

To: Members of the NLHFRP Fracking Panel

What are the risks of investor-state lawsuits if we allow fracking?

I'm writing on behalf of a St. John's based group, Citizens against CETA, to present arguments against allowing fracking to take place in Newfoundland and Labrador. Our focus is not the potential environmental and health effects of fracking, but rather the risk they bring of investor-state lawsuits.

Investor-state lawsuits are permissible under the auspices of trade agreements like NAFTA and take place in independent, offshore tribunals. There are no permanent judges in these tribunals and judgements are decided by three lawyers, appointed each time a corporate investor chooses to sue government. Neither is there an appeals process, which is particularly alarming given that [independent studies](#) have revealed that corporate bias and conflict of interest are inherent to these tribunals.

If Newfoundland and Labrador go ahead with fracking the ensuing legal costs for our provinces could be very high. Here's why:

1. **Fracking companies use investor-state lawsuits:** There is already fracking litigation under NAFTA. Lone Pine Resources, a Canadian company with registration in the US, is suing Canada for \$250 million because of the Quebec government's decision to impose a temporary moratorium on fracking.
2. **Suing governments has become an industry in itself:** The [likelihood of a corporate lawsuit](#) is much greater than in the past. That's because hedge funds and other financial institutions are increasingly offering to finance the corporate share of lawsuits in return for a percentage (usually between 30-50%) of the settlement or damages awarded. Mining companies are the most frequent users of investor-state lawsuits worldwide.
3. **Damages awarded can be huge:** Increasingly, damages are based on the estimated loss of future profits. The largest award to date is \$2.3 billion against Ecuador for cancelling the operating contract of an oil company in the Amazon region.
4. **Canadian and NL laws count for nothing in these tribunals** as judgements are based on treatment according to the language in the trade agreement(s). For example, in February of this year a NAFTA tribunal awarded Exxon Mobil and Murphy Oil \$17 million in damages after our province tightened up requirements relating to their research and development spending in this province. What most people aren't aware of is that three levels of Canadian courts had already rejected the corporations' argument that they were being unfairly treated. The Canadian courts cited the oil companies' responsibilities under the Atlantic Accord as their reason for denying them damages. That argument counted for nothing in the NAFTA tribunal.
5. **Who will pay the costs?** It is Canada, not the provinces, that has to pay the the costs of investor-state lawsuits because it is the federal government that is sued, even if it is a municipal action that causes the lawsuit. However, the federal government has served notice that it will find ways in the future to [reclaim costs](#) and damages from the provinces.

6. **Will the federal government defend us against lawsuits?** They did not do so in the case of the Abitibi-Bowater dispute, in spite of a request from the province. The result was a \$123 million settlement.
7. **What will be the impact of CETA?** If the CETA trade agreement between the European Union and Canada is ratified, the risk of investor-state lawsuits will be made greater as CETA's environmental regulatory protection is weak. That will encourage lawsuits. Over half of the investor-state lawsuits worldwide so far have been filed by European corporations.

If our province allows fracking and then tries to back out or tighten up regulations at a future date we risk very costly lawsuits in tribunals with dubious legal and ethical legitimacy. Where are the long term benefits of fracking that would justify this undermining of the Canadian judicial system and possibly cost us huge amounts in damages?

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