INDEPENDENT RUN-OF-RIVER PROJECTS IN BRITISH COLUMBIA: THE NAFTA QUESTION

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Introduction

This white paper report is intended to correct misinformation being spread about NAFTA's impact on run-of-river hydro projects built by Independent Power Producers (IPPs) in British Columbia. In particular, this white paper report concludes that:

1. Nothing in NAFTA would force B.C. to allow an IPP to export water, according to a joint declaration issued in 1993 by all signing countries;

2. Nothing in NAFTA forces B.C. to permit continued use of crown land beyond the termination of a lease;

3. NAFTA panels are reluctant to find governmental legislation to be an expropriation of an investment; and accordingly,

4. NAFTA panels are reluctant to award substantial damages in the unlikely event that such governmental action is seen as an expropriation.

The authority cited to support the sensationalistic NAFTA claims being made by the opponents of independent green energy projects turns out to be a school paper from 2007 written by students of the University of Toronto.[1] As will be shown, the misinformation being spread does not even align with the authority cited.

The intent of NAFTA

NAFTA was intended to open the borders of North America to trade by placing restrictions on the discriminatory acts that governments could take to unfairly favour domestic industry and disadvantage foreign investors.[2] This introduced greater levels of certainty to foreign investors by providing protections against the nationalization or expropriation of a foreigner's investment. In this regard, NAFTA has been a recognized economic driver for Canada, the United States, and

[1] Joseph Cumming & Robert Froehlich, *NAFTA Chapter XI and Canada's Environmental Sovereignty: Investment Flows, Article 1110 and Alberta's Water Act*, available at: http://www.ourrivers.ca/pdf/Cumming.Froehlich.NAFTA.ChXI.pdf

[2] *Id.*, at 3.

Mexico. From the date of signing in 1992 to 2004, US investment in Canada quadrupled, and Canadian investment in Mexico grew at a comparable rate.[3]

NAFTA: What it can and cannot do

- NAFTA does not compel the exportation of water, or the power derived from that water. In reviewing the issue in 2001, the Department of Foreign Affairs and International Trade determined that fresh water is not a "product," and that nothing in NAFTA could be used to compel a country to exploit, sell, and export a resource.[4] This interpretation is backed by a joint declaration of NAFTA signatories issued in 1993 that specifically identified water as a class of material outside the definition of "good" for NAFTA's purposes.

- NAFTA does not compel the use of land and resources beyond the term of a lease. There is no provision in NAFTA that would force B.C. to allow an IPP to occupy land or operate under a license after the expiry of such lease or license. The errant notion that IPPs are granted perpetual access to the benefits of B.C.'s water just by signing a lease for a period of years runs counter to the property law in either country. At the expiration of a lease of land, the land returns to the government, along with any improvements and facilities constructed on it.

- NAFTA expressly permits a government to introduce environmental legislation to protect the health and welfare of its citizens. All three countries expressly indicated that governments would continue to legislate to protect the environment, even if such legislation or regulation restricted trade.[5] So long as legislation is non-discriminatory and does not amount to a nationalization or expropriation of property, Canada or B.C. is free to legislate for a valid public purpose.

NAFTA Case Studies

Unless private property has been nationalized or confiscated, NAFTA panels are reluctant to find that legislation has risen to the level of "expropriation". Of the 6 case studies explored by the student authors of the school paper, only 1 found that expropriation had occurred and that compensation was due.[6] In this case, the Mexican government's decision to convert private land into an environmentally-protected area came after a US firm had invested large sums of money in building a hazardous waste handling facility with the consent of Mexican authorities. In all other cases, NAFTA panels have consistently found that mere legislation or regulation does not amount to

[3] *Id.*, at 24.
[4] BULK WATER REMOVALS, WATER EXPORTS, AND THE NAFTA, Department of Foreign Affairs and International Trade, prepared by David Johansen of the Law and Government Division, 2001, available at: http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/prb0041-e.htm#C. Bulk Water Removal and NAFTA Chapter 11(txt) Canada has a long history of considering bulk water (in streams and rivers) as falling outside the definition of "good" or "product" with respect to GATT, the FTA, and the NAFTA.
[5] *Supra* note 1, at 25.
[6] *Id.*, at 7-12.

expropriation, especially where no nationalization has occurred, the regulation was not confiscatory, or the private company retained control of the investment.[7] This means that B.C. could continue to regulate run-of-river hydro facilities, so long as it does not seize private facilities or confiscate private property.

In cases where expropriation has occurred, NAFTA panels have (on average) granted only 5% of the claimant's damages. Of the 6 case studies in the student paper, only 4 were actually seen before a NAFTA panel, and only 1 was found to have been an expropriation.[8]

Conclusion

What does this all mean for British Columbians? Well, in lay terms, it means that a hypothetical "thought experiment" by a couple of students based on Alberta law has been dressed up like the bogeyman by opponents of independent run-of-river projects and used to arouse feelings of fear, uncertainty, and doubt. The student paper shows that NAFTA panels are unlikely to find that an expropriation has occurred, and that such panels are also reluctant to find for substantial damages. In their conclusion, the authors even go so far as to say "this reluctance on the part of Tribunals is a positive sign in terms of the overall threat that [NAFTA] poses to Canada's environmental sovereignty."[9]

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[7] *Id.*
[8] *Id.*
[9] *Id.*, at 20.