

*Force of Nature Media Report :
The Environmental Movement
in the Media from an
Independent Perspective.*

Quebec Prohibition of Pest Control Products.

Part 11.



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16/07/2009

Will Dow challenge Quebec pesticide law ?

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Globe and Mail Update

TORONTO — **Dow AgroSciences** is mulling over a **NAFTA** [**North America Free Trade Agreement**] challenge to **Quebec**'s law banning the cosmetic use of pesticides, setting a spotlight on one of the most controversial clauses of the trade agreement among Canada, the United States and Mexico.

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Under the trade pact, companies can claim that new laws or regulations are indirect expropriation of property without fair compensation, and **Dow** says it is out **\$2-million** over the pesticide ban.

Although the company signalled in **August** that it was considering taking on Ottawa by filing a **NAFTA** notice of intent over the issue, it hasn't formally decided to go ahead with the legal action. But Brenda Harris, the company's manager of regulatory and government affairs, says a decision is pending and will be made this month.

If the company decides taking on **Quebec**'s popular pesticide ban is worth the fight, it will likely intensify the efforts within the environmental community to have the trade deal revised to stop such corporate challenges.

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Dow AgroScience argues a Quebec regulation prohibiting the use on residential lawns of 2,4-D, a dandelion-killing herbicide it makes, wasn't based on sound scientific grounds showing hazards from the residential use of its product.

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The **Canadian Environmental Law Association (CELA)** has written to both Prime Minister **Stephen Harper** and U.S. President **Barack Obama**, asking that they repeal or amend the section of the **North American Free Trade Agreement**, known as **Chapter 11**, covering investor disputes with government over expropriation.

The group contends these provisions may discourage governments from enacting environmental or health and safety laws, based on fears that companies might claim these action harm their interests.



The section “*operates as a chill [on regulation] because the government would worry, ‘What if I’m going to get an investment challenge and have to fork over big dollars?’*” said **Theresa McClenaghan**, **CELA**'s executive director and counsel.

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International Trade Minister **Stockwell Day**, in a recent letter to the group, indicated the government rejects criticism of the investor provisions, and says they “*have served Canada well.*” But Mr. **Day** said the government is prepared to go up against **Dow AgroSciences** if it comes down to a dispute.

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“The fact that a [notice of intent] has been served does not establish the merits of a claim. However, should this claim proceed, the government of Canada will continue to work with the government of Quebec to vigorously defend our interests,” he wrote.

Under the trade pact, **Dow** has to file its case against the federal government, even though its objection is with a **Quebec** regulation prohibiting the use on residential lawns of **2,4-D**, a dandelion-killing herbicide it makes. The company is irked by the pesticide ban, saying it wasn't based on sound scientific grounds showing hazards from the residential use of its product.

“I think it's a misconception that the investment chapter of NAFTA actually restricts the government's ability to regulate,” Ms. Harris said. *“They have the ability to regulate. What we're saying is that you have to use clear, science-based criteria.”*

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Although Newfoundland and Abitibi Bowater may also be heading toward a **Chapter 11** dispute over the seizure of many of the company's assets in the province, claims that environmental rules are tantamount to expropriation are the single largest source of complaints under the provision, amounting to about **40 per cent** of the 24 cases filed against Ottawa.

The most recent to be filed were in **September** and **October**, by two U.S. citizens disputing a **Quebec** regulation protecting Atlantic salmon, for a combined **\$6-million**. Four cases based on environment-related rules were filed **last year**, the highest annual total since the trade pact began in **1994**.

Potentially the most costly dispute against the federal government was filed in **2006** by a Pennsylvania investor claiming **\$355-million** over a decision blocking the use of an abandoned open pit mine in Northern Ontario as a dump for Toronto's garbage.

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Very few of the claims against Canada have led to substantial payments by taxpayers to businesses, although Ethyl Corp. received about **\$13-million** as a settlement over a disputed gasoline additive.



Ms. **McClenaghan** says **NAFTA**'s provisions allowing investor claims are being viewed internationally as a weakness in the Canada-U.S.-Mexico trade pact, pointing to the fact that more recent treaties have clarifying language precluding these types of challenges.

For instance, she said the free trade agreement with Columbia that Mr. **Harper** announced in **November** has much more restrictive language over investor challenges to environmental laws.

The Canada-Columbia pact's section explaining the two countries' understanding of “ *indirect expropriation,* ” said that regulations “ *designed and applied to protect legitimate public welfare objectives, for example health, safety and the protection of the environment, do not constitute indirect expropriation.* ”

“ *That's stronger than NAFTA,* ” Ms. **McClenaghan** says.

She adds the wording of U.S. trade deals negotiated since **NAFTA** with countries such as Australia, Singapore and Chile also make it harder to challenge valid environmental regulations. The **NAFTA** countries should “ *reconsider whether there is a need for an investment chapter at all,* ” she says.

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**Culprit that has conspired to prohibit
legal, safe, and irreplaceable pest control products.**

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The idea of reopening **NAFTA** isn't popular in the business community. “ *I'm not aware of a huge problem here in terms of sound environmental legislation and regulatory decisions being overturned arbitrarily,* ” said Ross Laver, spokesman for the Canadian Council of Chief Executives. He said the number of challenges is “ *remarkably small* ” compared to the large volume of North American trade and that the pact has delivered major benefits. “ *The experience of the last 13 years has been that Canada has done very well by this agreement.* ”

NAFTA challenges to Canadian environmental regulations :

- **Ethyl Corp.** over a gasoline additive. The dispute, begun in **1997**, settled for about \$13-million (U.S.).
- **S.D. Myers Inc.** challenges a temporary ban on exports of PCBs. The dispute, begun in **1998**, settled for **\$5-million**.
- **Sun Belt Water Inc.** challenges British Columbia's moratorium on bulk water exports in **1998**. It claims losses of about **\$200-million**. The federal government says the claim isn't valid.
- **Chemtura Corp.** challenges a ban on the pesticide **lindane**, claiming **\$83-million** in losses. The dispute began in **2001**.
- **Albert Connolly**, a U.S. investor, disputes an Ontario decision to turn a property with marble deposits into parkland. The case is filed in **2004**, and Foreign Affairs says it is invalid. The dollar amount claimed was not disclosed.
- **V.G. Gallo**, a U.S. investor, claims losses of **\$355-million** over an Ontario regulation blocking the use of an abandoned mine for Toronto's garbage. The case began in **2006**.
- **Dow AgroSciences** challenges a **Quebec** ban on the use of the herbicide **2,4-D** on lawns. The case began in **August** and claims **\$2-million** in damages.
- **Bilcon**, a Delaware company, challenges a ruling blocking a quarry in Nova Scotia. The case began in **2008** and the company is claiming **\$188-million**.
- **William Greiner** and **David Bishop**, two U.S. investors, separately challenged **Quebec** regulations on salmon fishing in **2008**. The claims are for combined losses of **\$6-million**.

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*... the NAFTA
sky is falling !*

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FORCE OF NATURE was launched for continuous transmission on the Internet on January 1st, 2009. It is a series of e-newsletters, destined for the Green Space Industry, the environmental movement, politicians, municipalities, and the media, nation-wide across Canada, and parts of the United States. Force of Nature is produced in two parts. First, The Media Report itself that reports on the current events affecting the future of the Green Space Industry. Second, Independent Perspective, which is a running commentary, sometimes also of a more technical in nature.

Force of Nature is the brainchild of William H. Gathercole and his entourage. The opinions expressed in these e-newsletters, even though from an independent perspective, may not reflect those of everyone in the Green Space Industry, or Mr. Gathercole's many associates. Be warned! Mr. Gathercole and his team may sometimes be very irreverent and fearless with these e-newsletters.

William H. Gathercole holds a degree in Horticulture from the University of Guelph, and another pure and applied science degree from McGill University. He has worked in virtually all aspects of the Green Space Industry, including public affairs, personal safety, and environmental issues. Mr. Gathercole has been a consultant and instructor for decades. Mr. Gathercole has been following the evolution of environmental terrorism for over a quarter-century. His involvement in environmental issues reached a fevered pitch in the 1990s, when he orchestrated, with others, legal action against unethical and excessive municipal regulations restricting the use of pest control products. (i.e. the Town of Hudson.) Although he can be accused of being anti-environment-movement, he is, in fact, simply a strong advocate for the Green Space Industry. However, this position has not precluded him from criticizing the industry itself. Nonetheless, his vast knowledge of our long journey with environmental issues is undeniable. (Hopefully!) For many years, Mr. Gathercole has been a contributing columnist for TURF & Recreation Magazine, Canada's Turf and Grounds Maintenance Authority.

All pictures contained in Force of Nature were found somewhere on the Internet. We believe that they are in the public domain, as either educational tools, industry archives, promotional stills, publicity photos, or press media stock.

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The following titles are currently available. (Or, will be available in the near future.) ● Alberta Prohibition ● British Columbia Prohibition ● Canadian Association of Physicians for the Environment ● Consequences ● David Suzuki Foundation ● Death and the Environmental Movement ● Golf and Landscape Trade Industries ● June Irwin, The Princess of Junk Science ● Kazimiera-Jean Cottam ● Kelowna BC Prohibition ● New Brunswick Prohibition ● Nova Scotia Prohibition ● Ontario Prohibition ● Organic Fertilizers ● Pets and Lawn Care Chemicals ● Prince Edward Island Prohibition ● Quebec Prohibition ● Rachel Carson, The Queen of Junk Science ● Randy Hillier, The Next Premier of Ontario ● Salmon Arm BC Prohibition ● The 9/11 Era of the Green Space Industry ● The Failure of Integrated Pest Management ● The Industry Strikes Back ● The Misconceptions About Cancer ● The Wisdom of the Solomons ● Wisconsin Fertilizer Prohibition ● ASK FOR A COPY OF ANY BACK ISSUE OF FORCE OF NATURE TODAY.

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