

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COUNCIL OF CANADIANS, and DALE CLARK, DEBORAH BOURQUE, and
GEORGE KUEHNBAUM on their own behalf and on behalf of all members of the
CANADIAN UNION OF POSTAL WORKERS, and
BRUCE PORTER and SARAH SHARPE, on their own behalf and on behalf of
all members of the CHARTER COMMITTEE ON POVERTY ISSUES

Applicants

- and -

HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA

Respondents

AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date to be fixed by the Registrar, or as soon after that time as the matter may be heard, at 130 Queen Street West, Toronto, Ontario M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38C prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service in the court office

AMENDED THIS 11th day of October / PURSUANT TO
MODIFIÉ CE 11^{ème} jour d'octobre / CONFORMÉMENT À
RÈGLE/LA RÉGLE 28.02 (6)

THE ORDER OF
L'ORDONNANCE DU
JUGÉ/FAIT LE
REGISTRAR
LE GREFFIER
COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

A. Chiu

where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to oppose this application but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid Office.

March 28, 2001

Issued by: R. SHAM
Local Registrar

Address of Court Office:
393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: DEPARTMENT OF JUSTICE
The Exchange Tower
3400 - 130 King Street West
Toronto, Ontario
M5X 1K6

APPLICATION

1. THE APPLICANTS MAKES APPLICATION FOR:

- (a) ~~A declaration that Section B of Chapter Eleven of the *North American Free Trade Agreement* ("*NAFTA*"), as implemented and made part of Canadian law by the *North American Free Trade Implementation Act* S.C. 1993, c.44 ("*NAFTA* Implementation Act") including but not limited to ss. 4, 5, 6, 9 and 10 of that Act, infringes and denies rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and is therefore void and of no force and effect;~~
- (b) ~~A declaration that Section B of Chapter Eleven of *NAFTA*, as implemented and made part of Canadian law by the *NAFTA Implementation Act* including but not limited to ss. 4, 5, 6, 9 and 10 of that Act, infringes and denies rights and freedoms guaranteed by s. 15 of the *Charter* and is therefore void and of no force and effect;~~
- (a) A declaration that Section B of Chapter Eleven of *NAFTA*, as implemented and made part of Canadian law by the *NAFTA Implementation Act* including but not limited to ss. 4, 5, 6, 9 and 10 of that Act, infringes and denies rights and freedoms guaranteed by s. 2(e) of the *Canadian Bill of Rights* S.C. 1960, c. 44 (the *Canadian Bill of Rights*) and is therefore inoperative and of no force and effect;
- (b) A declaration that Section B of Chapter Eleven of *NAFTA*, as implemented and made part of Canadian law by the *NAFTA Implementation Act* including but not limited to ss. 4, 5, 6, 9 and 10 of that Act, is contrary to the requirements of and limitations established by s. 96 of the *Constitution Act, 1867* and is therefore *ultra vires*, void and of no force and effect;
- (c) A declaration that Section B of Chapter Eleven of *NAFTA*, as implemented and made part of Canadian law by the *NAFTA Implementation Act* including but not limited to ss. 4, 5,

6, 9 and 10 of that *Act*, is in breach of binding and fundamental constitutional principles including the rule of law, democracy, and constitutionalism, and is therefore *ultra vires*, void and of no force and effect;

- (d) A declaration that Section B of Chapter Eleven of NAFTA, as implemented and made part of Canadian law by the *NAFTA Implementation Act*, including but not limited to ss. 4, 5, 6, 9 and 10 of that *Act*, fails to comport and comply with fundamental constitutional requirements, and infringes and denies the rights and freedoms guaranteed by s. 7 and s. 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), insofar as it precludes and fails to ensure that NAFTA tribunals consider, weigh and apply fundamental *Charter* values, including the right to life, liberty and security of the person and the right to equality, in adjudicating claims under NAFTA with respect to laws, regulations, procedures, requirements and practices of federal, provincial and municipal governments.
- ~~(f) — A declaration that, insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*, the *Commercial Arbitration Act*, R.S.C., 1985 c. 17 ("*Commercial Arbitration Act*") including but not limited to s. 5 of that Act, infringes and denies rights and freedoms guaranteed by s. 7 of the *Charter* and is therefore void and of no force and effect;~~
- ~~(g) — A declaration that, insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*, the *Commercial Arbitration Act* including but not limited to s. 5 of that Act, infringes and denies rights and freedoms guaranteed by s. 15 of the *Charter* and is therefore void and of no force and effect;~~
- (e) A declaration that, insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*, the *Commercial Arbitration Act*, including but not limited to s. 5 of that Act,

infringes and denies rights and freedoms guaranteed by s. 2(e) of the *Bill of Rights* and is therefore inoperative and of no force and effect;

- (f) A declaration that, insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*, the *Commercial Arbitration Act*, including but not limited to s. 5 of that Act, is contrary to the requirements and limitations established by s. 96 of the *Constitution Act, 1867* and is therefore *ultra vires*, void and of no force and effect;
- (g) A declaration that, insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*, the *Commercial Arbitration Act*, including but not limited to s. 5 of that Act, is in breach of binding and fundamental constitutional principles including the rule of law, democracy, and constitutionalism and federalism, and is therefore *ultra vires*, void and of no force and effect;
- (h) A declaration that, insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*, the *Commercial Arbitration Act*, including but not limited to s. 5 of that Act, fails to comport and comply with fundamental constitutional requirements, and infringes and denies the rights and freedoms guaranteed by s. 7 and s. 15 of the *Charter*, insofar as it precludes and fails to ensure that *NAFTA* tribunals consider, weigh and apply fundamental *Charter* values, including the right to life, liberty and security of the person and the right to equality, in adjudicating claims under *NAFTA* with respect to laws, regulations, procedures, requirements and practices of federal, provincial and municipal governments.
- (i) A declaration that Her Majesty in Right of Canada did not have the lawful or constitutional authority to enter into, and acted unlawfully and unconstitutionally in entering into, Section B of Chapter Eleven of the *NAFTA* as an agreement binding under international law, since by doing so Her Majesty in Right of Canada:

i) ~~infringed and denied rights and freedoms guaranteed by s. 7 and 15 of the Charter and s. 2(e) of the Canadian Bill of Rights;~~

ii) violated the requirements of and limitations contained in s. 96 and s. 132 of the *Constitution Act, 1867*, and in the *Royal Letters Patent Constituting The Office of Governor General of Canada* R.S.C. 1985, Appendix II, No. 31;

iii) breached fundamental constitutional principles including the rule of law, democracy, and constitutionalism; and the fundamental constitutional requirement, and the requirement of ss. 7 and 15 of the Charter, that Charter values be weighed and applied by any tribunal adjudicating claims under NAFTA with respect to laws, regulations, procedures, requirements and practices of federal, provincial and municipal governments; and

(vi) failed to comport and comply with fundamental constitutional requirements, and infringed and denied the rights and freedoms guaranteed by ss. 7 and 15 of the Charter.

(j) Costs of this Application to be fixed by the judge hearing the application; and

(k) Such further and other relief as the circumstances of the case may require and this Honourable Court deem to be just.

2. THE GROUNDS FOR THE APPLICATION ARE:

By entering into and implementing Section B of Chapter Eleven of *NAFTA* (including the *Commercial Arbitration Act* insofar as it applies to claims made under Articles 1116 and 1117 of the *NAFTA*), the Government and Parliament of Canada have:

(a) deprived Canadian superior courts of their authority to adjudicate upon matters reserved to them by s. 96 of the *Constitution Act, 1867*. In doing so, the Government and Parliament of Canada have interfered with and usurped the core and inherent jurisdiction of Canadian superior courts under s. 96 which are essential to the administration of justice in accordance with fundamental constitutional principles including the rule of law and, in particular, has ousted the jurisdiction of superior courts to:

- (i) make final and binding determinations respecting the validity and lawfulness of government action and legislation;
 - (ii) to remedy any such invalidity or unlawfulness including by awarding of damages; and,
 - (iii) and to exercise supervisory jurisdiction with respect to the decisions of any inferior courts or tribunal respecting such matters.
- (b) infringed and denied rights and freedoms guaranteed by ~~s. 7 of the Charter~~ and s. 2(e) of the *Canadian Bill of Rights* by depriving Canadians of their liberty and security of the person and of a determination of their rights and obligations, without affording them a fair hearing in accordance with principles of fundamental justice;
- ~~(c) denied non-investors equality before and under the law, and the equal protection and benefit of the law, in a manner which discriminates against them on the basis of national origin, sex, disability, race, age, and other prohibited grounds, by creating international investment rights that certain investors may directly enforce through a binding adjudicative process, while failing to establish binding and effective adjudicative processes for the enforcement of international treaties concerning human, labour, social and indigenous rights, or environmental protection and sustainable development;~~
- (c) acted in a manner that is *ultra vires* the treaty making power in s. 132 of the Constitution Act, and any authority under the *Letters Patent Constituting The office of Governor General of Canada*, by affording unknown “investors of another Party” the right to invoke binding arbitration under Section B of Chapter Eleven which is not a matter that is comprehended or authorized by the treaty making power or the exercise of any prerogative power to enter into and make treaties.
- (d) breached binding and fundamental constitutional principles including the rule of law, democracy, and constitutionalism by empowering private international arbitral tribunals to adjudicate claims challenging a broad diversity of laws, regulations, procedures,

requirements and practices of federal, provincial and municipal governments, and to determine those claims without the fundamental and essential safeguards of our political democracy and legal system, including:

- (i) an independent judiciary,
- (ii) a public hearing process,
- (iii) the right of affected persons to participatory rights in accordance with the principles of fundamental justice and fairness; and,
- (iv) the assurance of judicial oversight and review by Canadian courts in accordance with Canadian law;

(e) failed to comport and comply with the fundamental constitutional requirement, and the requirement of section 7 and 15 of the Charter, that Charter values must be weighed and applied by any tribunal considering and adjudicating claims under NAFTA with respect to laws, regulations, procedures, requirements and practices of federal, provincial and municipal governments,

Reliance will be placed, *inter alia*, on the following sources:

- (f) The *North American Free Trade Agreement*;
- (g) Sections 4,5,6,9 and 10 of the *North American Free Trade Implementation Act*;
- (h) Section 5 of the *Commercial Arbitration Act*;
- (i) Sections 7, 15 and 24 of the *Canadian Charter of Rights and Freedoms*;
- (j) Sections 96 and 132 of the *Constitution Act, 1867*;

- (k) Section 52 of the *Constitution Act, 1982*;
- (l) Section 11 of the Ontario *Courts of Justice Act*;
- (m) Rules 14 and 38 of the Ontario Rules of Civil Procedure;
- (n) Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

- ~~(a) The Affidavit of Deborah Bourque, to be sworn;~~
- (a) The Affidavit of Professor M. Sornarajah, affirmed April 28, 2003;
- (b) The Affidavit of Professor Stephen Clarkson, affirmed May 26, 2003;
- (c) The Affidavit of Professor Andrée Lajoie, affirmed May 14, 2003;
- (d) The Affidavit of Maude Barlow, affirmed November 2, 2001;
- (e) The Affidavit of Dale Clark, sworn November 7, 2001;
- (f) The Affidavit of Bruce Porter, to be sworn; and

Such further and other affidavits and materials as this Honourable Court may permit.

March 28, 2001

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THE COUNCIL OF CANADIANS et al

v. HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED
BY THE ATTORNEY GENERAL OF CANADA

Court file no. 01-CV-208141

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

AMENDED NOTICE OF APPLICATION

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