada knows it, because it fully understands that under article 1102 of NAFTA, it is obliged to provide “national treatment” to all other foreign investors in like circumstances. It cannot contract or legislate its way out of that obligation. If it wants to amend that obligation, it has to go back to the United States and to Mexico and say that article 1102 needs to be revised.

This is so we are not stuck having to pay precisely this type of compensation to every other company operating in Canada that has a water-taking permit or a forest licence when a government of this country decides that, for whatever reason, for the purposes of sustainable development, because there's some higher and better use for those resources, or because the company has no longer honoured its obligation to create employment as a condition of accessing those forest and water resources. Those conditionalities are a feature of laws from one end of this country to another. Canada would be on the hook to honour the kinds of claims or to pay the kinds of claims that would be asserted by companies in like circumstances to those of AbitibiBowater.

Therefore, in my view, it's not an overstatement to describe the consequences of this settlement as effectively representing a *coup de grâce* for public ownership and control of water and other natural resources with respect to which some licence or permit has been granted.

I'm out of time. If you have regard to my remarks, you'll see that I attempt to explicate what this means in terms of a company with a permit to use water to water a golf course in Quebec, to run a power plant in Ontario, or to provide the water resources for bitumen extraction in Alberta.

● (1015)

It has profound and far-reaching consequences and implications for Canadian ownership and control of natural resources from one end of this country to the other. If this were a settlement for $1.3 billion, it wouldn't be about the money: it would be about this profound loss of public right with respect to public natural resources.

Thank you, Mr. Chair.

The Chair: Thank you. It's an interesting point. I'm not sure this is the forum to say it in, but it's an interesting point.

Mr. Crowley.

Mr. Brian Lee Crowley (Managing Director, Macdonald-Laurier Institute): Thank you, Mr. Chair.

I'm the managing director of the Macdonald-Laurier Institute, which is a public policy think tank based in Halifax.

As I understand it, the committee is charged with studying a matter of great national importance that falls into two parts: first, $130 million paid by the federal government to AbitibiBowater as a settlement of its claim under NAFTA's investor provisions, and second, the impact of this settlement on future democratic decisions taken in the public interest by Canadian governments at all levels. Those are two separate issues, and I'm going to speak to both of them.

Like Mr. Van Harten, I intend to make four points with respect to these issues today.

Point one: the chapter 11 provisions of NAFTA provide no bar whatsoever to Canadian governments acting in the public interest through law and regulation, but they properly require that the government pay the legitimate costs associated with their decisions, including compensating parties whose property is confiscated or nationalized.

Let me expand on that point. The successful actions against Canadian governments under NAFTA's chapter 11, including AbitibiBowater's, have not been decided on the basis that Canada did not have the power to act in the public interest. That has not been the basis of these decisions. Indeed, there is no such provision under NAFTA, and no government would have signed it if there had been. What NAFTA does require is that where the legitimate interests of foreign investors have been damaged by policy decisions of those governments, those investors should receive appropriate compensation.

In the case of AbitibiBowater, for example, the chapter 11 challenge did not seek to roll back the decision of the Government of Newfoundland and Labrador to nationalize those assets. Instead, the challenge sought compensation for the damage the decision did to the legitimate interests of the company and its investors.

The claim that no compensation should be forthcoming in such circumstances is not, in my view, a defence of the sovereignty of governments in Canada. It is a defence of the unprincipled position that governments should be able to ignore the rights of parties damaged by government action, that individual rights should be hostage to the whims of government, and that the rule of law is an annoyance to be dispensed with when it inconveniences policy-makers.

Point two: paying compensation for expropriation is a matter of basic fairness and is a fundamental principle in Canadian law, not just NAFTA. Such a need for compensation is quite deeply entrenched in Canadian law and practice, quite separate from the constitutional question that Mr. Van Harten quite properly raised, which is that constitutionally there is no bar to this happening. That doesn't mean that governments have to not provide compensation.... On the contrary, the ability of governments in Canada to seize my home or your farm for matters of high national interest is undisputed. No one challenges that.

What is equally undisputed is that individuals should not be forced to bear the cost of important public policy, but that the cost of policy should be borne by governments and the taxpayers they represent. That is good policy when we consider that Canada has benefited enormously from the inflow of foreign investment over the course of its existence, since such investment brings with it not only employment but expertise and productivity improvement.

But it is in the nature of such investments that they have to be made up front, with often billions of dollars paid in the first year to, say, build an oil sands cracking plant, whereas the payback period is normally measured in years, if not decades. This long payback period after the initial investment subjects investors to various kinds of risks.

One of the principal risks is the risk that governments will change the law or break promises they have made in order to attract the investment in the first place. This political risk, I am glad to say, is relatively low in Canada, precisely because of our long-established tradition of the rule of law, the independence of the courts, and our deep commitment to fairness. As a result, we've been a very popular destination for foreign investors, but actions such as those of the Government of Newfoundland and Labrador endanger that hard-won reputation.

I think it's important to underline that the investor protection provisions are in no way an obstacle to democracy, because democracy here does not refer only to the ability of majorities to make decisions. We in Canada believe in a particular kind of democracy, where even the will of the majority is bound by rules and laws.

We believe, in other words, that even majorities may be wrong, and there are certain things majorities ought not to be allowed to do, such as oppress minorities. This means that constitutionalism and the rule of law are an integral part of democracy in Canada and that the investor protection provisions in particular and rules against uncompensated confiscation of property in general are firmly within the Canadian democratic tradition.

● (1020)

Point three: as a country with huge investment in other jurisdictions, we benefit enormously from such investor protections in other countries, and failure to apply such protections domestically would damage our credibility and harm Canadian investors. Let me expand on that point a bit.

In Canada, we don't actually have that much of a problem with uncompensated seizures of property. It's not chiefly a domestic issue because such seizures are, thankfully, quite rare. The larger problem is that Canada, in addition to being a major recipient of foreign investment, is also a major source of foreign investment for other countries. In fact, Canada has usually been a net exporter of capital since the late 1990s. In my brief, I include some data that will allow you to establish the truth of that proposition.

This means that a great many Canadian companies have invested millions of dollars in far-flung places like Peru, Ecuador, Mongolia, Vietnam, and Jordan, in industries as diverse as telecommunications, mining, and transportation. The profits earned by these companies help to pay for jobs and economic activity here, they generate tax revenue in Canada, and they help to pay for pensions and other retirement savings. In addition to benefiting Canada, these investments benefit the host country for similar reasons.

But the fact of the matter is that many countries that do not have the benefit of Canada's deep tradition of the rule of law and fair treatment under independent court often indulged in the kind of uncompensated seizure of foreign assets that the AbitibiBowater decision dealt with, because foreign investors could not be certain that their capital would be safe. The levels of investment required to lift many of these countries out of poverty were not available, and the political risk was simply too high. As a result of decades-long efforts by Canada and other western countries, we have increasingly brought such countries to understand the necessity of providing a stable and safe climate for foreign investment, achieved largely through bilateral treaties, but also through multilateral negotiations. The result has been a significant increase in the flow of capital to such countries and measurable improvements in their levels of growth and employment. Again, I include a chart which documents this.

A key factor, however, in helping such countries to see the worth of negotiating such investor protection has been the credibility of western partner nations, such as Canada, in arguing that they are not seeking to apply a double standard, but are asking third-world countries to apply the same standards that we have applied to ourselves.

Even if the net consequences of Newfoundland's decision in the AbitibiBowater asset seizure had been positive, I think the damage done to our credibility and the safety of Canadian foreign investments would far outweigh the benefit. As I hope I have made clear, I believe the consequences of Newfoundland's decision were negative, not positive.

The final point is that the AbitibiBowater case points out a damaging inconsistency in Canada's constitutional legal framework, whereby Canada has the treaty-making power and is therefore responsible for ensuring that we meet our treaty obligations, but provinces are not bound to respect the NAFTA provisions. A mechanism can and should be found to oblige provinces to take responsibility for their decisions and to prevent them from passing the costs of provincial decisions on to the federal taxpayer.

One of the questions that must seem mysterious to many outsiders is why Ottawa and the federal taxpayer had to pick up the cost of a decision that went against the Government of Newfoundland and Labrador for an issue falling under provincial jurisdiction. I'm scarcely saying anything this committee does not know when I observe that this anomaly arises because only the Government of Canada has the power to make treaties with foreign countries.

As the sole Canadian signatory of NAFTA, Ottawa is the respondent in NAFTA actions such as chapter 11 cases and, therefore, is responsible for ensuring that we meet our treaty obligations. The fact remains, however, that provinces can and do have the power to take actions that are contrary to NAFTA's provisions. At present, there is no mechanism for holding them responsible for these actions when they result in Canada's having to pay damage to other NAFTA partners. This asymmetry exits despite the fact that a large majority of provinces were supportive of the original free trade agreement, and later NAFTA, and indeed have recently sought the extension of NAFTA's benefits to state, provincial, and local government procurement in the face of the Buy American provisions of many of the stimulus programs in the recent recession.

● (1025)

If there is any kind of democratic deficit in the AbitibiBowater decision, it is that the Government of Newfoundland and Labrador was able to force the federal government and federal taxpayers to pick up the tab for its bad behaviour. Surely one of the principles of democracy is that voters should have to face the true costs of such decisions so that they can make a balanced assessment of the pros and cons. The current arrangements reward such bad behaviour and force innocent federal taxpayers, who have no hand in choosing provincial governments in other provinces, nonetheless to pay the tab. This is a classic perverse incentive.

I would therefore urge this committee to recommend that some kind of formal mechanism be established, by federal legislation if necessary, to ensure that the potential for such destructive gaming of the system by provinces be eliminated. Ideally, this should be done by negotiation, but the principle at stake is serious enough that Ottawa should consider giving itself the legal power to claw back from federal transfers amounts equal to the costs of the legal defence of such actions by provinces and the amount of any eventual awards. I realize that this is a complex area, but I cannot believe that a reasonable accommodation cannot be found.

Finally, I observe that precisely because provinces escape the obligations that NAFTA imposes, the European Union was keen to have the provinces represented at the bargaining table for the ongoing Canada-EU free trade negotiations. If the provinces are going to insist on sitting at the table and helping to negotiate such agreements, they should accept up front to be bound by all the obligations that result. To do otherwise is to confer on them power without responsibility, which, in my view, is another combination that has been found to be poisonous to the success of democratic institutions.

Thank you very much.

The Chair: Thank you, Mr. Crowley, for a fascinating commentary. I'm sorry that we don't have a whole lot more time. We only have about 20 minutes to go.

We're going to have to limit these rounds to five minutes in the first round. That's all we're going to get in today. So in fairness to each one, I'm going to ask that our questioners and our witnesses try to keep each segment to five minutes.

We're going to start with Ms. Hall Findlay, followed by Monsieur Guimond.

Ms. Martha Hall Findlay: Thank you, Mr. Chair.

Thank you very much, all three of you.

I have a quick comment, Mr. Crowley. On your last point, we did earlier have the discussion about the frustration and complete lack of negotiation and discussion between the provincial government and the federal government before putting that liability on Canadian taxpayers. I hope that in all of this we may have learned some lessons.

I say that out of full respect for the need for the process, the understanding of chapter 11, the need for that and the international responsibilities that this entails, and indeed from a positive perspective.... But your last point, I think, was the most telling, and I think is something that the federal government needs to work on, if not officially, very much in increasing the level of negotiation, interaction, and cooperation with the provinces.

An hon. member: Hear, hear!

Ms. Martha Hall Findlay: My question, though, is for Professor Van Harten.

As an Osgoode graduate, I'm particularly glad to see you here. This is great. My question for you relates a little bit to Mr. Shrybman's comments.

We're very short of time, but I was interested in your list. I'm glad that's coming to the clerk, because Don Stephenson from the department had said that this is the first time there has been—I think he said this is the first time—a settlement by the federal government under a chapter 11 expropriation. You've suggested there were a bunch more, so I'm looking forward to that.

But can you comment on Mr. Shrybman's comments about what this does from an international law perspective to some of those other rights such as water and forests?

● (1030)

Prof. Gus Van Harten: There's one other publicly known settlement, which is the Ethyl settlement, very early in the NAFTA experience. The United States has never settled a case.

On Mr. Shrybman's comments, as a matter of international law, for example, NAFTA itself defines assets extraordinarily broadly, and I have no doubt that the assets in question here would qualify under the definition of investment in NAFTA chapter 11. As a matter of customary international law, they might qualify as property, but there would be a lot of debate about the amount of compensation to be paid. NAFTA reflects the Hall standard of customary international law, which is the U.S. approach, historically, and most other countries in the world supported other standards such as appropriate or just compensation in general assembly resolutions in the 1960s and the 1970s.

As a matter of Canadian domestic law, I would probably just wish to defer to Mr. Shrybman on his evaluation of that. The one point I would make is that NAFTA covers indirect expropriations, whereas in Canadian law indirect expropriations, compensation is available only if there has been a direct taking of title. That is not the case under NAFTA chapter 11. Furthermore, of course, it's always subject to legislative supremacy, and legislative supremacy, as I indicated, has been in effect subordinated by NAFTA chapter 11 to the decisions of the arbitrators.

Ms. Martha Hall Findlay: Given the lack of time, Mr. Chair, I'll allow colleagues to continue.

The Chair: Monsieur Guimond.

[*Translation*]

Mr. Claude Guimond (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Mr. Chair, I am somewhat disappointed that we have received no documentation, either from the officials or from the people appearing today. We have not received anything. I do not know if it is because we travelled to Washington last week, and there was no time as a result. Mr. Laforest and I have made this observation. We would have appreciated the witnesses sending us their notes.

I have been a member of this committee for two years. We have often discussed chapter 11. We must acknowledge that it is a sensitive issue. We are talking about legal drift and uncertainty. We are hearing all kinds of things. I appreciate the arguments made by Mr. Shrybman when he talks about what the future will bring in terms of natural resources. Last Sunday noon, I listened to a Radio-Canada program that was discussing potential shortages of oil, water and food. If we are not careful and if we do not take the necessary steps immediately, we risk facing serious consequences.

Mr. Van Harten, in your presentation, you spoke about arbitration and about judges being influenced, but particularly about the fact that Canada has not had much success until now. That shocked me. If that is the case, there must be case law that shows it. I would like to know what your statement is founded on, and, given that case law exists, how we are going to manage to salvage anything.

[*English*]

Prof. Gus Van Harten: Yes. What's significant that the tribunals give interpretations to broad language of standards in the treaties. So the tribunals interpret what a very important concept of indirect expropriation or regulatory expropriation means. They interpret what is discriminatory. They interpret what is fair and equitable treatment.

When you look at the legal interpretations arrived at by tribunals, I understand there are differences between cases and facts, but the general law should more or less remain the same from case to case, regardless of respondent state, nationality of claimant, and so on.

I teach international investment law to students. In the NAFTA chapter 11 context, it is quite striking to see that clearly state-friendly interpretations of NAFTA arise under all the key standards in claims brought against the United States by Canadian investors, whereas the more investor-friendly interpretations in existing cases have involved claims against Mexico or the United States. I can cite the ADF award on national treatment.

I will give you an example. The Glamis Gold lawsuit against the United States involved a fair and equitable treatment claim. It involved a claim—the same as the one by AbitibiBowater against Canada here—that there was a failure to live up to legitimate expectations and maintain a stable business environment. That component of fair and equitable treatment was denied as a component of article 1105 in the Glamis claim against the United States, but it has been accepted in the subsequent and very recent claim against Canada in the Chemtura case.

Chemtura was won by Canada, but the interpretation of the law is significant, because in the experience to date—and there are not that many cases—it's quite clear that the United States has enjoyed more state-friendly interpretations of the core standards than have Mexico and Canada. If you extend that to other countries, the trend is the same.

● (1035)

Mr. Steven Shrybman: Could I add something to that, but in plain language? What Mr. Van Harten is effectively saying is that because tribunals are not independent, because they're not like Canadian courts, and because arbitrators depend upon having cases referred to them, no arbitrator would decide a case against the United States. Because they understand that the Congress of the United States would not put up with a private international tribunal deciding that something a U.S. government has done would give rise to compensation to a foreign investor. It's that simple.

Those arbitrators also know that Canadian governments will put up with precisely that type of abuse. That explains the asymmetry in the results between cases brought by Canadians against the United States and cases brought by Americans against Canada—in plain language.

The Chair: Thank you.

Mr. Julian.

Mr. Peter Julian: Thank you.

There's so much I'd like to ask all three of you, but I only have five minutes, so I'll get right to it.

Mr. Shrybman, I have a question for you. You've been clear about the danger of the payout made last summer to AbitibiBowater in setting a precedent, both for water rights that AbitibiBowater has and for potentially those of any other company. Do you think the federal government did an appropriate evaluation of what the impacts were of making this decision before they made it?

We've found out so far today—and this is the first hearing—that it's not just the $130 million; it's another $30 million for severance payments, environmental remediation...we're talking about hundreds of millions. So we're probably talking about a gift to AbitibiBowater of anywhere up to half a billion dollars. The government obviously didn't do an evaluation on the financial side. Did they do an evaluation on the legal side?

Mr. Van Harten, thank you for your comments. Given that the arbitrators who make the decisions in the chapter 11 provisions receive money from the companies that they're called upon to judge, and you raised the issue of judicial independence, do you think we've established a type of kangaroo court, for lack of a better word?

Evidence today has shown that AbitibiBowater is a Canadian company headquartered in Montreal that's using an escape clause to get chapter 11. We've seen other companies like Pacific Rim use similar investor-state provisions to change their nationality.

Does the decision on AbitibiBowater encourage any company that wants to file legal papers anywhere else on the planet to use the chapter 11 provisions to sue the Canadian government for decisions made in the public interest? That's a question that I've asked all three of you.

We will start with Mr. Shrybman.

Mr. Steven Shrybman: There are two possible explanations for why the Canadian government decided to settle rather than defend against this claim. One is that AbitibiBowater was in distress, the government wanted to provide some funding to it, and this was a convenient way to do that without creating a precedent that would cause every other company in financial straits to come knocking at its door. That's one explanation.

The other explanation is that the Canadian federal government doesn't much believe in public ownership and control of Canadian natural resources. It would rather see those privatized in every domain, from forest to water. There was no way it could proceed with a political agenda of that character, so this was a way through the back door to arrive at the same place.

What matters is not what their motives were, but what the consequences of their decisions are. Under NAFTA, Canadian governments, both provincial and federal, have an obligation to provide national treatment, which is the most favourable treatment accorded to any foreign investor in similar circumstances.

There are tens of thousands of companies operating in this country with permits to take water or harvest forests from public land as natural resources. Every single one of them, through the simple expediency of finding a foreign investor in the United States, can now tell others that they cannot recover any of the water that the company is entitled to take by permit to water its golf course, to irrigate its crops, or to bottle Coca-Cola to sell in U.S. markets, unless they pay the company, even though, until this very moment, these resources have always been understood to be public property, held in public trust by Canadian governments, for the benefit of Canadians, both present and future.

That's the consequence and that's what matters. Whether it was a diabolical plan to undo public ownership of public natural resources or just a politically expedient way to funnel money to a company in distress, I don't care. They didn't defend the case and its consequences are clear to anybody who practises law in this domain.

● (1040)

Mr. Peter Julian: Thank you.

Mr. Van Harten, please comment on the kangaroo court, and on the nature of AbitibiBowater using chapter 11.

Prof. Gus Van Harten: On the second question, this is the practice of forum shopping or round-tripping. In forum shopping, you set up a holding company in a third state in order to gain access to that state's investment treaty to sue the state in which you own assets. That's common in investment treaty arbitration. Not all countries allow it, but Canada certainly does.

Round-tripping is more controversial. That allows domestic investors to set up a holding company abroad in order to sue their own country. The most significant case is the Tokios Tokelès decision against the Ukraine, where a holding company in Lithuania was 99% owned by Ukrainians but was allowed to bring a claim under a bilateral investment treaty between the Ukraine and Lithuania by the arbitrators on the basis—and I quote from the award—that “the origin of the capital is not relevant” to the definition of investment.

That was a decision of two of the arbitrators in that case. Quite remarkably, the presiding arbitrator dissented from that decision on the basis that it violated the purpose of the ICSID convention, which was to promote foreign investment. The presiding arbitrator resigned in that case.

The Chair: Thank you.

Very quickly, for one minute.

Mr. Brian Lee Crowley: Just on—

Mr. Peter Julian: Sorry, I would like Mr. Van Harten to reply on the kangaroo court settlement.

The Chair: I'm sorry, Mr. Crowley.

We're going to have to move on with your time, Mr. Julian, if you're going to give him fair comment.

Mr. Crowley, did you want to finish?

Mr. Brian Lee Crowley: Just very quickly, Mr. Chairman, I've heard all the comments about the inadequacies of the arbitration process. I can understand and agree with many of the reservations we have about it.

The point is that there are only two alternatives if we're unhappy with the arbitration process. Either we go back to a situation where we rely on a contest of wills between Canada and the United States, not governed by rules, which was the state of affairs before the free trade agreement and which was much worse than the current status quo, or we move to an improved arbitration process, or indeed, towards the creation of a new set of judicial institutions that govern the emerging set of institutions that are binding the three countries of North America together. I think that's the better solution.

I think the fact that we are unhappy with the arbitration system is not an argument for getting rid of the rules-based system we have in place for relations between our three countries.

The Chair: Thank you.

We'll go to Mr. Cannan.

Mr. Ron Cannan (Kelowna—Lake Country, CPC): Thank you, Mr. Chair.

I just have a quick question. I'll share my time with Mr. Trost.

I just wanted to clarify, first of all, for the witnesses, the comment about water. It's been articulated many times in this committee that it's our government's long-standing position that water in its natural state is not considered a good. It's not a good or a product and therefore remains outside the scope of the trade agreements. We've heard, several times, members from the Council of Canadians bring up the issue of water.

I want to be perfectly clear. It's a specific issue and is my concern as a Canadian as well. The bulk removal of boundary waters from the basins, for any reason, including export, is prohibited, and the provinces have measures in place to protect waters in their jurisdictions. I just wanted to clarify that on the record.

The other question, specifically for Mr. Crowley, is with regard to chapter 11.

Are you stating, then, that it's imperative that we have this chapter 11 in place and that it's working as it was established to do?

● (1045)

Mr. Brian Lee Crowley: Thank you.

I think it is imperative that we have a rules-based approach to trade with the United States that's embodied in the free trade agreement. If you're going to have rules that govern the relationship between Canada and the United States, you must have someone entitled to interpret the rules. This is indispensable.

Is the current arbitration system up to the job? It's a lot better, as I said a moment ago, than one alternative, which is no agreed upon system, so the more powerful party always wins. I think that some very good points have been raised about the adequacy of the arbitration system.

As part of the set of negotiations recently announced by Prime Minister Harper and President Obama extending the logic of the institutions we have already developed to border management and so on, I think we should be seeking an improved arbitration process in which we might have more confidence in the independence of the arbitrator. I think the lack of independence of the arbitrator has been somewhat overstated here, but I think there's always room for improvement.

Mr. Ron Cannan: Thank you.

I agree that a rules-based approach and having a fair, level business field and some predictability are important.

Go ahead, Mr. Trost.

Mr. Brad Trost (Saskatoon—Humboldt, CPC): Thank you, Ron.

My question is to Mr. Crowley.

One of the other witnesses stated that when it comes to arbitration panels and dealing with the United States, the States tend to have the advantage. But when it comes to dealing with Mexico and Canada, investors tend to have the advantage. I'm not sure if investors perceive it that way.

But if investors would perceive it that way, what country would then have the greater economic advantage for attracting investors? Would it be Canada and Mexico, with the more investor-friendly perspective, or would it be the United States? What would be the economic advantage of those perspectives?

Mr. Brian Lee Crowley: I guess I'm a little confused by what's being argued before the committee. It's pretty clear, to me at any rate, that the NAFTA agreement intends to protect investors against precisely the kind of action we saw by the Government of Newfoundland and Labrador.

One of the complaints that has been brought forward before the committee is that sometimes tribunals don't do that. Well, what's the consequence that should flow from that?

My view is that the consequence should be that we get better at enforcing the agreement. If the complaint is that the agreement is properly enforced in Canada but not in the United States, then by all means let us throw our weight into the negotiations for improved institutions within Canada and the United States to ensure that the agreement is properly enforced in the United States.

I don't understand how the fact that it's properly enforced in Canada and not in the United States is somehow an argument for us to change the rules in Canada. I don't get that.

Mr. Brad Trost: Mr. Crowley, I'm not making that argument.

Mr. Brian Lee Crowley: I understand that. I wasn't suggesting that you were.

Mr. Brad Trost: I'm just asking whether this could give us an advantage in Canada.

Mr. Brian Lee Crowley: I spent some time in my remarks talking about why it's important to provide this kind of protection to investors because of the importance of upfront investments and long payback periods. We have to create certainty for investors so they can make that kind of investment.

Canada has been a destination for vast amounts of foreign investment. Anything that continues to assure investors they will receive fair and equitable treatment if they invest money in Canada, I think is a desirable thing.

● (1050)

The Chair: Thank you, Mr. Crowley, Mr. Van Harten, and Mr. Shrybman. I wish we could have gone another hour. I think it would have been useful for everyone. In any event, that is our time.

I have one housekeeping item. I'm going to excuse our witnesses and ask members to give me 30 seconds to consider the operational budget for the hearing we are having now. This is to cover the potential costs of witnesses. I doubt that we'll get anywhere near this number.

An hon. member: So moved.

The Chair: It is moved by Mr. Silva and seconded by Mr. Trost that we pass the operational budget for the Standing Committee on International Trade's consideration of the AbitibiBowater settlement.

(Motion agreed to)

The Chair: Thank you.

We will see you on Tuesday. I think we're back in room 306, but we'll give you notice tomorrow.

We're adjourned.

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