Submissions to Standing Committee on International Trade

Re: AbitibiBowater NAFTA Claim Settlement

Steven Shrybman
Sack Goldblatt Mitchell

On behalf of

The Council of Canadians

March 8, 2011

Summary

For the reasons set out briefly below, the settlement by the government of Canada of an investor-state claim by AbitibiBowater effectively allows foreign investors[1] to assert a propriety claim to Canadian water, including water in its natural state, where those investors have acquired a right to use water resources by permit or otherwise. By doing so, the Government of Canada has essentially transformed Canadian freshwater resources, most of which are owned by the provinces as a public trust, into a private property right to the benefit of foreign investors that have acquired a right to use water by provincial permit.

It would be difficult to overstate the consequences of such a profound transformation of the right Canadian governments have always had to own and control public natural resources. Moreover, by recognizing water as private property, the government has gone much further than any international arbitral tribunal has dared to go in recognizing a commercial claim to natural water resources. For this reason, not only will the AbitibiBowater settlement invite similar claims against Canada, but is likely to also be taken up internationally by corporations seeking to establish proprietary rights to water in a world where this non-renewable resource is becoming increasingly scarce.

AbitibiBowater v. Canada

In early December 2008, AbitibiBowater announced the permanent closure of its Grand Falls-Windsor pulp and paper mill in Newfoundland. In doing so, the company indicated its intention to sell the mill and its related assets, including a hydroelectric plant used to power the mill and certain timber harvesting licenses and water use permits.

Newfoundland responded by accusing AbitibiBowater of reneging on various commitments to continue its pulp and paper operations, including as a condition of its timber and water licenses. If AbitibiBowater no longer needed those resources to operate a pulp and paper mill and employ

[1] Foreign Investors as defined under Chapter 11 of NAFTA or similar international investment agreements to which Canada is a party.

Newfoundland residents, then Premier Williams said he would take them back to their rightful owners. Making good on that commitment, his government passed Bill 75, expropriating the company's assets, and terminating its water and timber rights and providing for their reversion to the Province. Bill 75 allowed for, but did not commit Newfoundland to paying any particular level of compensation for the rights, lands and assets being reclaimed or expropriated from the company.

It is clear that Bill 75 authorized the expropriation of certain private property owned or leased by AbitibiBowater, including its mill, but the company's water and forest licenses were not proprietary rights belonging to the company but rather permits issued by Newfoundland for certain purposes. The water and forest lands at issue were not deeded to the company, and its right to maintain or transfer them was subject to provincial law. Typically, provincial statutes authorizing water taking permits and forest licenses will allow the province to impose conditions on those grants and authorize public officials, or the responsible Minister, to rescind those licenses where it is considered to be in the public interest to do so.

As for expropriation, Canadian governments are entitled to take private property when in good faith they consider that necessary to achieve a public purpose, such as highway construction. Unlike the United States, private property is not protected under our constitution, and the proposal that Canada follow the US model was rejected when our constitution was repatriated in 1982 and the *Charter of Rights and Freedoms* incorporated to it. This means that in the case of expropriation, governments are free to determine the extent to which compensation will be paid to the owner of the property being taken.

But NAFTA provisions reflect US constitutional norms, not our own, a problem that has been dealt with thoroughly in the legal literature.[2] Thus Article 1110:

> ***Expropriation and Compensation***.
>
> *A Contracting Party shall not expropriate or nationalize directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except… accompanied by payment of prompt, adequate and effective compensation … equivalent to the fair market value of the expropriated investment …*

In other words, under NAFTA, foreign investors have an unqualified right to compensation when governments expropriate, and that compensation must reflect the fair market value of the property being taken.

This explains why, in response to the enactment of Bill 75, AbitibiBowater filed an arbitration

---

[2] David Schneiderman, *Investment Rules and the New Constitutionalism,* Law and Social Policy, Vol. 25, Issue 3, July 2000. Starner, Gregory M.; *Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property*; 33 Law & Pol'y Int'l Bus. 405 (2001-2002)

claim under NAFTA investment rules seeking $500 million in compensation, rather than seeking recourse in the Canadian courts. While the company relied upon various provisions of the Treaty's investment rules, the right to compensation under Article 1110 was foremost. However, in addition to claiming compensation for the physical assets taken by the Province, the company also claimed compensation for the loss of its water and forest licenses and delineated these in some detail. Thus, the company sought compensation for the expropriation of specific "Water and Waterpower Rights"[3] and to certain "Timber Rights and Rights ".[4]

These aspects of the AbitibiBowater claim clearly raise profound questions about the nature of public ownership and control of forest land and water resources that have always been considered to be held by provincial governments on behalf of the people of the province – that is, as a public trust. The case clearly put the concept of water as a public trust on a direct collision course with treaty-based corporate and commercial rights.

Canadian Water Resources as the Private Property of Foreign Investors

However, rather than defend public ownership and control of water, the federal government has agreed to settle AbitibiBowater's claim, and the terms of its Settlement Agreement with the Company have been recorded in the form of a Consent Award by the NAFTA arbitral tribunal on December 15, 2010.[5]

The key provision of the Settlement Agreement incorporated to the Consent Order provides as follows:

> *As consideration for the above-cited final settlement and waiver of any and all legal action by AbitibiBowater against the Government of Canada arising out of or related to the Act and/or claims by AbitibiBowater against the Government of Canada relating to the **assets and rights** cited therein, including those raised in the Notice of Arbitration, the Government of Canada shall make a payment of $130 million (CAD), following the constitution of the New Company, representing not more than the fair market value of the*

[3] These included water rights in relation to Grand Falls, Bishop's Falls, Star Lake, Buchans Charter Lease Section 8, and even a potential hydroelectric generation at Red Indian Falls (estimated 44MW capacity) and the Badger Chutes (estimated 22 MW capacity) on Exploits River.

[4] These included the following claims: (1) 2000 square miles generally Charter Lease Section 8 comprising the Red Indian Lake watershed in west-central Newfoundland (2) 1619 hectares in the vicinity of 1907 Lease Section 3, (3) 965,585 hectares at various locations Non-Renewable Licenses in central Newfoundland (4) 111,163 hectares located in central Private Reid Lots and western Newfoundland, including in particular the Reid Lot 59 lands (including the Grand Falls Mill, Grand Falls House, the AbitibiBowater Mill Manager's House, the Ambient Air Monitoring Station, and considerable additional lands suitable for residential and commercial development) (5) 72,782 hectares located in central Crown Reid Lots - 725 hectares comprised of lots on Victoria River.

[5] International Centre For Settlement Of Investment Disputes (ICSID), *AbitibiBowater Inc. v. Canada*, Consent Award, Dec, 15 2010. http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Abitibi_Consent_Award_Dec_15_2010.pdf

> ***rights and assets*** *owned by AbitibiBowater expropriated under the Act. Payment made under this Settlement Agreement shall be made to the New Company.*[6] [emphasis added]

By stipulating that the payment of compensation is on account of rights and assets, the government of Canada has explicitly acknowledged an obligation to compensate AbitibiBowater for claims relating to water taking permits and forest harvesting licenses.

According to the AbitibiBowater claim, its water rights and timber licenses are comprised of a diverse mix of interests that were granted by the province or acquired from third parties. Provincial permits and licenses were, in fact, granted over many decades and under different statutory schemes. The company claims that many of these rights were not contingent upon the company maintaining mill operations.

Because of the pre-emptory settlement of the company's NAFTA claim, no responding materials were filed refuting the Company's proprietary claims to water and timber licenses. The settlement also fails to identify the particular rights for which compensation is to be paid, or how much compensation is being paid on account of rights vs. assets.

Most importantly, the Settlement Agreement makes no attempt to exclude any the claims asserted by AibitibiBowater, thereby acknowledging the validity of each of the claims made by the company. But rights to harvest or use public natural resources have never been recognized under Canadian law as giving rise to proprietary rights with respect to which compensation is payable in the event that government seeks to terminate such permits and licenses, unless by doing so the government is in breach of some contractual obligation, in which case a remedy would lie to a Canadian court, not an international tribunal.

Moreover, by recognizing a proprietary claim to water taking and forest harvesting rights, Canada has gone much further than any international tribunal established under NAFTA rules, or to our knowledge, under the rules of other international investment treaties.

Most problematic however, is the precedent this settlement establishes under NAFTA and international law, notwithstanding Canada's purported attempt to limit the damage to this particular claim.

Thus section 7 of Settlement Agreement stipulates that:

> *This Settlement Agreement shall not constitute a legal precedent for any person, and shall not be used except for the sole purpose of giving effect to its terms, and shall not prejudice or affect the rights or defenses of the Parties or the rights of any other person except to the extent provided herein.*[7]

---

[6] Settlement Agreement para. 5.

[7] Idem, para. 7.

However, this proviso is entirely ineffective and the Government of Canada knows it, for under NAFTA Article 1102 it is obligated to accord foreign investors "National Treatment" which is defined this way:

> *1. Each Party shall accord to investors of another Party* ***treatment no less favorable*** *than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to investments of investors of another Party* ***treatment no less favorable*** *than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.* [emphasis added]

As the Federal Government well understands, it has absolutely no right to unilaterally amend its obligations under NAFTA, whether by way of Settlement Agreement or otherwise. Its putative attempt to do so is entirely disingenuous.

In other words, by settling this case, Canada has created a precedent that it must respect in regard to all similar future claims because of its obligation to accord foreign investors *National Treatment* (that is, equally favourable treatment) under NAFTA Article 1102.

It is not therefore an overstatement to describe the consequences of this settlement as effectively representing a *coup-de-grace* for public ownership and control of water and other natural resources with respect to which some license or permit had been granted.

Consider, for example, the decision of another province to rescind a water taking permit granted to a company operating a bitumen mine in Alberta, a golf course in Ontario, or a water bottling plant in Quebec. The statutes of these provinces allow for the cancellation of such licenses subject to certain procedural safeguards. Governments might take such action for various reasons, including to protect biodiversity, or to reallocate water resources to higher and better uses.

But even a partial public recovery of water rights could detrimentally affect the viability or value of the business enterprise dependent upon the use of this natural resource. Such a company, if foreign owned, would then have the right to compensation on the same terms as were accorded AbitibiBowater.

In other words, by settling with AbitibiBowater, the federal government has invited claims by any foreign owned company that loses an entitlement to take surface or groundwater in Canada for commercial purposes. The obligation of governments to treat water as a public trust essential to both human well-being and biodiversity would then have to give way to commercial and private interests. This, in turn, would dramatically curtail policy and regulatory options concerning water, whether used for resource extraction such as in the tar sands, for power generation, water bottling, or for any other commercial purpose.