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INTRODUCTION: PRIVATE INVESTMENT CLAIMS AGAINST STATE AND PROVINCES - THE IMPACT OF NAFTA CHAPTER 11 ON SUB-FEDERAL GOVERNMENT AGENCIES

J. Michael Robinson

MR. ROBINSON: Good morning ladies and gentlemen. This is an important topic and we have some outstanding speakers.

On my left is Mr. McIlroy, who, among his many accomplishments, runs a trade law, lobbying and strategic advice firm, called McIlroy and McIlroy. Mr. McIlroy worked as senior policy advisor for Canada's very first Minister of International Trade when we were just starting to try to understand these legal issues relating to the Canada/U.S. free trade agreement and later the North American Free Trade Agreement (NAFTA). He was in the U.S. as a visiting attorney with O'Melveny & Meyers for a while and knows that side of things. He is fluently bilingual. He took his degree at the Universite de Montreal, has a degree at the Sorbonne and received his law degree from Osgoode Hall Law School in Toronto.

On my right is Mr. Price, who is with Powell, Goldstein, Frazer & Murphy. This is a well-known, major Washington firm. He is an expert on trade law and was Principal Deputy General Counsel at the United States Trade Representative (U.S.T.R.). He was the lead negotiator on investment issues in NAFTA. He received his Juris Doctorate from Harvard and attended Cambridge.

I am going to introduce the topic briefly by telling a war story, which illustrates how many governments can do pretty foolish things when they do not understand the effect of investor-state law. This story involves the Toronto airport and the so-called second terminal.

In Toronto we did the first major Build-Operate-Transfer (BOT) project in Canada, I guess one of the first ones in North America to build, own, operate and transfer, for a new terminal there called the third terminal. It is a forty-year BOT in a private consortium of builders and developers and operators got together and financed it, and built it and ran it.

*Faskin Martineau DuMoulin LLP, Toronto, Ontario.
The consortium included a major U.S. participant, Lockheed, which not only builds aircraft but is in the airport construction and management business as well.

This terminal was so successful it was decided to do a BOT for the second terminal which was falling apart and needed to be rebuilt, so that contract was duly let, bid, and signed up.

All appropriate authorizations, orders in council and everything else were given, and it was a done deal.

Along came an election and the current prime minister said, “Well, those chaps, those conservatives do too much boondoggling and pork barreling and rewarding their Tory faithful.” He made Terminal Two an election issue, claiming that one of the principal members of this consortium, the same one, interestingly enough, that had built Terminal Three, had had the contract for Terminal Two, was a Tory and a major Tory fundraiser and, obviously, he had been given the contract for that reason, and if elected, he was going to tear it up. He was elected. He did. He tore the contract up by way of a bill in parliament, which said, “It never existed and nobody has any rights under it, except what I decide they shall have. If I decide to give them to minor compensation for their lost costs then they will be lucky fellows and that is it.”

A few people brought to the attention of the government. The Minister of Justice said, “Hey, guys, you can do this to Canadians. Our Charter of Rights and Freedoms, our so-called bill of rights, does not protect property rights, it does not protect corporations, and it protects personal rights and individuals. This is all fine. Parliament is supreme. You can tear up their contract and tell them they have nothing and that is legal, but you cannot do that to the U.S., and the U.S. member of the consortium can get full compensation.”

This was quite a surprise to some people up in Ottawa, notwithstanding they signed both the free trade agreement and NAFTA by this point. So the bill was blocked at the senate. Then the question was whether you are going to reintroduce it in the Commons and go through again.

They came up with a brilliant solution to avoid this problem, a great shell game: They gave the airport, which had been owned by the Federal Government as a public utility, to a municipal, not-for-profit corporation, and gave the airport this new, non-profit corporation called the Greater Toronto Airports Authority enough money to buy Terminal Three, in fact, for quite an inflated price. The money just happened to go to the same guys who had the claim on Terminal Two. The public never figured out this shell game. The problem went away.
That was the case that never was, and, of course, it would have been such a slam-dunk case against Canada, that I do not think anybody in this room would question the fact that if Lockheed had brought an action under Chapter 11 as an expropriated foreign investor, they would have won, they would have got compensation for the loss of their profits for forty years, which was very easily calculable with a five dollar adding machine, based on the forty-year BOT and the Canadians would have got zip. I think politically that would not have flown in Canada.