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Chair

Mr. Lee Richardson

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● (0855)

[*English*]

The Chair (Mr. Lee Richardson (Calgary Centre, CPC)): I call the meeting to order.

Good morning. Welcome to the 48th meeting of this session of the Standing Committee on International Trade. We are going to continue our study of the AbitibiBowater settlement, pursuant to standing order 108(2).

This morning we are welcoming as a witness Fred McMahon, vice-president of research at the Fraser Institute, and Scott Sinclair, senior research fellow, Canadian Centre for Policy Alternatives, who has been with us before. I appreciate your coming and wading through the muck this snowy morning in Ottawa.

I think we're all ready to go. It will be the usual procedure. We'll have an opening statement from both of you and will follow that up with questions. I think we should have time for two rounds today.

I will ask you to begin and hope that you keep those opening statements to 10 minutes or less so that we can get to questions. We'll start with Mr. Sinclair, if you're prepared to go.

Mr. Scott Sinclair (Senior Research Fellow, Canadian Centre for Policy Alternatives): Good morning. Thank you for the opportunity to present to the committee again.

The AbitibiBowater settlement raises many serious concerns, and I will briefly address three.

First, AbitibiBowater was compensated in part for the loss of water and timber rights on public lands. These are not normally considered compensable rights under Canadian law. The provincial legislation provided for the government to compensate the company for its expropriated assets—land, buildings, equipment, etc. The company did not pursue this option, turning instead to NAFTA arbitration.

The legislation, however, appropriately denied AbitiBowater compensation for the loss of its timber and water rights, which were returned to the crown. Such natural resources are the property of the provincial crown and the public of Newfoundland and Labrador. The province retains title to the land and the right to revoke licences and permits, with or without compensation, as it sees fit.

Access to publicly owned natural resources—water, timber, minerals, oil, and gas—is not a proprietary right; it's not an ownership right. It's a contingent or a conditional right. It's based on the understanding that the resource rights holder will develop the resources productively in a manner that benefits the public. Unfortunately—and it is a tragic situation whenever a company goes bankrupt and closes its last remaining mill in a province—the company was no longer willing or able to fulfill its part of that social contract.

Provincial governments have exclusive jurisdiction regarding matters of property and civil rights within the province, including expropriation. Provinces also have exclusive jurisdiction over natural resources on provincial lands. In decisions concerning such resources, the interests of investors must be balanced against other legitimate interests, such as those of workers, local businesses, communities, and environmental protection. Under Canadian constitutional law and the division of powers, these are clearly matters to be decided by the provincial legislature.

By contrast, the AbitibiBowater settlement embraces an open-ended and excessively broad conception of property rights which, as you've heard in previous testimony, goes well beyond reasonable protections and Canadian legal norms.

My second point concerns the fact that at $130 million, this is the largest NAFTA chapter 11 award to date. The high payout will undoubtedly encourage future investor-state claims involving regulation of natural resources.

There are also serious questions about the basic fairness of the federal government's spending such a large sum to compensate the investor alone, without addressing the needs of workers' severance and pensions, local businesses, the company's creditors, and the very significant costs of remediation of the environment. This settlement reinforces the view that NAFTA chapter 11 confers rights on foreign investors without taking into account an investor's obligations or responsibilities.

Finally, while the federal government has pledged that it will not seek to recover the costs of this settlement from the Newfoundland and Labrador government, it has put provincial and territorial governments on notice that it intends to hold them responsible for future NAFTA-related damages with respect to provincial measures.

This is far from an abstract or hypothetical issue. There have been 28 NAFTA claims against Canada; six of the seven currently active claims involve an alleged breach by a provincial or territorial government of NAFTA chapter 11. These disputes concern Ontario's blocking of a scheme to dispose of Toronto's garbage in an abandoned mine; Quebec's restrictions on the use of cosmetic pesticides; Newfoundland and Labrador's requirement that offshore oil companies invest in research and development within the province; Nova Scotia's decision to block a controversial quarry, as recommended by a federal-provincial environmental assessment; and conservation measures related to Atlantic salmon and northern caribou.

● (0900)

We are witnessing a constitutional crisis unfolding in slow motion. The de facto imposition through the federal government's treaty-making power of NAFTA chapter 11's broadly worded investor rights constrains the ability of provincial and territorial governments to legislate and regulate even within areas of exclusive provincial jurisdiction.

In closing, the Newfoundland and Labrador government's actions in this matter were lawful, constitutional, and in my view commendable. This settlement sets a troubling precedent that undermines public ownership and control of natural resources. Unfortunately, the federal government stepped in to compensate the investor while disregarding other legitimate interests and claims. This also sets the stage for future unwarranted federal intrusions into important areas of provincial jurisdiction.

Thank you.

The Chair: Thank you for that.

We'll go now to Mr. Fred McMahon, vice-president for research at the Fraser Institute.

Mr. McMahon.

Mr. Fred McMahon (Vice-President Research, Fraser Institute): Thank you, Mr. Chairman, for the invitation to be here.

I particularly appreciate the snow show outside. I was in Mexico about a week ago in a small town, and people were asking me about the Canadian weather. I confidently assured them that the worst of the Canadian winter was over by March 1 without fail.

I'm going to make a brief comment about the presentation we've just heard and then I'm going to go off at a somewhat unusual angle.

The rule of law is crucial to maintain, including the rule of law that descends from trade treaties. If we expect fairness internationally with our investments, which are global, we must provide fairness to those who invest in Canada. When an industry is based on the use of natural resources and that is part of the conditions for which it has invested and built jobs in Canada, then to deprive that firm of natural resources is indeed a violation of property rights, given that their investment was based on that.

The Canadian government or provincial governments, if they so wish and have a compelling reason to do so, may of course expropriate property in the public interest. That's well recognized, but the right of compensation for the expropriation of property rights is also crucial. That is a good balance, with the government having the ability in the public interest to expropriate if necessary while providing the compensation that Canadian investors would expect abroad.

Now, as I mentioned, I'm going to take a bit of an unusual turn here and, if you'll excuse the word, give something of a philosophical discussion.

When I was initially contacted by the committee, I was told that the concern was about a violation of Canadian sovereignty. Any diminution of sovereignty is typically—by my friend from the Canadian Centre for Policy Alternatives, the Council of Canadians, the CBC—deemed a bad thing.

Sovereignty, of course, descends from the sovereign; sovereignty meant the power of the sovereign. Now it typically means the power of the state. In fact, the greatest advances that we have seen over the last few hundred years are a reduction of state sovereignty, and the greatest tragedies we have seen over the last few hundred years are the assertion of state sovereignty.

State sovereignty has been eroded in two directions: internally, as more and more of the power of the sovereign was transferred to the individual and the space around the individual has grown, limiting state power; sovereignty has also been diminished externally, through trade treaties, treaties of peace, and other international connections, which have produced huge benefits.

The revulsion against giving away any sort of sovereignty can be summarized by what was on the Council of Canadians' home page during its combatting of the multilateral agreement—

● (0905)

Mr. Peter Julian (Burnaby—New Westminster, NDP): Mr. Chair, I have a point of order.

I'm sorry; I misunderstood the invitation. I believe the Fraser Institute was actually invited to speak to AbitibiBowater, not to attack our organizations across the country.

Could you perhaps direct the witness to actually speak to the issue that this committee is examining?

The Chair: I thought that would be highly unusual, Mr. Julian, and probably the last person to raise that issue....

Excuse the interruption, Mr. McMahon. Please continue.

Mr. Fred McMahon: Thank you.

Quoting somebody isn't attacking them, and the issue of sovereignty is surely at play here. It's certainly been used in the discussions. I don't see why it's not relevant to the point at hand.

The Council of Canadians wrote: Over the years, our national sovereignty has been diminished first by the Charter of Rights, then the FTA and NAFTA. But they all pale beside the coming MAI.

As you can see, the complaint is against reductions of sovereignty towards the individual and reductions of sovereignty externally. The case of AbitibiBowater is admittedly a reduction in sovereignty. It binds Canada to various international trade agreements, which are important for our well-being, given the very small size of the Canadian market and the fact that we need specialization in Canada, that we need specialization for our own industries to go out to the world market and to efficiently deliver goods here. Unless we continue to respect....

The point I'm trying to make here is that sovereignty should not be taken as an automatically good thing. In fact, through much of past history, the diminution of sovereignty has worked to the benefit of individuals and of economic growth. We are simply here following the rule of international law in compensating for the loss of property rights, and that concludes my statement.

The Chair: Thank you. Both cases will stimulate some interesting debate in questioning.

We're going to begin today with our friend from Newfoundland and Labrador. It's the battle cry of the Newfoundland tea party: expropriation without compensation.

A voice: It's the Republic of Doyle.

The Chair: Go ahead, Mr. Simms.

Mr. Scott Simms (Bonavista—Gander—Grand Falls—Windsor, Lib.): Thank you, Mr. Chair. Thank you, Mr. Richardson.

Thank you to our guests who are here, and thank you for your polarized opinions.

Mr. Sinclair, I'd like to start with you.

I'm no expert, but let's just say that as an alternative, since that is in the name of your centre, I thought it to be a much better state of circumstances if what happened was that you had a three-party conversation in which the federal government was involved with the provincial government as well as Abitibi to transfer money, yes, but at the same time to come up with an agreement to remediate the lands.

That property is incredibly dirty, we'll say. I grew up there. It's a 100-year-old mill; the environmental standards were never tightened until, say, the eighties, so that's a good 75 years without any real, tangible environmental standards.

I think what troubles the people there.... You've mentioned the pension issue, which is a major one, especially for the electrical workers who were transferred. There are also creditors involved who are getting somewhere in the vicinity of 10¢ to 20¢ on the dollar, and of course there are the other issues as well concerning money owed by Abitibi, but in this particular case I thought that what is egregious to them is that $130 million was paid and we're still seeing nothing done. We still have to spend that money to do that.

I'll let you answer that, and then I have a question for Mr. McMahon.

● (0910)

Mr. Scott Sinclair: I entirely agree with that analysis. Just in terms of the basic propriety or rightness of this settlement going solely to the investor and disregarding these other legitimate claims —as you've said, just stepping back from them—is, on the face of it, an unbalanced and inappropriate use of taxpayers' money.

The question is, how did it happen?

I think it happened because of the overriding influence of the NAFTA claim, which, as federal officials said, is a legally separate matter from all these other outstanding claims. We have a broadly worded set of rights, which I think diverges—I'd like to come to this point, too—considerably from Canadian domestic norms and parliamentary tradition, in a sense overriding and distorting important policy decisions.

I agree with you. I think the major priority—and certainly I think it was the major preoccupation of the provincial government—was to assert these claims of the people in the area.

Mr. Scott Simms: That's right, and the assertion was that the rights you spoke about in the beginning—the natural timber rights, and as well rights to the waterways—were certainly ones that belonged to the public, and they were on loan, we'll say, or used by the company to make a profit. It just bothers me that two groups....

I mean, the province did their thing, and when the NAFTA challenge was made, it seemed as though the federal government had no interest in discussing ways to getting around this. Again, $130 million was paid—for what? We don't know.

Mr. McMahon, this is probably more a philosophical question than anything else. Let's take a look at the oil industry for just a moment, and this relates to timber rights as well. When you make an exploration in a certain area and you have found something, you get what's called a licence to explore, and it expires at a certain period of time. If you make a discovery, according to the Canada-Newfoundland Offshore Petroleum Board, you get what's called a “significant discovery licence”, and you can sit on that with exclusive rights for as long as you want.

There's a company for the Hebron Development that sat on it for over 20 years and never did anything. Instead, they wanted to invest in other areas, such as Mexico. To me, this belongs to the people—it's theirs—but really, in effect, it belongs to the oil companies.

I only bring that point up because I think the same can be applied here to timber rights, as well as to waterways. Are we strict enough in how we settle our own resources?

Mr. Fred McMahon: There are two separable questions here. One is the appropriateness of the agreements under which oil and gas are explored for, under which mineral rights are explored for, under which timber rights are given. That's one set of issues.

The other set of issues is that once you put that agreement into a written agreement, then you have a legally binding agreement. You may disagree with your landlord, or if you are a landlord, you may find that you really don't like a clause of your lease arrangement. That doesn't mean that you can unilaterally change it.

● (0915)

Mr. Scott Simms: I'm sorry; I don't have a lot of time. Let me interrupt there.

My landlord also has the right to kick me out when he sees fit, with due notice. Here's the situation: what if you had a law that stated that if you do not move on this particular land—whether it was concerning timber rights, or whether it concerns an oil find—and if it's particularly egregious to the public, does the government have the right to say that you don't have it anymore and that they're going to give it to somebody else to use?

Mr. Fred McMahon: It is a good question.

It can be done, with appropriate compensation. I come back to the point that if you destabilize—

Mr. Scott Simms: Compensation for what?

Mr. Fred McMahon: It's compensation for whatever losses the company bears by having that. For instance, if the company leaves that oil and gas find, and they no longer have it, they've suffered a loss. If you compensate the company for the loss that they've borne, as in the Abitibi case, then yes, the government can move on that, but you don't want to destabilize the rule of law or destabilize agreements that you've made. As I say, there are two separable questions here.

The Chair: Thank you.

Go ahead, Monsieur Laforest.

[*Translation*]

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

Mr. Sinclair, in your presentation, you said a constitutional crisis was slowly unfolding with respect to the $130 million in compensation from the federal government. You implied that the federal government was interfering in an area of provincial jurisdiction.

Could you please elaborate on how and why that crisis could get worse?

[*English*]

Mr. Scott Sinclair: Thank you for the question. The constitutional dimensions of this issue relate to the prospect that the federal government, rather than acting simply as the signatory of the NAFTA, assumes responsibility for whatever fines or awards are levied in relation to NAFTA chapter 11 when provincial or territorial measures breach this treaty. If the federal government, rather than assuming that responsibility, attempts to hold provinces liable and insists that they pay in whole or in part, that really changes the constitutional calculation, particularly when they're acting within areas of exclusive provincial jurisdiction.

That's where I see this slow-moving constitutional crisis potentially developing.

[*Translation*]

Mr. Jean-Yves Laforest: I am asking because it would behoove us to keep a close eye on this issue. As you know, Canada is currently negotiating an agreement with the European Union. And, at the very end, it will no doubt include investment protection clauses. There is a difference between NAFTA and the agreement with the European Union, however. In the case of the European Union, the provinces are involved in the negotiations, and I would imagine they will have to sign off on the agreement. But I don't think that was the case with NAFTA.

We would do well to take into account the repercussions of the situation, as you described them, would we not? Canada, if not the provinces, should exercise caution and bear in mind what happened between the Government of Newfoundland Labrador and AbitibiBowater, should it not?

● (0920)

[*English*]

Mr. Scott Sinclair: I think that's an excellent question, and for the first time in the Canada-EU negotiations, the provinces are directly represented at the negotiating table, as you note.

I don't know what the exact provisions of that treaty will be with regard to provincial compliance, but I do believe that provincial and territorial governments, and the federal government itself, have a very strong interest, particularly if these types of investment protection provisions and investor-state dispute settlements are to be included in CETA, as it seems likely they will be, to ensure that these broadly worded, open-ended vague notions of, for example, expropriation and other issues related with the interpretation of these investment rights by various arbitrators and arbitration panels are clarified.

These issues have to be clarified and resolved prior to the provinces committing themselves, if they're going to do that in areas of provincial jurisdiction. I think it's a strong argument for not including these investment protection provisions and certainly for not including “investor state” in the treaty.

[*Translation*]

Mr. Jean-Yves Laforest: Mr. McMahon, as you said yourself, your presentation was a bit on the philosophical side. As I understand it, you believe that free-trade agreements and trading systems, in general, offset the small size of our market. You also talked about a nation with full sovereignty, noting that it has its disadvantages as well. I would like you to elaborate on that a bit more.

[*English*]

Mr. Fred McMahon: What I was referring to is actually the positive aspects of giving up sovereignty, of reducing the power of the state. For instance, individual rights and freedoms are actually a reduction in sovereignty, because it keeps the state out of the sphere around the individual. Reductions of sovereignty externally tie us into trade treaties.

In the case of Canada, with our small market, that's essential for our well-being. When you look at the evidence globally, you'll find that the nations that have entered the world global trading system have actually had the greatest reductions in poverty and the greatest increases in prosperity.

My argument was that reductions in state sovereignty have a history of positive outcomes rather than negative outcomes. What I was trying to deal with was the assumption that anything like AbitibiBowater that is seen to diminish sovereignty is therefore bad because it diminishes sovereignty. What I was saying is, no, sovereignty is not an intrinsic good.

[*Translation*]

Mr. Jean-Yves Laforest: Thank you.

[*English*]

The Chair: Thank you, Mr. McMahon.

Mr. Julian, I don't know if we should just give you six minutes. You've already taken a minute.

No, go ahead for seven minutes.

Mr. Peter Julian: Thank you, Mr. Chair.

Thanks to our witnesses, particularly you, Mr. Sinclair. You've done your homework; you obviously understand the file. We appreciate your bringing your expertise to the committee.

I'd like to ask two sets of questions. You made a comment, and I was very interested in it, saying that even though the Newfoundland and Labrador legislature had passed legislation that allowed for the compensation of real assets by the company, the company did not follow up; the company did not pursue that avenue.

I'm interested in a little more detail there, because the company didn't follow up on that. They didn't use the court system. In a very real sense, what they've done is try to destroy the rule of law by going directly to the federal government with their hands out and just asking for money. There's no court process, no legal process involved. The company obviously would not have won in a court of law.

How does this decision impact upon companies now—being able to rip up the rule of law, not go through the court system, and simply go to the federal government and demand money?

I'm also interested in the fact that this is a Canadian company headquartered in Canada. The witnesses from DFAIT confirmed that on Tuesday. What was supposed to be used by foreign investors can now be used by Canadian companies. I'm interested in what the implications are there as well.

My final question is this. We're counting up the hundreds of millions of dollars: $130 million that was given to AbitibiBowater; another $30 million that was assumed by the Newfoundland and Labrador government, which was certainly partial compensation; the environmental remediation that Mr. Simms has spoken about, which is in the hundreds of millions of dollars range. How much is it going to cost Canadian taxpayers and Newfoundland and Labrador taxpayers because the government is not pushing AbitibiBowater to respect its engagements and is simply handing money over?

● (0925)

Mr. Scott Sinclair: First, the Newfoundland legislation did provide for the Newfoundland government to compensate AbitibiBowater for its real property—its land, its equipment, and the sorts of assets that are normally considered compensable in an expropriation under Canadian law.

The legislation also blocked the company's assets to the courts, which is more common that you would think in Canada. Particularly in areas of environmental regulation and environmental protection, it's not uncommon for a government to extinguish all claims and to set up a process to settle claims, or, in some cases, even impose a settlement.

I have no doubt that if AbitibiBowater had followed that process, it would, at some point, have gotten value for its real assets. It might not have been entirely happy with it, but I think it would have been.

I'm not privy to the discussions that went on. There obviously were discussions between the province and the company over compensation, and as we heard, there were some trilateral discussions as well. I don't know if they were only tied to the NAFTA case or not.

As we heard in the testimony on Tuesday—and I'm not privy to these negotiations—the Newfoundland government was insisting that these other legitimate claims be factored into any settlement.

A voice: You're saying reasonable claims.

Mr. Scott Sinclair: Yes; they would include severance, pension, and environmental remediation claims. That was clearly their position. You'd have to invite the company to the committee to discuss what actually happened there.

The point you raise about the nationality of the company is a very important one. Again, it's another of these vague and open-ended problems in this arbitration system. In this case, AbitibiBowater, as a result of the merger, at least had substantial business operations in the United States.

You do have cases like the Gallo case, involving Ontario's legislation ending the scheme to dispose of Toronto's garbage at Adams Lake, in which basically the domestic investors have already settled and been compensated. Now they've passed off the claim to a U.S. individual, who's pursuing it under NAFTA. In my view, this is totally unacceptable.

You heard from Gus Van Harten that these sorts of gimmicks are quite common, actually, in international arbitration—unfortunately common.

Mr. Peter Julian: Just for the record, what you're saying is that the Canadian investors in this particular case, the Gallo case, were compensated—

Mr. Scott Sinclair: Yes, they were—

Mr. Peter Julian: —and now they're going for double, triple, quadruple compensation from—

● (0930)

Mr. Scott Sinclair: They're rolling the dice and trying to get a payoff under NAFTA.

Mr. Peter Julian: In the same way that AbitibiBowater just went to the government and said, “Hand over money”, you can now have other companies, Canadian as well, just going to the government and saying, “Hand over money; just shovel that money off the back of a truck to me”.

Mr. Scott Sinclair: I think the key thing about AbitibiBowater's claim is that it was appropriate for them to expect compensation. I think the Newfoundland government accepted this for their real assets.

Contrary to what Mr. McMahon has said, the full range of resource rights are not considered property rights. It's not just a matter of governments legislating this. Even when governments don't prescribe, and it's left to the courts, there's a common law presumption that compensation will be paid.

The courts do not protect all types of resource rights and permits. It's not an ownership right. These are publicly owned resources. This is an issue for every province in Canada. I served as a provincial official, and I can tell you that every province in Canada, including those that are very supportive of these agreements, protect their rights over resources and are insistent on this notion that these are publicly owned resources and that access to them is a conditional right.

To your last point, yes, there are a lot of claims. There are a variety of interests involved here. Unfortunately, the various levels of government are picking up the tab. I think the Newfoundland government has stepped into the breach. I'm disappointed that the only federal intervention was solely on behalf of the company and its investors.

The Chair: Go ahead, Mr. Holder.

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

I will be sharing my time with Mr. Trost.

In the same spirit that Mr. Julian saw fit to have Mr. Sinclair be his sole respondent, I might actually give Mr. McMahon some balanced time on this issue, just so that we get a thoughtful and balanced perspective.

It's rather interesting; as I've heard the testimony, the main actors in this situation, of course, are the Province of Newfoundland and Labrador—I dare not say, Mr. Simms, the "republic", as it's a bit early to call it that—as well as AbitibiBowater and the Government of Canada. Lest we forget, the tragedy in this is the tragedy that it came to pass at all. I don't think it's the ultimate outcome that anyone would have wished.

As I think about this whole circumstance, what we have is a rules-based system that allows companies to properly become engaged in legal contracts. Should there be disputes, then we have a dispute settlement mechanism that creates outcomes. As I think of it, in the absence of a rules-based system, to me it asks the question of what the expectation would be.

Mr. McMahon, you made the point, and I think it's a very good one, that if we expect fairness in Canadian business dealings internationally, without the rule of law being maintained, particularly in trade, how would you strike that balance? In other words, what would Canadian businesses expect abroad in terms of their dealings?

Could you expand on that just a little bit for us, please?

Mr. Fred McMahon: Certainly.

Canadian businesses and Quebec businesses—for example, Bombardier—have worldwide networks. The outflow of Canadian investment is about equal to the inflow of Canadian investment. Most of our great firms, or a few of our great firms, would survive without international markets. I mentioned Bombardier, and there's Magna. Name any major manufacturing or service industry in Canada, such as our banks; if rules were simply dropped, as my friend here would like, internationally our businesses would be left high and dry.

I'd like to make a further domestic point. If we give Canadian provinces untrammelled sovereignty over resources so that they can make and break agreements when they wish—withdraw timber rights, withdraw mineral rights, withdraw water rights that they've agreed to—and we give them the power to do that without compensation, we simply shut down all mining, all oil and gas exploration, all timber harvesting in Canada. No company is going to go in if, on a Wednesday, the provincial government can simply say, "All these properties actually belong to the state. We have decided to terminate your thing. It doesn't matter that you've just spent a billion dollars building a mine. We're taking away your mineral resources because we want to." It could be for whatever reason. No one would invest in any of these industries that are so important to rural Canada.

You have it both internationally, as you pointed out—and pointed out extremely well, I thought—but if we went the full extent of what's being recommended here, with no compensation for resource rights in Canada, we would also see an immense blow to our economy and a devastation of rural life if we accepted that provinces have sovereignty and are not constrained by their own agreements.

● (0935)

Mr. Ed Holder: You know, it's rather interesting; in your initial remarks, you talked about taking a bit of a philosophical bent. I have to declare to all at this table that I did a philosophy major at Western, which is why I went into insurance: that's what you can do with a philosophy degree, at least from my standpoint.

A voice: You can go into politics.

Mr. Ed Holder: There you go, and my Cape Breton mother was very proud, I want you to know.

A voice: Hear, hear!

Mr. Ed Holder: I keep coming back to this, I guess, but I heard a couple of comments from my colleague Mr. Julian that I just have to challenge. You can't leave those kinds of things sitting out there. It's not appropriate.

One of the things I heard him say was that AbitibiBowater ripped up the rule of law, and that AbitibiBowater was talking about double, triple, quadruple compensation. That feels outrageous to me, and I just have to challenge that and say that it's just not appropriate.

As my last question—I'd ask you to be briefer in your response than I have been in my comment, just so that Mr. Trost can ask a question as well—what have we learned from the whole dealings between AbitibiBowater and the province and the Government of Canada?

Mr. Fred McMahon: Very simply, I think we should follow our own treaties. When the Government of Canada, representing the people of Canada, signs an international treaty, we should accept a rules-based system and not believe that we have the power to rip it up.

We may have other policy questions at stake, but as I've said, the legal agreement and compensation constitute a separate issue from other concerns. You have to deal appropriately with respecting the international framework of treaty laws that cover this. You may have other complaints, but that's a separate issue.

Mr. Ed Holder: Did I leave time for my colleague?

The Chair: You have less than a minute.

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

Mr. McMahon, we're looking at this case specifically, but we're also looking at the issue more broadly.

Does the Fraser Institute have any studies you could forward to the committee on the economic impact of protecting foreign investors and how it affects capital flow and investment to companies? Is there anything you can forward to the committee?

Mr. Fred McMahon: We haven't done anything specifically, but there would certainly be studies that I could look up.

Mr. Brad Trost: If there's anything you could forward to the committee, I'm sure it would be useful in our deliberations to understand the economic impacts.

By my count, Mr. Chair, I have three seconds, so—

The Chair: Well, thank you, Mr. Trost.

We have an opportunity, if we get through this very quickly, to at least to start a second round.

These are five-minute rounds for questions and answers, and we're going to ask Ms. Hall Findlay to begin.

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

Thank you very much, gentlemen.

Mr. McMahon, as an aside, I just want to thank the Fraser Institute for its commentary in recommending that the current Harper government follow the lead of the prior Liberal governments in its economic policies. Thank you very much for that. I thought that showed great insight.

I'll just throw in my background—not necessarily a philosophy background, but an international law background—and suggest that entering into international trade treaties is not a giving up of sovereignty, but is, in fact, an exercise thereof. Entering into contractual arrangements is, in fact, an exercise of our sovereign ability to do that, but that's a much longer conversation.

Some interesting issues have been raised, Mr. Sinclair, and the challenge we have now is that we're not going to answer these in five minutes, so I will be asking for some further discussion, actually. On the issue of property rights, there's a very big difference between an ownership right and a right to use. If you have a contract to have a three-year supply of widgets, for example, and the widget supplier cuts that off after a year and a half, then you will have a legal claim against the supplier of widgets for the loss you will have suffered with regard to lack of access to those widgets for the subsequent year and a half.

I don't know that compensating somebody for an early termination of a right to use water or an early termination of a right to use wood or timber, or have access to that, is a bad thing. I don't know, and I don't know that it necessarily needs to be a denial of the underlying ownership rights of those resources to provide compensation if, in fact, there was an arrangement to use and that arrangement gets terminated early.

As I said, we're not going to be able to answer these questions in five minutes, but I would like to have a longer conversation because, like you, I feel we have to make sure we maintain that ownership right and the rights that come with it with the provinces and the territories.

Here is my other challenge. We've heard that perhaps there's been abuse of nationality of enterprises to take advantage of chapter 11. We've heard challenges with possible arbitration panel biases that need to be addressed. We have very clearly a lack of communication, and this is the one I will finally ask your thoughts on now and again for further discussion because, as a perfect example, the country is in the middle of negotiations with Europe. I think the opportunity here is to learn from some of the challenges that the NAFTA provisions have created to allow us, in our discussions with Europe, to perhaps word things better—to be clearer on nationality, for example, and to address some of the challenges we've seen in a clearer way.

Any thoughts you might have on that, after this, would be very helpful.

Finally, the most important thing I have come away with from the AbitibiBowater issue is the extraordinary lack of communication that allowed the federal government and Canadian taxpayers to be on the hook for a claim that could conceivably have had that compensation.... I don't disagree at all with the idea of compensation, but it could have allowed that compensation to go to other aspects of liabilities, such as the remediation and the pensions that never happened.

It's very frustrating to hope for responses in five minutes.

Mr. Scott Sinclair: I'll just address one point very briefly. I think it is extremely exaggerated to say that this principle of public ownership of resources with no automatic right of compensation would be an immense blow to the Canadian economy, when for public reasons—including both pro-development and controlling development for environmental and other reasons when property rights are amended—the Canadian economy and our natural resource economy has operated that way for over a century. Governments and companies normally act reasonably toward each other. They have a mutual interest in developing these resources.

● (0940)

We are currently operating under these rules. It's the excessive, open-ended version of property rights under NAFTA that is beginning to destabilize those understandings.

I'll leave Mr. McMahon some time to respond.

Mr. Fred McMahon: Well, first, on your opening gambit, it is true that it is an act of sovereignty to negotiate trade treaties, but once you do that, they actually limit your sovereignty. They say that you cannot do this or you must do that. In the case of NAFTA, it is the required compensation. The Canadian government's sovereignty over walking away from that is limited. The Canadian government's sovereignty over throwing up tariffs outside the treaty is limited. Yes, you use your power to negotiate the treaty, but then the treaty puts constraints on the exercise of sovereignty.

As for property rights to natural resources, you can call them contractual agreements, if you wish, or you can call them property rights, but the fact is that if you and I have an agreement that I am allowed to use something or can receive a supply of widgets, in your case, for a certain period of time, cancelling that agreement without compensation is a violation of either property rights or contractual rights. You're quite right that in five minutes we don't have time to get into whatever fine distinctions there are between the two, so at this point, I'm quite happy to use the muddy terms “property rights” or “contractual rights”. We can work out the details of the definitions later.

● (0945)

The Chair: Thank you.

We are going to run over time, but we started a bit late, so I'm going to give you the final one, Mr. Keddy. Be in and out in five minutes.

Mr. Gerald Keddy (South Shore—St. Margaret's, CPC): Thank you, Mr. Chairman, and welcome to our witnesses. It'll be five minutes from me; no worries.

I want to go back for a moment, Mr. Sinclair, to your statement about property rights. I've always been amazed—no disrespect to the lawyers in the room—that if you want a different opinion, you just ask a different lawyer, and I think you stand to be corrected on property rights.

There certainly are lots of property rights in Canada regarding water. They simply don't regard and treat water as a commodity. You should be clear in what you're saying. There are all kinds of pre-1867 water rights in Canada and post-1867 water rights in Canada, lots of them, for using that water to generate electricity, turn a mill, and do other things. Simply, it is not a commodity to be exported. That's the fine line.

Would you agree or disagree?

Mr. Scott Sinclair: I wouldn't agree with that characterization of my comments, because I was talking specifically about access to publicly owned resources.

Mr. Gerald Keddy: Thank you.

Let's talk about publicly owned resources. First of all, I'm not clear that there was a lease agreement for AbitibiBowater in Newfoundland. I don't know if it was a lease agreement or if they actually owned the property.

It was a lease agreement. Do we know that? There is a difference. You can talk about using natural resources in a lease agreement, and absolutely, that lease can be mitigated at the end of the lease or by due process within it, but within the terms. If you own the property, that's when expropriation comes in. You don't expropriate in the case of a lease agreement, to my knowledge.

As for timber rights, why is there the idea that timber rights are somehow different from any other property? They're no different from any other property. If you follow your summation and your explanation of this, which I'm trying to do, then as a private landowner, I don't own my property. I'm only leasing it somehow from the government, as long as I pay my taxes on it. I don't think most Canadians would agree with that statement. I think they think that they own it, but that it can be expropriated for the so-called public good in certain instances. However, until those instances occur, we own our property. In different provinces, there are different regulations involved. I think in Nova Scotia we get the first seven feet or 10 feet of surface. After that, the mineral rights can be opened to somebody else, but we own our property.

I don't know how you can say that it's different, somehow, because there are timber rights involved.

A voice: Your next witness will clear that up.

Mr. Scott Sinclair: Again, I want to insist on the point that we're addressing today, which is compensation for access to publicly owned resources.

● (0950)

Mr. Gerald Keddy: No, we're talking about privately owned resources.

Mr. Scott Sinclair: Where the investor doesn't own the resources, there can't be an expropriation. Expropriation is the taking of property. If there is no proprietary right, there is no expropriation.

Mr. Gerald Keddy: If there wasn't an expropriation, why would the Province of Newfoundland bring in legislation so the company couldn't sue them?

Mr. Scott Sinclair: The legislation expropriated certain assets, and it returned rights—the rights I'm now talking about—to timber and water to the crown.

Mr. Gerald Keddy: Absolutely, without question, but I'm not clear on whether they owned it wholly or they leased it. Your original statement didn't differentiate between leasing and owning. That's my question.

If the position of the Council of Canadians is that no Canadian owns property, I think you're going to have a difficult job convincing them of that.

Mr. Scott Sinclair: Well, I don't represent The Council of Canadians.

Mr. Gerald Keddy: Oh, pardon me.

Mr. Scott Sinclair: My statements are on the record. You can check them against your memory.

Mr. Gerald Keddy: The other quick comment—

Mr. Scott Sinclair: You raise some interesting points. This is a complex issue, and I would agree with that.

Mr. Gerald Keddy: I think they are interesting points. The issue here—and I don't think anyone is arguing it—is a very difficult one. No one is happy with the situation. I'm sure AbitibiBowater is not happy with the situation. The labour union in Newfoundland is not happy with it. I don't think the Government of Canada is happy about paying $130 million.

To Mr. McMahon's earlier point that we try to avoid this in the future, in the meantime there has to be a process for compensation. It's never going to involve everybody. It's never going to be broad enough. It's a—

Mr. Fred McMahon: If we can violate our contracts without compensation, we violate the rule of law and we suppress investment in Canada. No one will believe us.

The Chair: Thank you, Mr. Keddy, and thank you to our witnesses. We have just begun; in any event, I appreciate the beginning.

We're going to have another round in a few minutes. I'm going to ask for a two-minute break while we bid our witnesses farewell and welcome additional witnesses.

We'll suspend for two minutes.

Thank you.

● _____ (Pause) _____

●

● (1000)

The Chair: Welcome back to the second round of witnesses in our continuing study of the AbitibiBowater settlement. In this second round, we have Jean-Michel Laurin, vice-president of global business policy for the Canadian Manufacturers and Exporters. Welcome back, Monsieur Laurin. It's good to have you here.

We also have David Coles, who is the president of the Communications, Energy and Paperworkers Union of Canada. Welcome, Mr. Coles, and thank you for being here.

As individuals, we have replacement witnesses, for a reason I'm not entirely sure of. I want to thank Michael Woods, a partner of the trade and competition group from Heenan Blaikie, and Alexandra Logvin, who is a lawyer in the litigation group for Heenan Blaikie, for coming at the last minute.

I understand that this was somewhat thrust upon you, and I appreciate your taking the time to come on short notice to fill in here. I'll let you explain that further as you begin to speak. I don't know if you have an opening statement prepared, but I will ask our other witnesses in this case to try to be brief, because we only have about 45 minutes to go.

We will begin with opening statements. I'm going to ask again that we might condense them a bit in order to get into questions. We'll start with our witnesses now.

First we have Mr. Coles, the president of the Communications, Energy and Paperworkers Union of Canada.

Please go ahead, Mr. Coles.

Mr. David Coles (President, Communications, Energy and Paperworkers Union of Canada): Thank you, sir.

Thank you to the panel as well. I appreciate the opportunity to tell our side from the workers' point of view.

I would like to give you a little bit of my background. It is a very unique position for a trade union leader to have had to spend most of the last two years in corporate boardrooms dealing with CCAA protection law issues, international trade law issues, and bankruptcy law issues.

I am not a lawyer; I'm a negotiator. However, I did chair the negotiations with AbitibiBowater to try to find—and in the end was successful—its way out of CCAA protection.

Once again, my name is Dave Coles. I am the president of the Communications, Energy and Paperworkers Union. We represent some 130,000 members, including about 60,000 members in the forest sector, of which 7,500 are current AbitibiBowater employees. There is also another group, about 20,000 former employees, who were our members and who are now retirees.

In March of 2009, AbitibiBowater closed the Grand Falls-Windsor paper mill in Newfoundland, and over 500 of our workers lost their jobs. We represented those proud workers, and they were confronted with the harsh choice between bowing to the company's demands—they had been bargaining—and giving major concessions. AbitibiBowater at the time was very much playing hardball with our members.

As it happens, the Grand Falls-Windsor workers had to confront the latter choice. They did so by being robbed of their final rights that were properly negotiated in a contract—their severance pay.

It is important to put the dispute between AbitibiBowater and Newfoundland and Labrador in a proper perspective. When Newfoundland and Labrador adopted Bill 75, which revoked AbitibiBowater's water and timber rights and expropriated the hydroelectric assets along with the mill, it did so because AbitibiBowater closed the Grand Falls mill and refused to pay severance packages owed to the mill workers.

On April 30, 2009, about a month after the mill shut down, Premier Danny Williams issued an ultimatum to AbitibiBowater, telling the company to respect its severance obligations to the workers or face expropriation. In saying so, the premier took a proactive step in favour of his citizens' right to obtain what was due to them.

Instead, the company was placed under the protection of the Companies' Creditors Arrangement Act, the CCAA. You should note that severance was to be paid 48 hours later, but the payments were circumvented by the company's filing for CCAA protection—a coincidence, some say.

Thus, the premier acted and the government then stepped in and paid more than $30 million in severance pay that was owed to the people who lost their jobs in Grand Falls. To my knowledge, it is unprecedented for any government in Canada to take such an action. I should add that I personally had to sign a $30 million promissory note—it was actually $33 million—with the premier, to ensure that if the union ever did win its cases before the courts, we would repay the $33 million. We didn't win, and I was relieved of that responsibility.

We also have to be clear about the terms of the expropriation. The water and timber rights granted by Newfoundland and Labrador to Grand Falls-Windsor mill owners back in 1905, originally the Anglo-Newfoundland Development Company, were conditional to the operation of the mill in the province. It is in section 3 of the 1905 charter, a lease between Newfoundland and the company, and you'll see in my report that it is stated there.

The 99-year lease was renewed in 2002, but only on the condition —a contractual condition—that the number 7 paper machine would stay open. If that weren't the case, the provincial legislation stated that the lease would be revoked and that timber and water rights would go back to the public.

● (1005)

That was the law.

The larger question is whether AbitibiBowater was using public resources to run the paper mill or to be a private power producer. Put another way, are the licences to use resources for economic development just another kind of private property that can be used, not used, or sold, regardless of public benefit?

As for the hydroelectric assets and the mill itself, Newfoundland and Labrador did announce their willingness to compensate AbitibiBowater. I was in the boardrooms when those discussions were taking place. The premier never did say—at least when I was around—that they weren't going to find a way to compensate AbitibiBowater, because they knew they had a contractual right to do so.

That wasn't good enough. The company then launched a $50-million NAFTA challenge. At the time I told the company they were making a mistake and, given the opportunity, we would challenge that. Rather than wait for an unelected trade tribunal to give the ruling that would have in all likelihood favoured Canada, as the 1905 charter lease was judicially strong, the federal government simply settled out of court for $130 million.

My knowledge of those assets is that they paid a fairly high price for a very low-valued operation. This was tantamount to saying to AbitibiBowater, “You were right. We were wrong. By the way, we acknowledge that the water and timber rights are yours, not the province's”. That goes back to the issue of law.

On Tuesday, Steven Shrybman made a strong case to the effect that instead of burying the problem under the rug, the out-of-court settlement might have very dark consequences for the status of Canadian resources. We endorse that. The rash decision of the federal government in this case might serve as jurisprudence that the company that is granted a permit or lease to use or exploit a resource, such as water or timber, might demand compensation if that permit or lease is revoked.

That was a startling and dangerous concession for the federal government to make. We disagree with chapter 11; the record's clear on that. We think it represents no less than a charter of rights for foreign investors that allows unelected trade tribunals to trump not only democratically elected governments but also the country's legitimate judicial process. However, the chapter 11 process is there, and while it is, there is a chance it may rule against the claimant, as it did in the UPS case, or minimize the claim for foreign investors, as it did in the S. D. Myers case, in which Canada only had to pay $850,000 out of a $20 million claim. However, everybody loses when the federal government simply pleads guilty and acknowledges a company's right to a resource that it did not own, but merely leased.

Our only consolation in this case is that thanks to Premier Williams, we were able to have the severance paid to our members.

Thank you.

● (1010)

The Chair: We'll go now to our stand-in witnesses, if you will.

Mr. Woods, do you have an opening statement?

Mr. Michael G. Woods (Partner, Trade and Competition Group, Heenan Blaikie, As an Individual): My name is Michael Woods. I'm a trade lawyer at Heenan Blaikie just down the street here on Metcalfe. That's why I'm here—because I'm just down the street on Metcalfe. The person you really wanted to hear from, Professor Todd Weiler, my good friend, wasn't able to make it from London because of the weather. He sends his apology.

I won't make a real opening statement. I'm just here to explain that I'm pinch-hitting and that I wasn't involved in the case on either side. I can answer questions to the best of my ability. I haven't delved into the case in any great detail. We in the trade bar, of course, follow these different chapter 11 cases.

I'm very interested in the federal-provincial aspect. I'm very interested in the questions of how people perceive the NAFTA going forward. I'm very interested in the idea that we should not consider ourselves being at a fixed point. It's awfully hard to open trade agreements and amend them, and the danger of doing that—and we've had those discussions before about NAFTA—is that you could lose the whole agreement. I think there's a trade-off in terms of the NAFTA, and indeed NAFTA chapter 11, and it would be a bad day if we had to tear up the whole agreement or if it were to be de-liberalized, let's say.

That said, I think there's lots of scope and lots of room for administrative mechanisms and ways to approach trade as we're going forward.

I'm proud to say that my firm advises the Government of Quebec in the Canada-EU free trade negotiations, and in that context I believe we are seeing more involvement. I'm not directly involved in those discussions—it's Pierre Marc Johnson and Véronique Bastien of our Montreal office—but I see more and more interchange between the provinces and the federal government as we move forward with these trade agreements, because there's a recognition that the trade agreements affect provincial jurisdictions as well as federal and that there's a lot at stake.

It's not a one-way situation. The reason we have the aspects of chapter 11 and investor-state dispute settlement, which is the big issue, is that it's a mechanism that's 100 years old and has been protecting Canadian, European, and American investors all around the world. It's something we seek to protect our investments.

Trade works as a two-way street. Countries that were the developing countries that we wanted protection in are now countries like Brazil, which are investing huge amounts of money in Canada. The investment between the United States and Canada is huge. I don't have the statistics with me, but there's this added protection.

Obviously I have a vested interest. I've been counsel on NAFTA cases. I've been co-counsel with Todd Weiler, so I have that particular point of view, but I think that progress can and should be made on the federal-provincial aspects. It is possible and it's doable.

Finally I'd like to say that having just come in as a pinch-hitter and looked through the case very briefly, my view is.... I've worked at the trade law division. I was there when we negotiated the NAFTA. I was there when we negotiated the FTA. I was there during the Uruguay Round. I'm not that old, so I wasn't there during the Tokyo Round, but I've been there: I've acted on government teams defending and I've acted as claimant counsel.

The only documents I have are the claim for arbitration, the notice of intent, and the claim itself. I know the lawyers on both sides. I think the lawyers took a calculated view of the situation, and they came out with a settlement. I can't comment on the politics of the settlement and I can't comment on how the situation came to be where it was, but if I were sitting there as counsel on either side, I would think that the deal that was struck would be a reasonable one. If I were sitting with the trade law division going back to government, or if I were advising AbitibiBowater, I would say that there would be risks in going forward and that this is a settlement we can live with.

● (1015)

As to the other related elements, I don't have a clear picture of what was going on because I wasn't involved. Perhaps that allows me to speak more freely; I am speaking today as an individual. However, I can tell you this: if you have a hard question and you get two answers from two different lawyers, as you were saying, I have with me Alexandra Logvin, who joined the firm as a student working on a NAFTA chapter 11 case. She has great experience in international arbitration. She's worked with the federal government as well. She worked on the UPS case. She's worked with us and with Todd Weiler on claimants' cases.

That includes, I must tell you, for those of you who wonder about the balance of how the NAFTA could work, that I'm proud to say that we fought for the feedlot operators of Picture Butte and Lethbridge and so on when the border was shut because of BSE. We took a case forward for individual cattle lot operators, and we consolidated the case.

So it's not just about big corporations suing or making claims against the government; the tool can be used by anybody who has an investment. One of the problems, frankly, and one of the things that I would like to see would be more empowerment for individuals, for corporations, to be able to take on governments directly, at their own expense, and to find ways to set up tribunals so that they're less ad hoc and more cost-effective—and therefore less costly—for individuals who should be able to take on countries that are harming their investments or their trade rights, just as you can sue the government in Canada.

I said I wasn't going to make an opening statement, but if you put a lawyer in front of a mike, that's what happens.

The Chair: Thank you for that. I appreciate your comments. It seemed very reasonable to me.

We'll conclude with a brief opening statement from Jean-Michel Laurin, vice-president of global business policy at Canadian Manufacturers and Exporters.

[*Translation*]

Mr. Jean-Michel Laurin (Vice-President, Global Business Policy, Canadian Manufacturers and Exporters): Thank you, Mr. Chair.

Good morning everyone.

[*English*]

Thank you for the opportunity to appear again before the committee this morning on behalf of Canadian Manufacturers and Exporters and to take part in your discussions.

Before I begin, I'd like to say a few words about Canadian Manufacturers and Exporters. CME is Canada's leading trade and industry association, and we're the voice of manufacturing and global business in Canada, as you know. Our association represents more than 10,000 leading companies nationwide, and more than 85% of our members are small and medium-sized manufacturing companies, representing every industrial and export sector of the Canadian economy.

As you know, manufacturing is an export-intensive business. More than half our industrial production is exported directly, and most of that is exported to or through the United States. Manufacturers also account for two-thirds of Canada's exports, a significant proportion of Canada's foreign direct investment, and foreign direct investment coming to Canada as well.

It's increasingly critical for Canadian manufacturers to succeed in global markets, as you know. As manufacturers increasingly invest in innovation and become more agile, specialized, and able to serve niche markets, their need to find new customers and business opportunities globally also increases. This leads many of our members to invest abroad or to seek to attract foreign investment to Canada. Our ability to attract foreign investment into Canada and our ability to invest abroad are both critical to our sector's competitiveness. A significant proportion of our members' operations are also the result of foreign direct investment coming to Canada that we've been able to attract and retain because of the good work our members have been doing.

These companies fight day in and day out to maintain production mandates and attract new investments to this country. Many are also looking to grow their business outside Canada and need to take advantage of foreign direct investment opportunities—for example, in the United States—to offset the impact of the high Canadian dollar we're seeing right now. What we hear from our members is that coming out of the recession there are tremendous investment opportunities in the United States, Mexico, and elsewhere, and it is critical for their businesses to grow their presence in these markets.

This is why CME supports foreign investor promotion and protection agreements, such as NAFTA's chapter 11 and other agreements that have been or are being negotiated by the Canadian government. We need to ensure that Canadian businesses investing abroad are not discriminated against in favour of domestic companies, and we also need to provide the same assurances to foreign companies that are investing in Canada, to the extent that we're getting reciprocal treatment in the other country.

The issue here is not to tie the hands of governments when it comes to issues like expropriation, but rather to provide a legal framework for doing so that is not discriminatory, that's predictable, and that's based on rules. Foreign investment protection agreements protect and promote foreign investment by providing legally binding rights and obligations to Canadian companies investing abroad while providing the same rights to foreign companies operating or investing in Canada.

I understand that Don Stephenson from the Department of Foreign Affairs and International Trade testified here earlier this week, so I won't go through the specifics of the case. I'm here to discuss the specifics, but I'm here especially to review the implications of this case for manufacturers and exporters throughout Canada. I think we've seen two major implications from this case.

First, I don't think the threat of expropriation was on the minds of many companies investing in Canada, especially not U.S. companies. It's not typically an issue that we would hear from our members. Some might argue that the AbitibiBowater case is unique and special, but regardless of whether or not that's the case, the perception now is that expropriation of assets does happen. There have been cases, and that perception is something we don't think is positive.

The case also sets a precedent and will lead investors to ask more questions in the future. That's certainly not something we view positively. We certainly don't want foreign investors thinking their assets can be up for grabs. Moreover, if their assets are being nationalized or expropriated, this needs to be done based on rules that apply to everyone. There needs to be a demonstration that this is done on grounds of public interest and there needs to be some assurance that investors will be compensated appropriately if that's the case.

● (1020)

I would say that the second main implication is that this specific case shows why we need investor protection agreements such as NAFTA's chapter 11: it's so that expropriations are done in a way that is rules-based and that provides adequate compensation based on fair market value. I won't actually read the text of the agreement for you, but if you do read it, you'll see that it's quite explicit in what it sets out in terms of principles and rights for investment. I think that when we consider this, we also need to look at the positive impact this is having on Canadian companies investing in the United States.

To conclude, I'll say that foreign investment protection agreements, including chapter 11, provide this rules-based framework that we need to protect and govern foreign investment. The AbitibiBowater case shows why it's critical to have such rules in place.

I'll end my comments there. I will be pleased to answer your questions.

Thank you.

The Chair: Thank you, Monsieur Laurin.

We're going to start with Mr. Simms this time.

Mr. Scott Simms: Thank you, Mr. Chair.

Thank you to our guests.

First of all—

The Chair: Excuse me, Mr. Simms; I'll mention to everybody that we're going to try to keep to five minutes so that we can make sure everybody gets in. It will be five minutes for questions and answers.

Thank you.

Mr. Scott Simms: Mr. Coles, thank you for your speech here today. You've cleared up a couple of issues that were brought up earlier about leases. Thank you for that. I'll get to you in just a moment.

Mr. Laurin, here is my opinion on this. I understand where you're coming from about rules-based situations so that everybody is clear about what the rules are when you invest. I have no problem with that whatsoever. You use chapter 11 as a pillar of an example of remedies being in place for expropriation measures, and Mr. Woods, in relation to a case in Alberta, talked about how individuals have a greater ability to do that. That's fine.

Let's look at the other side for a moment. For oil and gas, the North Sea is an incredibly intricate place to invest in. They have a very advanced system; I would even say, in my opinion, that it's the most advanced in the world. They have what is called fallow field legislation. In other words, you have a certain number of years to invest in a certain property. Once you do that, you can have your licence and you can carry on, but if you don't undertake any activity after two or three years, you have to explain why not.

The whole principle is that it doesn't belong to these companies. It's not theirs in perpetuity. It belongs to the people, to whom you have to be responsible. In this case, going back to Mr. Coles' evidence here, quite clearly you can call it perception or whatever, but in 1905 it was operational in the province. They got all these rights based on the simple fact that they had to provide employment, period. Now, you can say that it was over 100 years ago, but the principle was renewed in 1992. That was the whole principle of it.

A lot of us were being accused of expropriating for no apparent reason, and I believe Premier Williams was called "Danny Chavez" at one point. However, the thing about it is that he has a point: it's a two-way street.

I'll start with Mr. Laurin's comment on that. Mr. Coles, I'd like you to comment as well.

● (1025)

Mr. Jean-Michel Laurin: Obviously there are different countries and different jurisdictions that have different regimes when it comes to granting access to natural resources and managing that access to natural resources that they're providing to companies. My point on the specific case that happened in Newfoundland and Labrador—and it's certainly what our members are telling us—is that if you come up with policies and change the regime for accessing those natural resources, then it should be done in a way that's predictable, consistent, and in line with best regulatory practices—in other words, it applies to everybody.

In this specific case you're looking at right now, we weren't involved directly in those discussions in the way that David was, but my understanding is that our members want a predictable, rules-based system that applies fairly to everybody. I think that if Newfoundland and Labrador want to change the regime it's providing for accessing natural resources, including logging rights, that is certainly something that's within the rights of the province, but, again, there need to be rules around how—

Mr. Scott Simms: Maybe there was a lack of rules. Take it at face value: in 1905, and as renewed recently, the idea was that if you provide jobs, you get the rights.

Mr. Jean-Michel Laurin: There was an agreement in place that governed the way that AbitibiBowater was operating in the province, and different provinces have different regimes. The point is that if you make changes to the way this regime is operating, you need to do it in a way that's consistent and treats everybody fairly and in equal fashion. That's the point we're trying to make.

When we're looking at attracting foreign investment to Canada, people want to know what the rules of the game are, and they want to make sure that the rules of the game won't be changed during the process.

Mr. Scott Simms: Fair enough. I think governments would like to do the same. Maybe that was the whole point of Newfoundland's exercise. Maybe we learned from that.

Would you comment, Mr. Coles?

Mr. David Coles: I have two problems. One is the conflict in Canada between resource rights belonging to the province and international trade belonging to the federal government. It's a complex legal issue. If an employer makes a deal for you to operate, and then the employer changes or breaks that deal, in our view you have a legal right to respond to it.

For example, if the potash industry was all bought up in Saskatchewan, shut down for economic reasons, or sold to another country, I would argue that the citizens of Saskatchewan have a right to say, "Wait a minute; those are our resources. Start them back up. Take them over. Do something."

This is all about the rights of corporations. Tell me who's defending the rights of the citizens of Canada or the provinces?

● (1030)

Mr. Scott Simms: Did you ever speak to the Prime Minister about this?

Mr. David Coles: Yes, I did, a couple of times.

The Chair: Thank you. We have to move on.

Go ahead, Mr. Laforest.

[*Translation*]

Mr. Jean-Yves Laforest: Thank you, Mr. Chair. I will start off, and my colleague will finish.

Good morning to all of you. It is a pleasure to meet with you.

Mr. Coles, I was especially struck by your presentation. I found it fascinating. There are a number of AbitibiBowater employees in my riding affiliated with your union. And I want to stress the fact that, in this whole situation, several injustices have been committed against the workers. That is a side of the issue we are discussing somewhat indirectly.

I think about what this company has done in recent years. In Quebec, in my riding, senior managers shut down the Belgo plant, they temporarily shut down the sawmills in La Tuque, and they just shut down the Dolbeau plant permanently.

Employees and unions do not understand the federal government's decision to pay out $130 million to a company like AbitibiBowater. People appreciate that the industry is in trouble, and they are even ready to make concessions. But people find AbitibiBowater's actions in Newfoundland Labrador unacceptable, not even giving workers severance pay, which the government had to do. Workers at the Grand-Mère plant recently agreed to another series of rollbacks in their working conditions, conditions that were hard-won over the years.

It is unacceptable for the company to collect $130 million and not pay a thing to its employees, while those at the top rake in big fat bonuses, to the tune of millions of dollars. The company's executives have received bonuses over the past few years. People find that outrageous. I appreciate that this is a NAFTA dispute, but workers sure have trouble understanding this process when they see themselves being cheated as the executives line their pockets.

I would like to know whether you have anything to say about that.

[*English*]

Mr. David Coles: The background for AbitibiBowater is extremely complicated. It was a cavalier move by two independent companies, Abitibi and Bowater, to run themselves into massive, incredible debts.

When the economic crisis of September-October of 2008 struck, the company had a $1.4 billion unfunded liability for its Canadian pension plans. They couldn't meet their fiduciary responsibilities along with their other debts and were forced into CCAA. Our members, in an effort to try to keep the company from being dismantled, accepted wage and benefit rollbacks of more than 17% so that the pensioners wouldn't be cut and the company could exit CCAA.

When the federal government gave the $130 million gift to AbitibiBowater, the workers who had lost their severance and taken a wage cut received none of that money. As you say, they don't get the complication of a set of laws, meaning bankruptcy protection, CCAA, and NAFTA; all they see is that they personally bear the brunt of this manoeuvre by Bay Street and Wall Street. They are out of pocket and they don't understand it. You're absolutely correct.

● (1035)

[*Translation*]

Mr. Jean-Yves Laforest: Thank you, Mr. Coles.

[*English*]

The Chair: You have thirty seconds; go ahead.

[*Translation*]

Mr. Claude Guimond (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Good morning everyone.

Mr. Coles, earlier you mentioned precedents and jurisprudence. Chapter 11 deals with private interests versus the public good. Those are very valid questions we should be asking ourselves, as parliamentarians. We do indeed get the sense we are seeing a negative trend here, and there is no denying how disturbing this all is. Just look at the situation before us.

My question will be brief. As elected officials, what can we do in the future to prevent this kind of trend and restore the balance, so as to bring about a situation that is more acceptable to all sides?

[*English*]

Mr. David Coles: I know I don't have any time, but as Mr. Woods said, the problem we're faced with is a quagmire of legal jurisdictions. I think we have to work towards rules-based situations, because to tell a province that it can't control its own resources is heading for a constitutional and economic disaster.

The Chair: Go ahead, Mr. Julian.

Mr. Peter Julian: Thanks, Mr. Chair. Thank you to all of our witnesses.

I'd like to focus on you, Mr. Coles. It appears to me, just reading your testimony, that here we had a company that broke the original agreement, which was the 1905 conditional water and timber rights based on mill operation. It looks as though they also broke their obligations around the renewal in 2002. The lease was renewed, with the obligation that they would continue to operate the number 7 machine. They refused to honour their contractual commitments for severance pay, which was a negotiated agreement, as I understand it, that they then broke by going into CCAA.

In my part of the country, when somebody consistently breaks their agreements they are a deadbeat. Here's a corporate deadbeat that consistently refused to honour its obligations.

My questions will start off with this. Are we now setting a precedent that a corporate deadbeat can just go to the government and get tons of money for not respecting its obligations? I think that's something that completely flies in the face of what most Canadians believe should happen. Canadians believe individuals and businesses have to honour their commitments. Here is a case of a company that clearly didn't, so does this open the door to other corporate deadbeats using this device to get money out of the government?

I'd like to know how Abitibi got to this point over the course of the last few years.

My other concern is that the payment just seems so bizarre and irresponsible, given all of the evidence that we've had before committee. Was this some kind of ideological decision the government made? Were they trying to get back at Premier Williams? Why would the government just fork over $130 million, when clearly the company was not respecting its end of the bargain at any point and refused to negotiate with the Newfoundland-Labrador government for compensation for their real assets?

Mr. David Coles: Well, there are two parts to the question. One is that I can't speak on behalf of the Harper government. You'd have to ask them why they did it and put the resources of Canada at such risk.

The issue is very disconcerting for our union, and that's all I can speak for, because we represent workers in resource extraction. I am not being facetious here. If a company that gets the right to extract a resource shuts it down because they can make some money somewhere else and they think they have the right to leave it shut down, and the province that gave them those rights to extract can't exercise rights when it's broken its rules....

I was just before a panel the other day, around Stelco, which is now U. S. Steel Canada. They make commitments to the Canadian government that they're going to do certain things, deliberately break them, don't do them, and we go, “Oh, well...”.

What about the rights of the citizens who are paying the taxes? I'm not opposed to foreign ownership and I'm not opposed to fair trade, but if there are rules and a corporation breaks those rules, how do they get to trump citizens?

● (1040)

Mr. Peter Julian: Thank you very much for that.

I'd like to ask our other witnesses. I'm a member of the Burnaby Board of Trade. I've won business awards. I'm a long-standing member of the New Westminster Chamber of Commerce. The small businesses in my area respect their contractual obligations. They very clearly keep their word. They walk the talk. I'm a little disturbed by a kind of blanket acceptance that even a company that repeatedly breaks its word, breaks its contracts, refuses to meet its obligations, is being defended in a process that, to my mind, was clearly irresponsible.

You seem to be speaking more philosophically about chapter 11, but do you not agree that when a company repeatedly breaks its obligations, chapter 11 should not be a device by which they can get compensation when they've broken their word and their contractual obligations and they refuse to meet their commitments?

Mr. Michael G. Woods: I think that the concept of expropriation is pretty simple. If somebody takes something from you—takes your investment, takes your house, takes something that you've built and invested in—the international law and, to a lesser extent, domestic law—although I'm not an expert in domestic law—provides for compensation. In this process, nobody took away the right of the Newfoundland government or of any of the provincial governments to manage natural resources.

I don't know the whole history of AbitibiBowater and what was going on. My simple assertion this morning was that from both sides of the counsel table—from the federal government lawyers who advised government and from the lawyers advising AbitibiBowater—it was a settlement worth making, because it was a lot less than the eventual claim could have been. The claim could have gone on for a long, long time. I think that in terms of people's concerns about the precedential value of the claim and the concerns about what this was going to lead to, having that case go on as a $500 million or $600 million case and having damages go on would have made it more difficult. The case was settled relatively quickly, and it was settled relatively quietly.

Mr. Peter Julian: But the public interest wasn't maintained.

Mr. Michael G. Woods: No, no. If there's a link, and this is just my view....

I remember years ago when I was in the federal government, I used to lead a delegation to the OECD. We had the OECD members, and we had BIAC, which was the business council, and we had TUAC, which was the workers. The three groups were never able, except on very rare occasions, to meet together, and part of the problem is, I think, that the issues you are all talking about have really very little to do with chapter 11. Chapter 11 basically states that if you have an investment in Canada and it's taken away, whatever the circumstances, if you can show that you have an investment and you can meet the tests of article 1110—

Mr. Peter Julian: But they didn't have to here.

The Chair: Sorry, Mr. Julian; your time has expired. I think you made the point.

Mr. Trost, can you wrap this up? We've got about five minutes.

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

I must say I'm finding this an interesting session. I'm not here to defend or criticize the company—it sounds as though they have made more than their share of mistakes and are due for a certain element of criticism—but I'm interested in making sure that Canada defends the rule of law and meets its international obligations. I'm interested in improving our legislation for future times when this might happen, because this case is moving on. It particularly interests me—as some of the witnesses have stated—that international investors get more protection under chapter 11 than domestic investors will get under domestic legislation for their properties in cases of expropriation, and so forth.

My question is to our lawyer friends here. Can you give me a basic understanding—I'm a non-lawyer—as to what protections there are for property from expropriation, etc., under chapter 11, under domestic law, and who actually receives more protection? Is it fairly equal; if not, why? Would it be very advisable to make it more equal?

I know you could probably do a third-year law class on that, but do your best in four minutes.

● (1045)

Mr. Michael G. Woods: First of all, I'm an international trade lawyer and I've spent 25 to 30 years doing that. I left domestic practice when I left a firm in Sudbury, Ontario, where I was a litigator, so I can't speak to you with great expertise on the law of expropriation in Canada domestically.

I do believe it would be great for Canadian investors if they were able to use a chapter 11-like device to protect themselves against threats to their own investments here in Canada, but they can't, because that's not the way NAFTA is set up. I'm pretty certain that in most major developed countries—G-8 and G-7 countries—we're trying to attract large amounts of investment, and there's an international standard. It was set many years ago to protect countries like the United States and Canada in countries where there was a real danger that a massive investment could be taken away at the whim of a leader of some country, so those provisions are stronger.

We could get back to you with more, but in the domestic context there is a lot more discretion in the government in terms of how they address the expropriation exercise and how they compensate. I'm sorry that I don't know the details.

Mr. Brad Trost: I can follow up.

In your opinion, would it be a good idea to put something equivalent to chapter 11 into domestic legislation to provide more property protection for domestic investors? That would equal the playing field and end this forum shopping that has been alleged by other witnesses.

Mr. Michael G. Woods: I don't want to cop out, but it's a question that's a little beyond my jurisdiction. I would certainly, as a practitioner, love to be able to take the tools we have in chapter 11 and use them to defend Canadian investors, wherever their investments are.

The Chair: Mr. Laurin, you can comment on that.

Mr. Jean-Michel Laurin: Like Michael, I'm not necessarily familiar with domestic legislation. It's not a concern that's been raised to us by our members yet, but we haven't consulted them on the specific issue either. Obviously, as I mentioned earlier, we want a rules-based regime, but as for differences between chapter 11 protection and domestic protection, I can't really comment more.

Mr. Michael G. Woods: Here's another point: when foreign investors are upset at the way the government of whatever country is treating them, their remedy is international investor-state arbitration. They can't go to the ballot box and change the government.

Mr. Brad Trost: I have 15 seconds here. Would it be profitable for everyone involved if this were simplified?

Mr. Woods, you said there are ways to make it more accessible to people. Are there ways we could simplify this so the process could be quicker for resolution and clearer for investors, both domestic and international?

Mr. Michael G. Woods: In my view there are always ways to improve it. I think one of the problems with this particular case is that whatever faults, if any, the claimant in question had coming in, or whatever they brought to the table in terms of their own situation, it looks as though that aspect wasn't addressed in a unified way.

The provincial government took steps, and because of the international trade jurisdiction, the federal government was left with the problem. The problem was solved through a settlement, but the leverage back at the investor....

I've represented investors in these kinds of claims, and if you're facing a government that's negotiating with a kind of full-court press with everybody on the same page, then you have a discussion, you have a negotiation, and then you have the government side saying that if you're doing this, we can do this back.

What happened here was that it happened just like that—overnight, I think; I wasn't privy to the discussions. Then next the federal government was served with a notice of intent, a notice of arbitration; they were looking at a $500 million or $600 million liability. Whether it's right or wrong, I think it's not debatable that this is a liability on the federal crown.

There's no mechanism. People have written since this case that there ought to be one, and I think even the government officials talked about it being a subject for further discussion. There's no mechanism in place to create that kind of full-court press, right from the person who's having problems losing his or her job....

We have to really think of all of us. We're all Canadians. We're all individuals. We all have jobs. We all have to make a living.

I've been a trade negotiator. I've fought for the provinces in the liquor boards and the beer wars. We have to get it lined up so that we're on the same page and we're a team. If we're not a team, then it's simple: the other side says, “Hey, this isn't a team. We're going to go there because that's our best bet. When we go there, we don't have to worry about the people over there, or there, because they don't even talk to each other.”

Now, I know it's not that bad. The fact is that we live in a great country, and part of the greatness of our country is that we're able to live in different jurisdictions with different rules and sets of laws in different communities. However, when we're threatened by a case like this NAFTA chapter 11 case, the world is a tough place out there. I was a trade commissioner too, and I went to really tough countries. I tried to negotiate for Canada to win contracts, and if you're not working together....

There were famous stories—and it's not as bad as it used to be—when I was a trade commissioner, of two or three Canadian companies bidding against each other for the same product. There were 12 other bids, and every other country got their act together—in Brussels, Paris, Washington, New York—and they were all one single team.

We have our differences and we're always going to have our differences, but the great thing about Canada is we can have them. However, when we're hit by a big case, by a major liability, we have to figure out a way to work together. It's quite doable, and I've seen cases of it happeneing. The beer wars were an example. We got the provincial governments all together in a room. We fought for them. We talked to them about what our arguments were going to be at the WTO and the GATT and we worked together.

That can happen, and that should be happening more. I don't think it takes a new agreement. It doesn't take a constitutional amendment. It just takes good folks like you sitting in a room with counterparts and working it out.

● (1050)

The Chair: That's a great way to wrap it. Thank you very much, Mr. Woods.

Mr. Coles and Monsieur Laurin, thank you, again. We appreciate your time.

I'm going to bid farewell to our witnesses.

I have a quick point for the committee. If I could have your attention for one second, March 22 is our next scheduled meeting, and it is the day of the budget. I have been advised by the clerk that a number of the committees, particularly those meeting in the afternoon, are cancelling their meetings for that day. With regard to those who meet in the morning, I'm aware of one at 11:00 that is cancelling because of the lock-up.

Our schedule for that day has been set. The item on the agenda is a review of our Washington report, and the analysts will have the report prepared for next week. We'll discuss it and conclude it at that meeting. We will also give instructions to the analysts with regard to wrapping up the testimony we have heard on AbitibiBowater.

That is what is on the agenda, and I want to get your thoughts one way or another on it.

Mr. Peter Julian: Mr. Chair, you're not proposing cancellation, then.

The Chair: No, I'm just asking for your point of view on whether we should or shouldn't.

Mr. Peter Julian: I'd like to have the meeting.

An hon. member: Thursday is fine.

The Chair: What do you mean, Thursday is fine? It's on Tuesday, March 22. Are we going to have a meeting or not have a meeting? That's the question.

Mr. Mario Silva (Davenport, Lib.): We'll have no meeting on Tuesday. Thursday is fine to have a meeting.

● (1055)

Mr. Peter Julian: No, let's set the meeting. Let's get it done.

The Chair: I don't know why we wouldn't go ahead. My sense is that we should go ahead with the meeting.

An hon. member: It's a committee report. Let's do it.

[*Translation*]

Mr. Jean-Yves Laforest: According to the newspapers, there could be a possible confidence vote on March 21. That is the only issue. The Liberals want to move a motion of non-confidence in the government. Since it is still hypothetical, I guess we should go ahead and schedule the meeting.

[*English*]

The Chair: I'm not sure if I agree with your reasons, but the premise is the same. We're moving somewhat in the direction we're going to go.

Go ahead, Mr. Keddy.

Mr. Gerald Keddy: If you're simply saying that we won't meet on Tuesday because it's budget day and everyone is going to have lots to do on budget day, but that we'll meet for the same reason on Thursday and just miss one meeting, I have no difficulty with that.

The Chair: Well, no, that wasn't my premise. I was asking the question about what you....

We'll go to Ms. Hall Findlay.

Ms. Martha Hall Findlay: We start at 8:45, so we'll by done by 10:45. I would just as soon meet.

The Chair: Okay. I think that's all we need.

We will meet again. Your offices should receive a draft copy of the Washington report mid-week. We will ask you to peruse it so that we can begin discussion of it at 8:45 on Tuesday, March 22.

Thank you.

Mr. Peter Julian: Mr. Chair, in the event the non-confidence vote is brought forward Monday, I'd just like to thank you for your stewardship of this committee.

The Chair: That is also making a presumption, which is that the non-confidence motion might pass, but I always appreciate your goodwill. Thank you, Mr. Julian.

We'll see you all on March 22.

The meeting is adjourned.

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