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of / de	Apr 20 09
for / pour	John H. Sims, Q.C. Deputy Attorney General of Canada Sous-procureur général du Canada

**NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER**

**CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT**

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**ABITIBIBOWATER INC.,**

**Investor,**

**v.**

**GOVERNMENT OF CANADA,**

**Party.**

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Pursuant to Articles 1116, 1117, and 1119 of the North American Free Trade Agreement (“NAFTA”), the disputing Investor, AbitibiBowater Inc. (hereinafter “**AbitibiBowater**” or “**the Company**”), hereby respectfully serves a Notice of Intent to Submit a Claim to Arbitration for breach by the Government of Canada (hereinafter “**Canada**”), through the actions of the provincial Government of Newfoundland and Labrador, of its obligations under Chapter Eleven of NAFTA. AbitibiBowater also hereby requests Canada and the Government of Newfoundland and Labrador to begin formal consultations and negotiations, as contemplated by NAFTA Article 1118, in an effort to amicably resolve this dispute. Such consultations would be in accordance with the Company’s proactive outreach to form a joint working group to address and resolve all issues related to its assets and rights in the Province of Newfoundland and Labrador.

**I. TYPE OF CLAIM**

1. AbitibiBowater submits this Notice of Intent both under NAFTA Article 1116 as an investor on its own behalf, and under NAFTA Article 1117 on behalf of three investment enterprises that it owns or controls directly or indirectly: Abitibi-Consolidated Company of Canada, Abitibi-Consolidated Inc. and AbitibiBowater Canada Inc. (hereinafter collectively the “**AbitibiBowater Canadian Entities**”).

**II. DISPUTING INVESTOR**

2. The disputing investor, AbitibiBowater Inc., is incorporated in the State of Delaware, United States of America, and thus is an enterprise of a Party (the United States) pursuant to NAFTA Article 1139. Its registered address is as follows:

1209 Orange Street  
Wilmington, Delaware 19801  
United States of America  
Phone: 302-658-7581  
Fax: 302-655-2480

**III. CLAIM BY AN INVESTOR OF A PARTY ON BEHALF OF AN ENTERPRISE**

3. AbitibiBowater owns or controls, directly or indirectly, the following Canadian incorporated enterprises whose rights have been directly affected by acts for which Canada is internationally responsible:
  - a. Abitibi-Consolidated Company of Canada
  - b. Abitibi-Consolidated Inc.
  - c. AbitibiBowater Canada Inc.

Each of these AbitibiBowater Canadian entities has the following registered address:

1155 Metcalfe Street, Suite 800  
Montreal, Quebec  
Canada, H3B 5H2  
Phone: 514-394-2160  
Fax: 515-394-3644



b. **OGILVY RENAULT LLP**

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mryan@smss.com

**VI. PROVISIONS OF NAFTA CHAPTER ELEVEN BREACHED**

6. Canada, through the actions of its constituent political subdivision the provincial Government of Newfoundland and Labrador (hereinafter "**the Province**"), for which it is internationally responsible, has breached its obligations under Section A of Chapter Eleven of NAFTA, including but not limited to the following provisions:

- a. Article 1110 -- Expropriation and Compensation;
- b. Article 1105 -- Minimum Standard of Treatment;
- c. Article 1102 -- National Treatment; and

d. Article 1103 -- Most-Favored-Nation Treatment.

7. These provisions of NAFTA state as follows:

**Article 1110: Expropriation and Compensation**

1. No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:
  - (a) for a public purpose;
  - (b) on a non-discriminatory basis;
  - (c) in accordance with due process of law and Article 1105(1); and
  - (d) on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and be fully realizable.
4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
6. On payment, compensation shall be freely transferable as provided in Article 1109.
7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or

creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

**Article 1105: Minimum Standard of Treatment**

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

**Article 1102: National Treatment**

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.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
4. For greater certainty, no Party may:

- (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
- (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

**Article 1103: Most-Favored-Nation Treatment**

- 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party 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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

**VII. THE UNDERLYING FACTS**

- 8. This claim arises out of the arbitrary, discriminatory and illegal treatment of AbitibiBowater under legislation enacted by the Province, expressly directed at the expropriation of most of AbitibiBowater's investments in Newfoundland and Labrador, including their property and facilities and various vested rights and legal entitlements, and the denial to AbitibiBowater of appropriate compensation and of the usual judicial avenues of legal redress. Canada is responsible for the Province's acts under NAFTA and applicable principles of international law.
- 9. On December 16, 2008, Bill 75, entitled "An Act to Return to the Crown Certain Rights Relating to Timber and Water Use Vested in Abitibi-Consolidated and to Expropriate Assets and Lands Associated With the Generation of Electricity Enabled by Those Water Use Rights" (hereinafter the "**Abitibi-Consolidated Rights and Assets Act**" or the

“Act”<sup>1</sup> was passed by the Newfoundland and Labrador House of Assembly and received Royal Assent the same day. This Act, and related measures, are the subject of this claim. By these measures the Province rejected the Company’s requests to form a joint working group to address cooperatively all issues related to its assets and rights in the Province. Instead, the Province illegally expropriated AbitibiBowater’s and the AbitibiBowater Canadian Entities’ investments, including their property and facilities and various vested rights and legal entitlements, and unilaterally repudiated various agreements with the AbitibiBowater Canadian Entities. As explained further below, this expropriation was carried out without a valid public purpose, in a blatantly discriminatory fashion, without the requisite due process, and without provision for the full and prompt compensation required by NAFTA Article 1110 and applicable international law.

10. The Act was also in breach of other NAFTA obligations, including Canada’s obligation to accord AbitibiBowater “treatment in accordance with international law, including fair and equitable treatment and full protection and security” (Article 1105) and its obligation to accord AbitibiBowater “treatment no less favorable” than that it accords investors of Canadian nationality or nationals of other States (Articles 1102 and 1103).
11. These violations of NAFTA are described more fully in Section VIII. First, this Section VII describes the underlying facts, including:
  - (a) an overview of AbitibiBowater, its rights and investments in the Province, and its important contribution to the development of local communities over the last century (Section VII.A);

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<sup>1</sup> A copy of the Act is attached as Exhibit A.



- (b) AbitibiBowater's announcement in early December 2008 of the planned closure of one of its interests in the Province, the pulp and paper mill in Grand Falls-Windsor (hereinafter the "**Grand Falls Mill**"), as a result of an economic downturn and market decline in the industry and the collapse of negotiations with the unions and consultations with the Province over a renewal plan aimed at reducing operating costs at the Mill (Section VII.B); and
- (c) the Province's precipitous decision, through the enactment of the Act, to strip AbitibiBowater of most of its rights and interests in the Province, in retaliation for its planned closure of the Grand Falls Mill (Section VII.C).

**A. The Investor and Its Investment**

- 12. AbitibiBowater is a limited liability company organized under the laws of the State of Delaware, United States of America. AbitibiBowater was created in 2007 through the merger of two other forest products companies, the U.S. company Bowater Inc. and the Canadian company Abitibi-Consolidated Inc.
- 13. AbitibiBowater produces a wide range of newsprint, commercial printing papers, market pulp and wood products. It is the eighth largest publicly traded pulp and paper manufacturer in the world, measured by sales volume. AbitibiBowater owns or operates 25 pulp and paper facilities and 30 wood products facilities located in the United States, Canada, the United Kingdom and South Korea. Marketing its products in more than 90 countries, the Company is also among the world's largest recyclers of old newspapers and magazines, and has third-party certified 100% of its managed woodlands to sustainable forest management standards. AbitibiBowater's shares trade under the stock symbol ABH on both the New York Stock Exchange and the Toronto Stock Exchange.

14. AbitibiBowater has been operating in Canada for over a century, through its Canadian subsidiaries (the AbitibiBowater Canadian Entities) and their predecessors. Aside from its activities in Newfoundland and Labrador, AbitibiBowater also owns and/or operates enterprises in other parts of Canada, including British Columbia, New Brunswick, Nova Scotia, Ontario, and Québec.
15. In Newfoundland and Labrador, AbitibiBowater holds a broad range of rights that can be traced in part back to grants in various forms by the provincial government and its predecessors and agents (such as the January 12, 1905 Charter Lease), but also in part to other arm's length agreements made with private third parties, for which valuable consideration was likewise given. These transactions provided AbitibiBowater with extensive land rights, timber rights, water use rights and various other related rights, established through a wide array of deeds, leases, easements and other contractual agreements. AbitibiBowater's various rights are described in Section VII.A.1 below.
16. In addition to the substantial sums AbitibiBowater expended to acquire these various rights, the Company invested many hundreds of millions of dollars more in the Province over the course of the last century. These investments served as the catalyst for the birth and development of communities throughout the Province, and reinforced the Company's position as a good corporate citizen and strong local partner in the community since 1905. Examples of these major investments are provided in Section VII.A.2 below.
17. Based on these rights and investments, AbitibiBowater established, owned and operated (with its partners) two major hydroelectric generation facilities in the Province, the Star Lake Hydro Project and the Exploits River Hydro Project -- the latter encompassing both the Bishop's Falls and Grand Falls generating facilities. AbitibiBowater also owned and

operated a smaller hydroelectric generating facility in Buchans. These assets are described in Section VII.A.3 below.

(1) **The Sources of AbitibiBowater's Rights**

18. AbitibiBowater's involvement in the Province dates back to January 7, 1905, when its predecessor the Anglo-Newfoundland Development Company, Limited (hereinafter "ANDC") was incorporated as a Newfoundland corporation. ANDC was incorporated with a listed capital of CDN \$5 million, a vast sum at the turn of the 20<sup>th</sup> century, equivalent to more than US \$84 million in today's currency.<sup>2</sup> Its formation was the result of a confluence of events and forces. The colonial Government of Newfoundland was determined to attract industrial enterprises to the island, to expand the region's economic base as its fishery industry collapsed and in the wake of a major fire causing losses above CDN \$20 million.<sup>3</sup> Newfoundland heavily promoted its development efforts in the United Kingdom, eventually catching the attention of the Harmsworth Brothers, publishers of the *Daily Mail* and several other leading newspapers. Traditionally, the Harmsworths had obtained pulp and newsprint from Scandinavia, but increasing worries about German expansionism led them to look westward to North America for alternative supplies.
19. The Harmsworths entered into discussions with the colonial government in 1904 to acquire the necessary lands and rights, and began also purchasing assets from other forestry operators in arm's length transactions. From 1905 and over the next century, AbitibiBowater and its predecessor companies including ANDC (hereinafter referred to

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<sup>2</sup> The 2008 values of historical investments included in this Notice of Intent were calculated using an inflation calculator for Canadian dollars available at [http://www.bankofcanada.ca/en/rates/inflation\\_calc.html](http://www.bankofcanada.ca/en/rates/inflation_calc.html) and a similar calculator for U.S. dollars available at <http://www.westegg.com/inflation>. The resulting figures were converted to U.S. dollars at the exchange rate prevailing on December 31, 2008.

<sup>3</sup> Government of Canada, Newfoundland: An Introduction to Canada's New Province, published by authority of the Right Honourable C. D. Howe, Minister of Trade and Commerce, prepared by the Department of External Affairs in Collaboration with the Dominion Bureau of Statistics, Ottawa, at page 29 (1950).

collectively as “AbitibiBowater”) made a broad range of significant investments in the Province, acquiring numerous valuable rights and contributing significantly to the region’s economic development.

**(a) The Charter Lease**

20. AbitibiBowater’s first significant transaction with the Province<sup>4</sup> was the January 12, 1905, Charter Lease (“**Charter Lease**”), a perpetually renewable 99-year lease of 2,000 square miles of surface, timber and water rights in the Exploits River watershed in the southwest interior of the Province. The Charter Lease was issued by the Province and thereafter ratified by legislation, the Pulp and Paper Act of June 15, 1905. Under the Charter Lease, AbitibiBowater was required to pay the Province annual rentals and timber royalties, which it has continued to do to this day.
21. In addition to promising regular payment of rents and royalties, AbitibiBowater covenanted in the Charter Lease to spend at least CDN \$250,000 within four years of the date of the Charter Lease, and a further CDN \$750,000 within twenty-five years, in connection with “the erection of one or more pulp and paper mills and their equipment, including water power development, on or in connection with the demised premises.”<sup>5</sup> There is no dispute that AbitibiBowater honored this commitment. In fact, during its first five years of operation alone, AbitibiBowater invested more than CDN \$6 million in the colony of Newfoundland,<sup>6</sup> a phenomenal sum at the time (equivalent to more than US \$101 million today) and many times the amount it was required to invest under the Charter

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<sup>4</sup> The term “Province” in this Notice of Intent includes its predecessor colonial and provincial governments. In 1905, when ANDC commenced its pulp and paper business, Newfoundland was a colony of the United Kingdom. It remained thus until April 1, 1949, when it joined Canada as a Province.

<sup>5</sup> Charter Lease, Section 12.

<sup>6</sup> See “Fifty Years of Progress at Grand Falls: The Impact of the Anglo-Newfoundland Development Company Limited on the Economy of Newfoundland,” published by the Pulp and Paper Magazine of Canada,” at 18 (F. A. Price, ed., 1959).

Lease. This massive investment by AbitibiBowater, which was merely the opening step in an ongoing investment process that continued for another century, was instrumental in the economic, social and sustainable development of the region, as discussed further in Section VII.A.2 below.

22. As part of the Charter Lease, AbitibiBowater surrendered to the Province certain preexisting timber licenses and leases that it had acquired independently from other forestry operators in arm's length transactions. For example, in 1905 AbitibiBowater had acquired considerable timber holdings from Newfoundland Timber Estates, Limited, for consideration of CDN \$400,000, which in today's dollars would equate roughly to US \$6.75 million. The Charter Lease recitals refer to these and other valuable leases and licenses acquired independently from "various parties." AbitibiBowater surrendered these interests to the Province in connection with issuance of the Charter Lease.
23. Notably, the surface, timber and water rights conferred by the Charter Lease were not conditional on the continued operation of the planned paper mill at Grand Falls. Rather, they were perpetually renewable as a matter of right, under Section 14(b), which provided that

the Government will, at the request and cost of the Lessee, at the expiration of the term hereby granted and again at the expiration of every further term of ninety-nine years which may be hereinafter granted under this covenant, grant to the Lessee at the same rents and royalties ... a new lease of the demised premises together with all rights and privileges hereby granted.<sup>7</sup>

24. Regarding water use rights, the Charter Lease stated as follows:

The Lessee shall be entitled (so far as the Government can, *consistently with any grants heretofore made and actually subsisting* grant the same)

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<sup>7</sup> Charter Lease, Section 14(b).

to have, use and enjoy for its milling and logging business all streams, lakes, watercourses, springs or water in, upon under or intersecting the demised premises, and all water power or powers in and upon Exploits River down to and excluding Bishops Falls and particularly, but not by way of limitation, the entire water power of Grand Falls on said Exploits River.<sup>8</sup>

While the water use rights conferred by the Charter Lease may therefore appear to be use-specific, the qualification respecting “grants heretofore made” in the opening language of the clause is significant. AbitibiBowater already had broad rights to all “water-courses” on the lands at Grand Falls, without any conditions on use, through Reid Lot 59 (discussed further in paragraph 27 below).

25. The Grand Falls Mill was officially opened in 1909. The mill historically has been powered by energy generated from the Bishop’s Falls and Grand Falls hydroelectric generation facilities. Both of these hydroelectric generating facilities are located on the Exploits River and form part of the Exploits River Hydro Assets, discussed further below.
26. In late 2003, in anticipation of the expiry of the initial 99-year term of the Charter Lease, AbitibiBowater exercised its right to renew the lease. Despite initial verbal indications that the Province would honor its renewal obligation, however, the Province ultimately declined to do so. It insisted in writing that any renewal would have to be separately negotiated -- on much more restrictive terms -- and issued under different legislation. The Province nonetheless continued to accept rental and other payments from AbitibiBowater under the Charter Lease, indicating its tacit acknowledgment of the Company’s continuing legal rights.

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<sup>8</sup> Charter Lease, Section 3 (emphasis added).

**(b) Other Land, Water and Timber Rights**

27. Independently of the Charter Lease, AbitibiBowater acquired substantial other land, water and timber rights in the Province, most of them from other forestry operators in arm's length transactions for valuable consideration. For example, in addition to the timber licenses and leases acquired independently in 1905 (discussed above in paragraph 22):

- AbitibiBowater acquired from the Newfoundland Pine and Pulp Company Limited, in 1911, its interest in a 999-year lease dated 1907 for five parcels of timber land (the “**1907 Lease**”);
- AbitibiBowater acquired, from the Albert E. Reed Company (Newfoundland) Limited, in 1919, its interest in a 999-year grant dated 1907 of water use rights for Badger Brook, together with lands for erection of dams and associated control structures (the “**Badger Brook Grant**”);
- AbitibiBowater acquired, in the early 20<sup>th</sup> century, 33 additional non-renewable timber licenses issued under the Crown Lands Act, originally with variable expiry dates but later agreed to expire on December 31, 2010 (hereinafter the “**Non-Renewable Licenses**”);
- AbitibiBowater acquired from the Reid Newfoundland Company, at various times during the 20<sup>th</sup> century, substantial additional timber lands in 16 different freehold grants, specifically including all the “water-courses” on the lands, a term which conferred freehold water use rights (the “**Private Reid Lots**”).<sup>9</sup> One of the Private Reid Lots, “**Reid Lot 59**,” included the lands on which the Grand Falls Mill was constructed, and the reference to “water-courses” included that portion of the Exploits River which traversed the Reid Lot 59 lands, including Grand Falls itself;<sup>10</sup>
- AbitibiBowater acquired from the Alexander Bay Pulp and Paper Company Limited (in liquidation), in 1928, “the exclusive right to cut timber in and over” eight additional “**Crown Reid Lots**,” until the expiration of a 99-year term (subject to certain rights of renewal) that had started in 1919 with original licenses made by the Reid Newfoundland Company;
- AbitibiBowater acquired from the Bishop’s Falls Pulp and Paper Company Limited, in 1929, two large freehold parcels of land on the Exploits River at

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<sup>9</sup> While AbitibiBowater had leased some of the Reid Lot lands as early as 1905, in return for rents and royalties (the “**1905 Reid Lease**”), it later acquired full freehold interests in these lots through various deeds executed later in the century, including in 1962 and 1975. Many of these transactions involved the payment of valuable consideration to Reid Newfoundland Company.

<sup>10</sup> AbitibiBowater acquired Reid Lot 59 in part by the 1905 Reid Lease, in part by a new deed in 1929, and in part by a further new deed in 1933, for valuable consideration.

Bishop's Falls, together with the right to erect and maintain a dam (the "**Bishop's Falls Deed**"). The Bishop's Falls Deed included "the right to use the waters of the said Exploits River at Bishop's Falls" for a 999-year term beginning in 1907 ("**Crown Grant No. 55**," also known as the "**Bishop's Falls Waterpower Lease**"); and

- AbitibiBowater also acquired, in the early 1930s, 20 additional parcels of freehold land (known as the "**Stock Pipe-Line Lands**").
28. AbitibiBowater paid valuable consideration for these freehold, leasehold and license timber rights acquired from third parties independent of the Charter Lease. For example, Abitibi Bowater paid more than CDN \$2.5 million in 1929 (a sum exceeding US \$24 million today) for the Bishop's Falls Deed.
29. Notably, only a few of the many rights AbitibiBowater assembled during its century of operations in the Province were even arguably conditioned on continued operation of the Grand Falls Mill. The Non-Renewable Licenses admittedly depended on operation of at least two paper-making machines at the Grand Falls Mill, and as to these licenses, AbitibiBowater acknowledges that the closure of the Mill at the end of March 2009 would result in early termination, 21 months prior to the licenses' scheduled expiration. But most of AbitibiBowater's other land, water and timber rights contained no such condition. As discussed further in Section VII.C, the Province's attempt to expropriate almost all of AbitibiBowater's rights, without any attention to their differing legal provisions, was thus wholly arbitrary and indiscriminate.

(2) **AbitibiBowater's Additional Investments in and Contributions to the Province**

30. In addition to the substantial amounts AbitibiBowater spent to acquire these various rights, the Company invested enormous sums in the Province over the course of the last century. These investments help place into context AbitibiBowater's broader involvement in the



Province which, to the benefit of many hundreds of local employees, small businesses and public authorities, has hardly been the kind of “one-way street” that Provincial authorities later claimed to justify the sweeping expropriation of AbitibiBowater’s rights.

31. Since 1996 alone, AbitibiBowater invested (or caused to be invested through its partnerships) approximately CDN \$145 million in the Grand Falls Mill and approximately CDN \$135 million in the hydro-electric projects. And these investments were simply the latest in a long line of historical investments. For example, AbitibiBowater invested CDN \$50 million (worth somewhere in the range of US \$300 million today) in modernization and rehabilitation of Grand Falls Mill operations between the end of World War II and 1972, including conversion of the Bishop’s Falls pulp and paper mill to a hydro-electric generating facility and installation of a new paper machine. Between 1985 and 1995, the Company made improvements valued at more than CDN \$162 million (roughly US \$185 million today), including among other things a new effluent treatment system and the modernization of the wood-room. Over the next five years (1996-2000), AbitibiBowater allotted more than CDN \$97 million to additional improvements, including upgrade of hydro-electric generation capabilities, pulping systems, computer systems, dams, and other projects. The Company undertook CDN \$25 million worth of further upgrades to the Grand Falls Mill in 2005.
32. AbitibiBowater’s investments in the Province, over the last century, were instrumental in building entire communities that had not existed prior to AbitibiBowater’s arrival, and in developing the institutions necessary to support community growth. Indeed, as a strong local partner and corporate citizen, AbitibiBowater built the entire town of Grand Falls. In addition to its mill and hydroelectric operations, AbitibiBowater built and repaired roads

and bridges on its timber lands, and replanted forest lands to ensure sustainability. In the last five years alone, the Company spent more than CDN \$26 million on such improvements, which the Province has now expropriated along with the lands on which they lie.

33. The Company contributed in numerous other ways to the local community to which it belongs. Starting in 1909, it established a trust fund for the operation of the hospital and schools in Grand Falls, and by 1929 AbitibiBowater had expended more than CDN \$100,000 (roughly US \$1 million in 2008 dollars) on school construction. The Company spent another CDN \$150,000 (also roughly US \$1 million today) by 1950 on construction of a new high school in Grand Falls.<sup>11</sup> AbitibiBowater allocated significant sums to scholarship funds and other educational programs throughout the Province, and by 1967, it was contributing more than CDN \$100,000 (approximately US \$500,000 in 2008 dollars) each year to education.<sup>12</sup> In recent years, AbitibiBowater has continued to support education, for example donating CDN \$100,000 in 1997 to Memorial University of Newfoundland's Opportunity Fund.<sup>13</sup> The Company also donated CDN \$650,000 in the 1980s (almost US \$950,000 today) to help purchase new medical equipment for the Central Newfoundland Regional Health facility in Grand Falls-Windsor, and another \$350,000 (more than US \$500,000 today) to purchase medical equipment for the hospital in nearby Stephenville. These major monetary contributions do not begin to capture the

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<sup>11</sup> Grand Falls-Windsor Heritage Society Inc., *Grand Falls-Windsor: The Place and Its People*, published by Transcontinental Community Newspapers, Grand Falls-Windsor, NL, at 65 and 91 (2005).

<sup>12</sup> "Moby Joe: Commemorating the Official Opening of the New Machine Room Housing Price (Nfld.) Pulp & Paper Limited's Modern High-Speed Paper Machine 'Moby Joe'," published by Price (Nfld.) Pulp and Paper Limited, unnumbered (1968).

<sup>13</sup> "Abitibi-Price contributes \$100,000 to Memorial University's *Opportunity Fund*," <http://www.mun.ca/opfund/news4.html>, 1997.

Company's social commitment to its employees and the community, for example in annual assistance grants to town-sponsored athletic and arts programs and local festivals.

(3) **AbitibiBowater's Major Hydro Assets**

34. Based on the rights and investments detailed above, AbitibiBowater established, owned and operated (with its partners) two major hydroelectric generation facilities in the Province, the Star Lake Hydro Project and the Exploits River Hydro Project, along with a smaller hydroelectric generating facility in Buchans. Because these assets were captured by the Province's sweeping expropriation, they are described below

(a) **The Exploits River Hydro Assets**

35. As discussed in paragraph 27, AbitibiBowater acquired title in 1929 to the land and water rights at Bishop's Falls. From that year until 1951, AbitibiBowater's dam and pulp mill at Bishop's Falls supplied liquid pulp to the Grand Falls Mill. In the early 1930s, AbitibiBowater partly converted the Bishop's Falls Mill to generate hydroelectricity, and constructed a transmission line upon the Stock Pipe-Line Lands so the Mill could also be supplied with energy generated by the Bishop's Falls power station. In 1951, AbitibiBowater fully converted the Bishop's Falls plant to a hydroelectric generating facility dedicated to the supply of energy to the Grand Falls Mill.
36. AbitibiBowater's pulp and paper mill at Grand Falls continued to be powered principally by energy generated from the Bishop's Falls and Grand Falls hydroelectric generation facilities, which together form part of what is hereafter referred to as the "**Exploits River Hydro Assets.**" The rights structure for the Exploits River Hydro Assets is a complex one, but the assets include among other things:

- the Millertown dam (to which AbitibiBowater obtained rights in 1905);
  - the water use and hydroelectric generation rights at Grand Falls (which may be traced to Reid Lot 59, the Charter Lease, and a 2002 water use license);
  - the Grand Falls power house and dam (which are located within Reid Lot 59);
  - the water use and hydroelectric generation rights at Bishop's Falls (which can be traced to the Bishop's Falls Deed, including the Bishop's Falls Waterpower Lease); and
  - the Bishop's Falls power house and dam (which rights were conferred by the Bishop's Falls Deed).
37. In 2001, AbitibiBowater, together with Central Newfoundland Energy Inc. (a subsidiary of Fortis Properties Corporation), formed the Exploits River Hydro Partnership to finance and develop the Exploits River Hydro Project, a 31 megawatt upgrading of the Exploits River Hydro Assets. The Exploits River Hydro Project was constructed at a capital and start-up cost of CDN \$74 million and was commissioned in 2003. Since the commissioning, and pursuant to a 2001 power purchase agreement with Newfoundland and Labrador Hydro, the first 54 megawatts of power generated by the Exploits River Hydro Assets have been supplied to the Grand Falls Mill, with AbitibiBowater supplying the incremental power generated above that level to the provincial power grid.
38. In addition to its substantial ownership interest in the Partnership itself, AbitibiBowater was entitled to payment from the Partnership for the use of various rights and assets. For example, under the Exploits River Hydro Partnership Lease and Easement of 2002, AbitibiBowater was entitled to receive an adjustable base rental of CDN \$800,000 per year for lease and easement rights respecting the Exploits River Hydro Assets. Under the Restated Operations and Maintenance Agreement of 2002, AbitibiBowater was entitled to receive an adjustable base fee of CDN \$250,000 per year from the Exploits River Hydro

Partnership. These income streams formed an additional part of the value of AbitibiBowater's investment, which has now been expropriated.

**(b) The Star Lake Hydro Assets**

39. In 1997, together with CHI Hydroelectric Company Inc. (a subsidiary of Enel SpA), AbitibiBowater formed the Star Lake Hydro Partnership to develop and construct the Star Lake Project, a 15 megawatt hydroelectric generation project located in western Newfoundland and Labrador. The Star Lake Project was constructed at a capital cost of CDN \$59 million, in response to a request for proposals for the supply of power to the provincial power grid. Since its commissioning in 1998, the Project has continued to provide power to the Province, pursuant to a power purchase agreement with Newfoundland and Labrador Hydro.
40. Prior to passage of the Act, Abitibi-Consolidated Company of Canada had, with the Government's knowledge, entered into an agreement to sell its interest in the Star Lake Project to its partner Enel Atlantic Canada Limited Partnership ("Enel"), for net proceeds of CDN \$26 million. It did so after rejecting a lower offer from the Province for these assets. The Province has now obtained through legislation what it unsuccessfully sought earlier through a commercial negotiation. The Enel transaction has been thrown into turmoil by the Act's expropriation of AbitibiBowater's rights in the Star Lake Hydro Assets.

**(c) The Buchans Hydro Assets**

41. In addition to its interest in the Exploits River Hydro Assets and the Star Lake Hydro Assets, AbitibiBowater also had land and water use interests in a 1.8 megawatt hydroelectric generating facility and associated infrastructure and water rights in Buchans

(the “**Buchans Hydro Assets**”). AbitibiBowater’s rights in the Buchans area derived from the Charter Lease, and have also been expropriated by the Act.

**B. The Planned Closure of the Grand Falls Mill**

42. The pulp and paper industry has been enduring difficult times as a result of declining newsprint demand and high delivery costs, a problem not unique to AbitibiBowater. According to a recent report commissioned by the Province, North American newsprint demand has declined by almost five million tonnes (or almost 40%) since 2000, as the newspaper industry struggles to compete against the Internet. In the international markets traditionally served by the Grand Falls Mill, demand all but flattened in the same period.<sup>14</sup> In the last quarter of 2008, demand fell even further, and expectations for 2009 are for continued reductions in worldwide and North American demand.
43. AbitibiBowater’s global operations have been devastated by these trends. In 2007, AbitibiBowater suffered operating losses of some US \$400 million.
44. The Company has been proactive in managing this crisis. In late 2007, one month after completing the merger, AbitibiBowater announced “Phase 1” of an action plan to address Company challenges, including reduction of paper production capacity by 1 million metric tonnes during the first quarter of 2008. Phase 1 involved the permanent closure of several mills, as well as the indefinite idling of others, among other initiatives. AbitibiBowater announced that it would undertake a comprehensive “Phase 2” review of all aspects of its business to further reduce costs.<sup>15</sup>

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<sup>14</sup> “Provincial Report Forecast Paper Mill Closure,” <http://www.thetelegram.com/index.cfm?sid=205435&sc=82>, 30 December 2008 (discussing November 2008 report on the Newfoundland Forest Sector Strategy, submitted to the Province by the Nova Scotia-based management consulting firm Halifax Global).

<sup>15</sup> “AbitibiBowater Announces Phase 1 of Action Plan to Address Company Challenges,” AbitibiBowater Latest News (Nov. 29, 2007), <http://www.abitibibowater.com/media/latest-news.aspx?id=636&detail=true&reqid=11082781>.

45. As part of the comprehensive Phase 2 review, attention turned to the Grand Falls Mill, where the consequences of the industry downturn have been particularly severe. The Mill had the highest labor costs of any of AbitibiBowater's operations worldwide. This fact, coupled with industry-wide trends of declining North American demand and rising competition on international markets from several North American mills, meant that the Grand Falls Mill had to reduce costs to stay competitive and remain in operation.
46. In response to these economic realities, and in conjunction with the broader review of AbitibiBowater's assets worldwide, AbitibiBowater management devised an economic and structural renewal plan for the Grand Falls Mill, to provide it with a more sustainable future through an improved competitive status. The Company consulted regularly with provincial government officials about the renewal plan and a range of other issues, and also negotiated directly with the Province about a possible sale of certain AbitibiBowater surface rights to obtain additional capital for significant re-investment in the Grand Falls Mill, subject to reaching agreement with the employees on a new operating model.
47. Meanwhile, AbitibiBowater management launched extensive negotiations with union representatives and other local interests, to try to reach agreement on the cost cuts and other initiatives necessary to make the Mill competitive on a long term basis. The Company held many dozens of meetings with union representatives, over a period of more than three months in 2008. Unfortunately, the outcome of the negotiations was unsuccessful: members of the unions voted overwhelmingly against the Company's restructuring proposals, in September 2008 and again in November 2008. The votes were in stark contrast to the approach of union members at other AbitibiBowater facilities in Canada, who generally supported the Company's renewal efforts and worked

constructively with management to adopt changes that improved the competitiveness of their respective operations.

48. Despite its aggressive efforts during 2008 to manage the impacts of a devastating economic and market environment, the Company's fortunes continued to fall, due to the volatility in exchange rates, energy and fiber pricing, as well as structural challenges and declining consumption in the North American newsprint industry. In the first three quarters of 2008, AbitibiBowater suffered further operating losses of some US \$371 million. The Company's stock fell by 96% in 2008,<sup>16</sup> and in December of 2008, the New York Stock Exchange warned AbitibiBowater of a possible delisting, because its shares had traded for less than an average of one dollar for thirty consecutive days.<sup>17</sup>
49. On December 4, 2008, AbitibiBowater reluctantly announced a further action plan to address continuing economic and market challenges. The Company announced that it would be cutting its North American production through several steps, most of them involving operations in the United States. In addition to the permanent closure of the Grand Falls Mill at the end of March 2009, AbitibiBowater announced the permanent closure of a facility in Covington, Tennessee, along with the immediate idling of an Alabama newsprint mill and of two paper machines in Calhoun, Tennessee. AbitibiBowater also announced a program of rolling downtime at other facilities across the organization until market conditions improved. President and Chief Executive Officer David J. Paterson noted that "[s]takeholders made efforts to develop viable solutions to

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<sup>16</sup> See <http://stocks.forbes.com/stocks/ABH>; compare "U.S. voices concern over Canadian expropriation," Yahoo! Finance, December 22, 2008 (suggesting 2008 decline of 97%); <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a2f3LgkfzJVM> (suggesting shares have fallen 99%).

<sup>17</sup> Christopher Donville and Sarah Rabil, "AbitibiBowater aims to Refinance Debt in Early 2009," available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a2f3LgkfzJVM>.



keep these operations running, however, after careful deliberation, these decisions were necessary given current market and economic realities.”<sup>18</sup>

50. The decision to close the Grand Falls Mill was thus not taken lightly. AbitibiBowater management would have preferred to try to save the plant, had that been genuinely feasible. But lacking any meaningful progress in reshaping the mill’s fundamental economics, the Company ultimately opted to close the Mill. This was not, however, a sign of withdrawal from the Canadian marketplace. AbitibiBowater remains committed to maintaining economically viable operations in Canada.
51. AbitibiBowater did not just announce the closures and walk away from the communities that it had helped build. Instead, as Mr. Paterson emphasized in his December 4, 2008 announcement, the Company was committed to “make every effort to help mitigate the effects of these capacity reductions, as we are mindful of the impact they will have on affected employees and communities.”<sup>19</sup> In furtherance of this objective, AbitibiBowater management reached out to provincial officials the very day of the announcement, to propose the formation of a collaborative working group to address all issues arising from the planned closure and the Company’s overall presence in the Province. The Company’s outreach demonstrates that the public interest could have been served by cooperative discussions. Instead, the Province opted for unilateral action, in violation of Canada’s clear obligations to AbitibiBowater under NAFTA.

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<sup>18</sup> “AbitibiBowater Announces Action Plan to Address Market Challenges,” AbitibiBowater Latest News (Dec. 4, 2008), <http://www.abitibowater.com/media/latest-news.aspx?id=636&detail=true&reqid=1232536>.

<sup>19</sup> *Id.*

### C. The Abitibi-Consolidated Rights and Assets Act

52. Provincial authorities wasted no time in penalizing AbitibiBowater for its closure of the Grand Falls Mill. The same day the company announced the closure and approached officials about forming a joint working group, the Province's deputy premier rejected this outreach, and declared instead that the Province would attempt to expropriate AbitibiBowater's hydro and timber rights.<sup>20</sup>
53. Then, on Friday December 12, 2008 -- a mere week after the Company announced the planned closure -- Minister Kathy Dunderdale faxed a letter to AbitibiBowater after business hours, demanding that the Company "*forthwith surrender* to the Province its entitlement to [the Province's natural] resources." The letter was not an invitation to discussions; it was an ultimatum. Minister Dunderdale demanded to receive written confirmation of AbitibiBowater's intentions to surrender all of its natural resource interests within three days, *i.e.*, "by noon of 15 December 2008."<sup>21</sup> Since the letter was delivered after business hours on a Friday, without any early notice, this meant that the response was due by noon the very next business day. AbitibiBowater responded on Monday December 15, 2008, reiterating its request to establish a joint working group to address issues related to the Mill closure and the Company's overall presence in the Province.
54. AbitibiBowater's sensible proposal was ignored. Instead, on December 16, 2008 -- the day after the "high noon" ultimatum expired -- the Province hastily enacted the Act, without any attempt to consult with AbitibiBowater and without any public hearings or other responsible policy dialogue and review. Premier Danny Williams issued a number of

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<sup>20</sup> "N.L. to expropriate Abitibi assets in the province," Yahoo! Canada Finance, December 16, 2008.

<sup>21</sup> Letter from Kathy Dunderdale, Minister, Department of Natural Resources, Government of Newfoundland and Labrador, to Pierre Rougeau, Senior VP North American Newsprint, AbitibiBowater, December 12, 2008 (emphasis added).

statements to the press, articulating three basic justifications for the Province's precipitous act.

55. First, Premier Williams expressed concern about the impact of the Grand Falls Mill closure on the local workforce. He has not explained how expropriation of AbitibiBowater's other investments in the Province would serve a goal of protecting jobs, nor has the Province to this day announced any plans to save the Mill or to create jobs for former mill workers. To the contrary, while the Act expropriated most of AbitibiBowater's other interests in the Province, it did *not* expropriate the Grand Falls Mill. The Province's cherry picking of valuable resources, while providing no plan whatsoever with respect to the Mill or its workforce, cannot even arguably be justified by a rationale of job protection. The realities of the Act are thus starkly in contrast with Premier Williams' professed concern for the Grand Falls community. The Act in no way served the public interest.
56. Second, Premier Williams accused AbitibiBowater of breaking an alleged "covenant" between AbitibiBowater and the Province, in which the Company's entitlement to enjoy its accumulated investments, rights and interests was supposedly contingent on perpetual operation of the Grand Falls Mill.<sup>22</sup> Premier Williams did not point to any particular legal provisions supposedly demonstrating this covenant, except for one passage in Section 3 of the Charter Lease. But the issue is not as simple as pointing to one interpretation of a single line in a document prepared by a colonial government over 100 years ago. As discussed above, even that passage -- which did not on its face state any clear conditions on use -- acknowledged that AbitibiBowater's predecessor had significant grants *prior* to the Charter Lease, which were not even arguably tied to mill operations. Moreover,

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<sup>22</sup> "Abitibi vows NAFTA lawsuit," TheStar.com, December 20, 2008, <http://www.thestar.com/article/556699>.

AbitibiBowater's rights in the Province were based on much more than just the Charter Lease. As demonstrated in Section VII.A above, they rested on a wide array of other deeds, leases, licenses and contracts, the vast majority of which in no way were conditioned on Grand Falls Mill operations. The Act was therefore fatally overbroad, according to Premier Williams' own stated rationale.

57. Third, Premier Williams trumpeted the Act's importance in returning natural resources to provincial management and control. "[F]inally lands that had been ours and had been given away are back," he said, "back in our hands where they belong, in the hands of the people of the province."<sup>23</sup> But the Act did not reflect any kind of grand policy scheme for centralizing timber, land and water assets in government hands. Other private companies operating in the Province continue to enjoy valuable deeds, leases and licenses involving natural resources. The Act simply singled out one such company for retaliatory expropriation, and dressed up its punitive actions with populist rhetoric designed to loosely suggest (but not really reflect) rational public policy goals.
58. The real motivation, and the real consequence of the Act, was simple. It was to kick a single foreign investor out of the Province, because that investor had angered Premier Williams and some of his constituents. As Premier Williams announced to the press, upon the passage of the Act, "we're willing to tell [AbitibiBowater] to go and do their business in *other* parts of the country and *other* parts of the world."<sup>24</sup>
59. The scope of the Act was sweeping. It effected the immediate expropriation of most of AbitibiBowater interests in the Province, except the Grand Falls Mill itself, including not

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<sup>23</sup> "N.L. to expropriate Abitibi assets in the province," Yahoo! Canada Finance, December 16, 2008.

<sup>24</sup> "'We wish you well': Williams to AbitibiBowater," CBC News, last updated Dec. 17, 2008, [http://www.cbc.ca/canada/newfoundland-labrador/story/2008/12/17/williams-abitibi.html?ref=rss&loomia\\_si=t0:a16:g2:r4:c0.101616:b20263633](http://www.cbc.ca/canada/newfoundland-labrador/story/2008/12/17/williams-abitibi.html?ref=rss&loomia_si=t0:a16:g2:r4:c0.101616:b20263633) (emphasis added).

only interests originally granted by provincial authorities, but also interests obtained from third parties in arm's length transactions for valuable consideration.

60. To begin, Section 3 of the Act (and its Schedule A) terminates the AbitibiBowater Canadian Entities' "timber rights and rights to lands" in the Province, and provides for the reversion of such rights and lands to the Province.<sup>25</sup> With the exception of the Non-Renewable Licenses, none of the timber lands grants, leases and licenses expropriated through the Act were conditional upon AbitibiBowater's operation of the Grand Falls Mill.
61. Section 4 of the Act (and its Schedule B) expropriates the AbitibiBowater Canadian Entities' water use rights in the Province.<sup>26</sup> The expropriation fundamentally undercuts both the Exploits River Hydro Project and the Star Lake Hydro Project, which depended on continuation of these rights. None of the expropriated water rights was conditional upon AbitibiBowater's continued operation of the Grand Falls Mill or the use of its timber holdings in the Province.
62. Section 5 of the Act (and its Schedule C) expropriates the AbitibiBowater Canadian Entities' lands and assets associated with hydroelectric generation in the Province, including all of AbitibiBowater's interests in the Exploits River Hydro Assets and the Star Lake Hydro Assets.<sup>27</sup> Notably, since it was commissioned, the Star Lake Project has provided power to the Province's power grid only and *not* to the Grand Falls Mill, but this fact did not spare it from seizure by the Province.

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<sup>25</sup> This included the 1907 Lease, the Non-Renewable Licenses, the various Private Reid Lots, the Crown Reid Lots, and three other Special Leases/Grants, which included lands located in the vicinity of Red Indian Lake and Exploits River.

<sup>26</sup> This included three Water Use Licenses, Crown Grant No. 55 (the Bishop's Falls Waterpower Lease), the Final Water Power License, and the water use rights conferred by Reid Lot 59, which included all water-courses pertaining to the lands at Grand Falls.

<sup>27</sup> Schedule C also expropriated AbitibiBowater's interests in the Millertown Dam, the Grand Falls power plant and dam, the Bishop's Falls power house and dam, the Star Lake power plant and dam, the Buchans power plant and dam, and the infrastructure associated with all of these projects, including numerous control structures.

63. Section 6 of the Act (and its Schedule D) expropriates easements in favor of the AbitibiBowater Canadian Entities in the Province.<sup>28</sup>
64. Section 7 of the Act (and its Schedule E) unilaterally repudiates various agreements between the Province and its agent the Newfoundland and Labrador Hydro Corporation, and AbitibiBowater and other interested parties.<sup>29</sup>
65. Section 8 of the Act revokes the 1905 Charter Lease and repeals the 1905 Pulp and Paper Act, expropriating all lands, timber and water rights granted under them. Yet nothing in the Charter Lease or the Pulp and Paper Act makes these rights conditional on continued operation of the Grand Falls Mill. To the contrary, Section 14(b) of the Charter Lease makes them renewable as a matter of right.
66. Section 14 of the Act grants full discretion to the Lieutenant Governor in Council, for all of the many AbitibiBowater rights expropriated by the Act, to “issue a license or other permission,” under whatever “terms and conditions that it sees fit,” to any other third party “for the occupation, use, access to or another right” associated with assets that until recently belonged to AbitibiBowater. The Province has reportedly transferred many of these valuable rights and interests to its own recently established Crown corporation, Nalcor Energy. Of course, the Province in future may attempt to sell off these valuable rights to third parties -- essentially allowing it to arrogate to itself the very benefits for which AbitibiBowater already paid valuable consideration, in earlier transactions with the Province or with independent third parties.

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<sup>28</sup> This included AbitibiBowater’s transmission lines for the hydroelectric generating projects owned by the Exploits River Hydro Partnership (the Bishop’s Falls-Grand Falls transmission line) and by the Star Lake Hydro Partnership (Easement No. 111480), in each of which AbitibiBowater is a partner.

<sup>29</sup> This included a number of agreements involving the Exploits River Hydro Project and the Star Lake Hydro Project, including their respective power purchase agreements with Newfoundland and Labrador Hydro.

67. Section 13 of the Act purports to impose continuing liabilities on the AbitibiBowater Canadian Entities for environmental remediation on the expropriated properties. The Act does not explain how AbitibiBowater is expected to fulfill these responsibilities at sites that it no longer owns, controls or is allowed to access.
68. Section 9 of the Act unilaterally extinguishes a pending lawsuit by Abitibi-Consolidated Inc. and Abitibi-Consolidated Company of Canada against the Province (Action 2003 01T No. 2113).<sup>30</sup> The Province was evidently unwilling to allow the courts to decide whether AbitibiBowater's position in the pending lawsuit was correct or not. Through the self-help of discontinuing the judicial inquiry by legislative fiat, the Province has ensured that it wins no matter what.
69. Section 11 of the Act demonstrates an even more sweeping disregard for due process and the right to be fairly heard in courts of law. The provision on its face bars AbitibiBowater from bringing any action or proceeding against the Province, resulting from or incidental to the Act's operation. In other words, the Province purports to shield itself, unilaterally, from any judicial review of its actions. At the same time, it singles out AbitibiBowater -- and no other investors in the Province -- for the unprecedented penalty of preclusion from any access to the courts.
70. Section 10 of the Act purports to exclude any possibility of compensation for AbitibiBowater for the myriad expropriations suffered under the Act, with one minor exception. The Province appears to have intended to grant the Lieutenant-Governor in

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<sup>30</sup> In this pending "Water Rights" litigation, the AbitibiBowater Canadian Entities contended that the Province had improperly required them to obtain additional Water Use Licenses in connection with the Exploits River Hydro Project, even though AbitibiBowater already held sufficient water use rights for the Project under the Bishop's Falls Waterpower Lease, Reid Lot 59 and the Charter Lease. The AbitibiBowater Companies argued that by reason of the Province's position, the Exploits River Hydro Partnership had unnecessarily incurred additional water use fees of approximately CDN \$150,000 per year, which fees have been paid since 2003.

Council the discretion to pay compensation to AbitibiBowater for the expropriation of the Hydro Generation Properties under Schedule C, but for none of the assets, rights or entitlements expropriated under any of the other schedules to the Act. As to the hydro assets in Schedule C, the amount of compensation appears intended to be entirely discretionary, not bounded by any principles of law or conventional valuation. As Premier Williams announced to the press, “[i]f there’s no agreement [on valuation], we will in fact impose an agreement. ... Under the legislation, cabinet will have the power to say, ‘Here’s the formula, here’s what the compensation is, here’s your check.’”<sup>31</sup> AbitibiBowater’s rights to fair compensation are thus entirely subordinated to the political will of the Province -- and Premier Williams has made clear what he considers to be a fair valuation. The “honourable thing,” Premier Williams stated publicly, would have been for the Company to have handed over all of its assets “free of charge.”<sup>32</sup>

71. As of this date, no compensation whatsoever has been paid to AbitibiBowater or the AbitibiBowater Canadian Entities.

#### **VIII. THE VIOLATIONS OF NAFTA CHAPTER ELEVEN**

72. Canada, through the actions of the Province, is responsible for measures inconsistent with its commitments under NAFTA Chapter Eleven. These measures clearly breach its obligations under Article 1110 (Expropriation and Compensation), as well as Articles 1105 (Minimum Standard of Treatment), 1102 (National Treatment), and 1103 (Most-Favored Nation Treatment).

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<sup>31</sup> “AbitibiBowater vows to defend Canadian assets,” Yahoo! Finance, December 17, 2008.

<sup>32</sup> “Williams shrugs off any Abitibi challenge,” Globe and Mail, December 17, 2008.



73. By reason of Canada's breach of its obligations, AbitibiBowater, an investor of a Party as defined in Section C of NAFTA Chapter Eleven, has incurred damages in relation to the AbitibiBowater Canadian Entities, investments of AbitibiBowater as defined in Section C of Chapter Eleven. Hence, AbitibiBowater must be compensated for Canada's failure to comply with its obligations arising under NAFTA Chapter Eleven.
74. The particular NAFTA breaches are detailed below.
- A. Canada's Breach of Obligations Under Article 1110 -- Expropriation**
75. NAFTA Article 1110 prohibits Canada from directly or indirectly nationalizing or expropriating the investments of a U.S. company in its territory, except (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and the minimum standard of treatment under international law; *and* (d) on payment of compensation.
76. Canada, through the Province, has clearly violated its obligations under NAFTA Article 1110 by enacting legislation that (a) provides explicitly for the direct expropriation of an extensive list of important rights, assets, licenses, and other interests held by AbitibiBowater in the Province through its Canadian subsidiaries, as detailed above, but (b) does not meet *any* of the criteria specified under Article 1110 for such expropriations to be lawful.
77. First, there exists no valid public purpose for the expropriation. As detailed above in Section VII.C, none of the Province's stated rationales can even arguably explain its actions. Premier Williams has referred to the job losses occasioned by closure of the Grand Falls Mill, but the Act does nothing to protect jobs at the Mill or in the surrounding community. Premier Williams has invoked a supposed "covenant" between

AbitibiBowater and the Province, but in fact, most of the rights expropriated by the Act were in no way conditioned on continued operation of the Grand Falls Mill. Premier Williams has also invoked the Province's right to control natural resources, but the Act was not part of any overarching policy initiative designed to repudiate all private use of such resources. To the contrary, its careful targeting of the rights of only one investor suggest that the *true* motivations of the Province were political and punitive, not based on rational public policy at all.

78. Second, the expropriation was discriminatory. On its face, the Act expropriates the rights and assets of a single investor, even though other investors in the Province have also been forced to shut down operations in hard economic times. The Province has publicly stated that AbitibiBowater's business partners and lenders will be compensated for the consequential hardships befalling them,<sup>33</sup> while offering no parallel compensation to AbitibiBowater. And the Act singles out AbitibiBowater for preclusion from the courts, leaving all other investors in the Province fully entitled to judicial review of their grievances while denying the same rights to AbitibiBowater.
79. Third, the expropriation violates international standards of due process. The legislation appears to have been rushed through parliamentary processes in a single day, without meaningful prior consultation with AbitibiBowater and in total disregard of the Company's proactive outreach to try to resolve jointly with the Province all issues related to its assets, rights and interests. Indeed, the only attempt by the Province to communicate with AbitibiBowater, before stripping it of most of its rights, was an ultimatum providing AbitibiBowater with a weekend in which to voluntarily "surrender" precisely the same

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<sup>33</sup> "Newfoundland to Expropriate Hydro and Trees from AbitibiBowater," NewNewsledger.com, 16 December 2008.

rights. The authoritarian nature of this ultimatum and the subsequent legislation is reminiscent of much less democratic systems elsewhere in the world. The Province's unilateral decision to strip AbitibiBowater of its right to access the courts, while terminating a pending case, similarly makes a mockery of any notion of due process.

80. Finally, the Act does not even remotely comply with the full compensation requirements of NAFTA Article 1110. That Article requires that such compensation be "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place." Article 10 of the Act clearly violates this "fair market value" compensation requirement, by purporting to authorize compensation limited on its face to certain hydroelectric assets and by providing no compensation whatsoever for the confiscation of AbitibiBowater's other rights and assets. Even with respect to the hydroelectric assets, the Act leaves compensation determination and timing entirely to the discretion of the Lieutenant-Governor in Council, which violates NAFTA Article 1110(3)'s requirements of payment "without delay" by valuation standards recognized under international law and "fully realizable."
81. There is no question, under these circumstances, that the expropriations effected by the Act are illegal under NAFTA Article 1110. This illegal expropriation entitles AbitibiBowater to full reparation for its losses, including (a) restitution of the assets expropriated or compensation at their fair market value, as well as (b) payment of any additional consequential damages suffered as a result of the Province's illegal actions.

**B. Canada's Breach of Obligations Under Article 1105 - Minimum Standard of Treatment**

82. NAFTA Article 1105(1) obliges Canada to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”
83. The Act's seizure of AbitibiBowater's timber, water, land and other contractual rights violates the principle of fair and equitable treatment under Article 1105. As detailed above, the illegal expropriation under the Act clearly was arbitrary, irrational and discriminatory, in violation of AbitibiBowater's legitimate expectations of a stable business and legal environment and of equal treatment vis-à-vis other investors. It was accompanied by a textbook “denial of justice” (the preclusion of all access to the courts), which qualifies as a further violation of the principle of fair and equitable treatment included in Article 1105. The “full protection and security” requirement of Article 1105(1) likewise includes basic requirements of legal security and access to the courts.

**C. Canada's Breach of Obligations Under Articles 1102 and 1103 -- National Treatment and Most-Favored Nation Treatment**

84. NAFTA Chapter Eleven prohibits discrimination against investors of the other State Parties, vis-à-vis both nationals or investors of other States. Under Article 1102(2), “[e]ach Party shall accord to investments of investors of another Party treatment no less favorable than 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.” The same principle is found in Article 1103(2), but in reference to “investment of investors of any other Party or of a non-Party.”

85. In effect, these NAFTA provisions make it illegal for Canada, through the Province, to discriminate against a U.S. investor's activities in Canada, whether by comparison to a local investor or to an investor from any other country. The Act undoubtedly breaches NAFTA's non-discrimination guarantees, by explicitly targeting and singling out the Canadian operations of AbitibiBowater, a single foreign investor, rather than serving as a measure of general applicability. Although the Province may have a right under NAFTA to expropriate in the public good subject to certain conditions, it cannot discriminate as between the owners of such assets by unilaterally imposing acts of retaliation on one investor, while treating other investors more favorably. Certainly, the Grand Falls Mill is not the first employer in the Province to shut its doors in hard economic times. Where the Province has not attempted in other cases to penalize companies by unilaterally seizing their remaining assets and cancelling their remaining legal rights, it is clearly discriminating against AbitibiBowater.
86. Discrimination is also apparent in the Province's approach to compensation for the expropriation. The Act limits AbitibiBowater's rights to be made whole while the Province has publicly stated that it plans to insulate AbitibiBowater's lenders and independent business partners from any adverse effects on their business interests. Discrimination is further apparent, as previously discussed, in the Act's attempt to preclude AbitibiBowater from accessing the courts or continuing with pending claims, while all other investors in the Province still retain the full panoply of judicial options as recourse for any ill treatment.

**IX. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED**

87. The Investor, AbitibiBowater, claims damages for the following:

- (a) damages in an amount to be proven in these proceedings, currently estimated as in excess of CDN \$300 million, equivalent to roughly US \$245 million at today's exchange rate, as compensation for the direct losses caused by the measures of the Province that are inconsistent with Canada's overarching obligations contained within Part A of NAFTA Chapter Eleven;
- (b) additional consequential damages arising as a result of the illegal measures, in an amount to be proven in these proceedings;
- (c) the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;
- (d) pre-award and post-award interest at a rate to be fixed by the Tribunal;
- (e) payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
- (f) such further relief as the Arbitral Tribunal may deem just and appropriate.

23 April 2009

Respectfully submitted,

*Michael Shor / JEK*

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