

New Challenges to Canadian Environmental and Health Policies Call NAFTA into Question



by Stuart Trew

Pesticide maker Dow AgroSciences has joined the growing list of North American companies to challenge environmental policy under the North American Free Trade Agreement (NAFTA). But its recent lawsuit against Quebec's acclaimed cosmetic pesticide ban is bound to shed some much-needed light on how far NAFTA goes to protect investors against environmentalists when what is really needed is protection the other way around.

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In early April, American chemical company Dow sued the federal government for \$2 million in damages it claims it will suffer from Quebec's cosmetic pesticide law. A number of organizations including Ecojustice Canada, Equiterre, the David Suzuki Foundation, the Environmental Law Clinic and the Canadian Environmental Law Association, have called on the federal government to vigorously defend Quebec's ban on the herbicide 2,4-D, arguing no level of exposure to the pesticide should be considered acceptable because of its cancer-causing chemicals.

New Democrat MP Pat Martin introduced a private member's bill this spring that would impose a national ban on the cosmetic use of pesticides. A national ban would strengthen Canada's defence

against Dow AgroSciences' NAFTA challenge by creating one national standard for all companies.

But before this happens, will the federal government be able to defend the provincial ban? Under NAFTA it has to try. But clearly the more appropriate response at this point would be for the Canadian government to signal its desire to renegotiate NAFTA to remove any clause that allows corporations to dismantle environmental and public health protections they feel infringe on corporate profits. According to the Canadian Centre for Policy Alternatives, about 40 per cent of legal challenges to government policy under NAFTA's Chapter 11 have been against environmental policies. And many of the cases have cost us millions.

CHAPTER 11 CASES

The Canadian government paid Ethyl Corporation \$13 million in an out-of-court settlement following a challenge – filed on April 14, 1997 – to Canada's ban on the import and interprovincial trade of the gasoline additive MMT, a suspected neurotoxin.

On July 22, 1998, U.S. waste disposal firm S.D. Myers Inc. challenged a temporary ban on exports of PCBs, which the federal government was arguably obliged to implement under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, according to trade lawyer and Council of Canadians' board member Steven Shrybman in a recent presentation to Parliament's Standing Committee on International Trade. A NAFTA tribunal later ruled the ban violated articles 1102 (national treatment) and 1105 (minimum standards of treatment) of NAFTA and awarded the company \$5 million plus interest in damages.

On December 2, 1998, U.S. water firm Sun Belt Water Inc. challenged British Columbia's water protection legislation

and voluntary ban on water exports on the basis that they violated the articles mentioned above (1102 and 1105), as well as article 1110 (expropriation). The Canadian government says the claim is invalid but the company, which asked for \$10.5 million in compensation, insists it is still active.

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On October 12, 2006, V.G. Gallo, the U.S. investor behind a scheme to drain an artificial lake on an abandoned mine in northern Ontario to make way for a new dump for Toronto's garbage, filed a Chapter 11 challenge when the Ontario government shut down the project in 2004 following a province-wide public outcry. The claimant wants more than \$355 million in expropriation costs and the case isn't settled yet.

Two more recent challenges – one \$188 million claim from U.S. company Bilcon against a ruling blocking a Nova Scotia quarry, and the other from a U.S. health company for \$160 million protesting difficulties establishing private health clinics in B.C. – show just how vulnerable our health and environment are to unreasonable and expensive corporate lawsuits. It is shocking to think how much time and money are spent defending policies established by local governments to protect Canadians – policies that most Canadians would gratefully endorse.

As these NAFTA challenges show, an even better solution would be to scrap the Chapter 11 private investor-state dispute process that allows companies to dismantle environmental and public health policies set by Canadians.

Stuart Trew is the Trade Campaigner for the Council of Canadians