

NAFTA's Chapter 11

A threat to the environment and public policy



When the North American Free Trade Agreement (NAFTA) was implemented in 1994, it introduced new corporate investment rights and protections unprecedented in scope and power. While there are many aspects of NAFTA that threaten social and environmental priorities, the investor-state dispute process found in Chapter 11 puts public policies aimed at protecting people and the environment at the most risk. Chapter 11 gives corporations the right to sue the Canadian government, often for tens of millions of dollars, if any public policy or government action denies them investment or profit opportunities.

There have been many Chapter 11 cases filed over the years. Most recently, in April 2009, American chemical company Dow Agrosciences decided to sue the federal government for \$2-million in damages that the company claims it will suffer from Quebec's cosmetic pesticide law. Ecojustice Canada, Equiterre, the David Suzuki Foundation, the Environmental Law Clinic and the Canadian Environmental Law Association (CELA) have called on the federal government to vigorously defend Quebec's ban on the herbicide 2,4-D, as a reasonable and lawful measure to protect human health.

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 of dollars. Here are some more examples:

- The Canadian government paid Ethyl Corporation \$13 million in an out-of-court settlement based on 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 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) 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 exports on the basis that they violated the same articles above (1102 and 1105), as well as article 1110 on expropriation. The Canadian government says the claim is invalid but the company, which asked for \$10.5 million, insists it is still active.
- On October 12, 2006, U.S. investor V.G. Gallo, challenged the Ontario government's decision to kill a joint project to put a major new dump for Toronto's garbage on top of an abandoned, flooded mine in northern Ontario. The environmental risks were enormous and the public opposition was overwhelming. Yet the company wants more than \$355 million in expropriation costs. The case is ongoing.
- U.S. company Bilcon, proponent of the White Point Quarry project in Digby Neck, Nova Scotia, wants \$188-million because an environmental assessment put an end to the project.
- U.S. investor Centurion Health would like \$160 million because of the difficulties it has faced in trying to establish for-profit health



services in British Columbia. "Canada is an unfair competitor in ways detrimental to U.S. private sector companies in the monopolized health care system in Canada," states Centurion's revised NAFTA Chapter 11 claim. "The competitive activities of Canada's private sector health care providers, based as they are on the foundation of a public monopoly and the network it has built with public funds, are incompatible with basic principles of fairness in regards to NAFTA and GATT (the General Agreement on Tariffs and Trade)," the company adds.

- U.S. pulp and paper company AbitibiBowater has filed a Chapter 11 case demanding \$300 million for Newfoundland's expropriation of water rights granted more than 100 years ago to help run their mill, which the company will be closing anyway.

In the health care challenge, Centurion is correct that current free trade agreements, and those now being negotiated, make it very difficult to strengthen public services after they have become partially privatized. The Chapter 11 dispute process also puts a chill on legitimate public policy. Just the threat of an expensive NAFTA Chapter 11 challenge is enough to discourage federal and provincial governments from pursuing environmental or health policies that might run counter to business interests. Think how much time and money is spent defending these legitimate policies.

The federal government is bound by law to defend Quebec's pesticide law, public health care, Nova Scotia's environmental assessment process, and Newfoundland's appropriation of AbitibiBowater's water and energy rights. But wouldn't a more appropriate response be for Canada to signal its desire to renegotiate NAFTA to remove or amend the Chapter 11 clause that allows companies to dismantle environmental and public health protections on the grounds they interfere with profits?

Take Action!

Business interests should never trump public interest. Write to your MP, or call their constituency office today and tell them that you want them to support local communities and not the profit interests of international corporations. Demand that the Canadian government scrap the Chapter 11 investor-state dispute process from NAFTA and any future trade agreements.

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