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PART I - NATURE OF THE APPLICATION

1. The Applicants, including the Council of Canadians, Canadian Union of Postal Workers, and the Charter Committee on Poverty Issues, bring this application challenging the investor-State provisions of Chapter Eleven of the North American Free Trade Agreement. The application raises fundamental constitutional issues respecting the authority of the Parliament and Government of Canada to clothe *ad hoc* arbitrators appointed under international commercial arbitration procedures with the power to make binding determinations (including awards of damages) in proceedings brought by individual foreign investors challenging legislative, regulatory and administrative measures (including expropriation and other measures taken in the public interest), as well as judicial procedures and decisions.

2. It is the position of the Applicants that the provisions and procedures under Chapter Eleven, which vest this authority in constitutionally unaccountable *ad hoc* arbitrators, violate the Canadian Constitution (including section 96 of the *Constitution Act, 1867,* fundamental constitutional principles, and *section 7 and 15 of the* Canadian Charter of Rights and Freedoms), and are inconsistent with section 2(e) of the Canadian Bill of Rights.

PART II - THE FACTS

A. The Evolution Of Investor-State Litigation

1. Prior to the advent of the 1989 Canada-United States Free Trade Agreement (FTA), Canada's international trade obligations were set out in the General Agreement on Tariffs and Trade (GATT), to which it and more than one hundred other nations were parties. The GATT's provisions were essentially limited to the rights and obligations of State parties in relation to the international trade in goods. While non-binding dispute resolution was available under the GATT framework, compliance with GATT provisions was ultimately a matter of goodwill among the parties to the Treaty

Affidavit of Professor Steven Clarkson, para. 6, Application Record, Vol. 2, Tab 3, pp. 277-278 [hereafter "Clarkson Affidavit"]

2. The FTA, which was signed in 1988, expanded this framework from regulating the international trade in goods to include the uncharted territory of business services and foreign investment. Thus, under the FTA, the obligation to adhere to international trade rules now applied to policies, programs and law relating to virtually all spheres of the economy, and every level of government.

Clarkson Affidavit, paras. 12-13, Application Record, Vol. 2, Tab 3, p. 279

3. The *North American Free Trade Agreement* (NAFTA) which was negotiated in 1993, broadened the free trade regime to include Mexico and expanded the scope of FTA rules in several ways. Apart from expanding the substantive provisions of the FTA, the most remarkable feature of NAFTA, which forms the subject of this constitutional challenge, is contained in Chapter Eleven. Chapter Eleven accords individual foreign investors and corporations the right to invoke international arbitration to claim damages arising from alleged wrong-doing by governments, public agencies, or Crown corporations, including actions which are alleged to have expropriated the investor's property ("investor-State claims"). The establishment of such investor rights represented a fundamental departure from the norms of both domestic and international law by allowing private parties to unilaterally invoke binding arbitration against a State party challenging government legislative, regulatory and other actions. These claims are heard by and decided by international arbitral tribunals ("NATFA tribunals").

Affidavit of Professor M. Sornarajah, para. 13, 32-37, Application Record, Vol. 1, Tab 2, pp. 13-15 and 22-25 [hereafter "Sornarajah Affidavit"]

4. Prior to the advent of investor-State procedures, a foreign investor would have had to establish the existence of an agreement with the nation state to submit a dispute to arbitration. In the absence of such agreement, the foreign investor's only recourse would have been to the domestic courts and later, in the event of non-satisfaction, to the diplomatic intercession of *his* home state. Unlike the usual concept of arbitration,

NAFTA establishes a right to arbitration even though no privity of contract exists between the disputing investor and the nation state against which the claim is brought.

> Sornarajah Affidavit, paras. 13, 32-37, Application Record, Vol. 1, Tab 2, pp. 13-15, 22-25

5. By dispensing with the requirement for privity of contract, Chapter Eleven empowers private parties to claim damages arising from the actions, policies or laws of sovereign states that are undertaken entirely outside the sphere of commercial relationships and that are essentially public, rather than private in character. Conversely, NAFTA tribunals are empowered to resolve disputes that could otherwise have only been brought before the courts of the nation state whose actions or laws were being impugned.

> Sornarajah Affidavit, paras. 13 and 35, Application Record, Vol. 1, Tab 2, pp. 13-15, 23-24

6. In this regard, from the time of confederation Canadian superior courts had exclusive jurisdiction:

(a) to determine the legality of legislative and executive governmental action and of the decisions of inferior courts and tribunals;
(b) to decide any and all private (contractual and tortious) claims made against the Crown, save those of no more than 200 dollars; and
(c) to decide, in matters of government expropriation, elements of exemplification and enforcement and to decide appeals in expropriation matters;

> Affidavit of Professor Andrée Lajoie, para. 10, Application Record, Vol. 2, Tab 4, pp. 445-446 [hereafter “Lajoie Affidavit”]

7. This exclusive authority clearly extended to claims brought by aliens/foreign, including claims brought against the Crown acting {in} its public or governmental capacity.

> Lajoie Affidavit, para. 10, Application Record, Vol. 2, Tab 4, pp. 445-446

8. The investor-State procedures of NAFTA and the arbitral regimes upon which they rely transfer these powers of Canadian superior courts to NAFTA tribunals in respect of the determination of claims asserted pursuant to NAFTA Chapter Eleven substantive rights and obligations.

Lajoie Affidavit, para. 21, Application Record, Vol. 2, Tab 4, p. 449

B. The Scope Of Investor-State Litigation

1. For the most part, NAFTA investment rules delineate a catalogue of government "measures" which may neither be adopted, maintained nor enforced by either national or sub-national governments. "Measures" are defined to include "any law, regulation, procedure, requirement or practice", and is now acknowledged to include the decisions of superior courts. "Investment" is also defined expansively to include many forms of tangible and intangible property interests, including debt and equity interests, business concessions and licenses

NAFTA, Articles 201, 1139

2. Among the measures which are prohibited by Chapter Eleven, are those that would:

(i) accord foreign investors and their investments less favourable treatment than is accorded, in like circumstances, to a State-party's own investors and to their investments (Article 1102);

(ii) accord foreign investors and to their investments less favourable treatment than is accorded, in like circumstances, to investors from any other nation, or to their investments (Article 1103);

(iii) not treat foreign investments in accordance with "international law including fair and equitable treatment and full protection and security" (Article 1105);

(iv) impose administrative or regulatory requirements, such as obligations to source goods and services locally - as a condition on the right to establish or carry on investment activities (Article 1106);

(v) impose constraints on the right of foreign investors to choose senior managers and board members of any nationality (Article 1107);

(vi) directly or indirectly "expropriates" an investment or represents a measure "tantamount to expropriation" (Article 1110).

NAFTA, Articles 1102, 1103, 1105, 1106, 1110

3. Moreover, where some action, policy, program or law is found to interfere with the investor rights so established, it is no defence for Canada to demonstrate that the measure was taken in good faith and for a *bone fide* public purpose, such as environmental protection or natural resource conservation, and having due regard to the *Charter of Rights and Freedoms* and/or other constitutional requirements.

> Affidavit of Professor David Schneiderman, paras. 5-6, Application Record, Vol. 4, Tab 9, pp. 1020 [hereafter "Schneiderman Affidavit"];
> NAFTA Article 2101

4. Investor-State claims that have been commenced or determined under Chapter Eleven illustrate that the government policies, programs and laws these claims {address} are neither explicitly about investment, nor international in their design or application. Rather the typical targets of investor-State claims are measures established to serve broad public policy objectives which are assailed on the grounds that they are unfair or represent expropriation. Indeed, all three of the parties to NAFTA have acknowledged that investor-State claims often raise issues of broad public concern and policy and importance, and which cannot be regarded as essentially commercial in character and this is clearly the case with respect to procedures and judgments of national courts.

> Sornarajah Affidavit, para. 13, Application Record, Vol. 1, Tab 2, pp. 13-15
>
> Attorney General of Canada's Outline of Argument *The United Mexican States v. Metalclad Corporation,* para. 5, Exhibit No. 8 to the Cross-examination of Stephen Brereton, Application Record, Vol. 5, Tab 10-H, p. 1321-1322
>
> *Mexico v. Metalclad Corp.* [2001] B.C.J. No. 950, 2001 BCSC 664 (B.C.S.C.)

5. Thus, investor-State arbitration under NAFTA has been invoked to challenge diverse government actions and judicial decisions including:

> the conduct of judicial proceedings and the judgments rendered by national courts to determine whether these are proper and just:;
>
> (i) municipal and state land use decisions on the grounds that they expropriated an investment in property;

(ii) environmental and public health regulations concerning air pollution and groundwater contamination on the grounds that these measures were discriminatory and unfair, or represented expropriation of an investment;

(iii) the manner in which certain parcel and courier product services are provided by Canada Post on the grounds that its business practices discriminated against a U.S. based courier company;

(iv) a ban on the use of a pesticide for certain agricultural purposes on the grounds that these were discriminatory or expropriated an investment;

(v) the refusal by a provincial government to settle a claim made by a U.S. based investor seeking damages arising from a province's decision to ban water exports from Canada, on the ground that the decision was discriminatory;

(vi) the allocation of Canadian export quotas under the Softwood Lumber Agreement on the grounds of administrative unfairness; and

(vii) the procurement practices and requirements of Canada Post, as being unfair and discriminatory.

Sornarajah Affidavit, para. 46, Application Record, Vol. 1, Tab 2, pp.28-29

6. An article published in the authoritative ICSID Review[1] described NAFTA as vast in scope and characterized its investor-State suit provisions as follows:

> It grants innumerable present and future investors the right to arbitrate a wide range of grievances arising from the actions of a large number of public authorities whether or not any specific agreement has been concluded with the particular complainant, and so impels us to reconsider fundamental assumptions about the international legal process as it affects investors abroad.

The author goes on to state:

[1] The *ICSID Review* is the official publication of the International Centre for the Settlement of Investment Disputes, which is organized under the auspices of the World Bank, and is the most prominent institution established to administer international arbitration.

> By allowing direct recourse by private complainants with respect to [such] a wide range of issues, these treaties create a dramatic extension of arbitral jurisdiction in the international realm.

Sornarajah Affidavit, paras. 43-44, Application Record, Vol. 1, Tab 2, pp. 26-27

7. Thus, diverse matters of public policy and law relating to economic, environmental and social concerns, which historically have been the exclusive sovereign preserve in Canada of parliaments and the courts have, in consequence of NAFTA investor-state procedures, now become the subject of claims for damages brought by private parties and judged by *ad hoc* arbitral panels.

Sornarajah Affidavit, para. 48, Application Record, Vol. 1, Tab 2, p. 30

C. Investor State Procedures Under Chapter Eleven

1. NAFTA investment rules are set out in Chapter Eleven of the Treaty which is divided into three parts. Section A sets out the scope, coverage and substantive obligations of the NAFTA provisions concerning investment. Section B establishes the investor-State suit procedures, and Section C defines various terms relating to the rights and obligations delineated by this Chapter of the NAFTA.

NAFTA, Chapter Eleven

2. To bring a claim authorized by Chapter Eleven, a private individual or company must: i) qualify as “an investor of a Party”; ii) consent to arbitration; and iii) waive their right to initiate or continue domestic judicial or administrative proceedings seeking damages in respect of the measure.

NAFTA Articles 1121 and 1139

3. While the investor’s right to commence an arbitration against a State Party is subject to these preconditions, it is not dependent upon the consent of any State Party. Rather the prior consent of the NAFTA Parties to the arbitration of such disputes is unilaterally given and is set out by Article 1122, qualified only by the proviso that arbitration take place in accordance with the procedures of the NAFTA.

NAFTA, Article 1122

4. A disputing investor wishing to submit a claim to arbitration under Chapter Eleven of NAFTA is entitled to invoke one of three sets of arbitral rules:

the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

the ICSID Additional Facility Rules, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or

the UNCITRAL Arbitration Rules

NAFTA Article 1120

5. Canada is not a party to the ICSID convention and therefore investor-State claims brought against Canada must proceed either under the ICSID Additional Facility, or the UNCITRAL Arbitration Rules, which are described below.

Affidavit of Denyse Mackenzie, Respondent's Application Record, para. 107, [hereafter "Mackenzie Affidavit"]

D. THE NORMS OF INTERNATIONAL COMMERCIAL ARBITRATION

1. Both the ICSID and the UNCITRAL have established rules and procedures for the conduct of arbitrations that are essentially unaltered by the provisions of Chapter Eleven. However, the procedural norms of international commercial arbitration reflect the fundamental assumption that these disputes are essentially private in character and of no consequence to third parties. For instance, arbitral proceedings are generally held in camera, and the confidentiality of the arbitral process is seen as one of its most important advantages. Indeed, the importance of secrecy to the arbitral process is expressly acknowledged by international commercial arbitration rules which provide, for example, that "Deliberations of the Tribunal shall take place in private and remain secret," or that "Hearings shall be held in camera unless the parties agree otherwise".

Sornarajah Affidavit, para. 28, Application Record, Vol. 1, Tab 2, pp. 20-21

2. Because international commercial arbitral disputes are assumed to have a private character, party autonomy is the principle which guides the procedures to be followed by arbitral tribunals. Thus, parties to such arbitrations are typically free to

choose their own tribunal, to determine the place of arbitration, and generally to set out the rules governing the conduct of the arbitration. While the State parties to NAFTA have encouraged tribunals to adopt a more transparent process, ultimately this depends upon securing the consent of both parties to a particular arbitration.

Sornarajah Affidavit, para. 29, Application Record, Vol. 1, Tab 2, p. 21

3. Similarly, the issues of notice to, and potential intervention by interested third parties is entirely ignored by the conventions and arbitral rules that frame such proceedings. The assumption that international commercial disputes are purely private in nature also underlies the limited scope for judicial review of such awards (see paragraphs 29 to 33 below). Thus, as set out in paragraphs 47 to 49 below, the arbitral process is virtually impervious to third parties even where they may be affected by the enforcement of an arbitral award.

Sornarajah Affidavit, para. 30, Application Record, Vol. 1, Tab 2, pp. 21-22

4. The rules and procedures followed by NAFTA tribunals differ from those followed by section 96 courts since, unlike courts, NAFTA tribunals are free to interpret the provisions of NAFTA as they see fit as no doctrine of *stare decisis* or binding judicial precedent constrains the exercise of their authority.

NAFTA, Article 1136:5

5. Also unlike courts, arbitral panels lack the quality of judicial independence. Thus, in addition to being appointed by the parties, arbitrators may play various roles from proceeding to proceeding - serving as the president of a tribunal convened to interpret NAFTA rules on one occasion, and as a party's nominee or advocate on another. This lack of independence has raised questions about the objectivity of arbitrators, and for the potential for self-interest to influence the approach taken by adjudicators to the issues that come before them.

Clarkson Affidavit, para. 57, Application Record, Vol. 2, Tab 3, p. 296;
Affidavit of James Crawford, Respondent's Application Record, Exhibit A
[hereafter "Crawford Affidavit"]

E. Recognition, Enforcement And Judicial Review Of Arbitral Awards

1. Under Chapter Eleven, the Parties are required to provide for the enforcement of an arbitral award in their respective countries. Canada has conformed with this requirement by amending the provisions of the *Commercial Arbitration Act* to specifically provide for the enforcement of arbitral awards arising from NAFTA investor-State claims. However, disputing investors are also authorized to seek enforcement of an arbitration award in any jurisdiction that is a party to international conventions established to provide for the recognition and enforcement of foreign arbitral awards, namely the *New York Convention* (to which Canada and 120 other nations are signatory), or the *Inter-American Convention*.

> Sornarajah Affidavit, para. 24, Application Record, Vol. 1, Tab 2, p. 19;
> NAFTA, Article 1136;
> *Commercial Arbitration Act* R.S., 1985, c. 17 (2nd Supp.), Schedule 2 (section 2) Article 1(2)

2. Under NAFTA, judicial review of arbitral awards, and judicial supervision of arbitral tribunals, is vested exclusively in the jurisdiction named as the place of arbitration, which may be in any nation that has ratified the *New York Convention*. The scope for judicial review is not determined by NAFTA or by the arbitral regimes it invokes, but rather by the law of that jurisdiction. It is that jurisdiction, and that jurisdiction only, that determines the procedures and substantive grounds upon which an arbitral award may be set aside. Until and unless that occurs, an arbitral award may be enforced against Canada in any of more than a hundred jurisdictions in which it may have assets.

> Sornarajah Affidavit, paras. 86-88, Application Record, Vol. 1, Tab 2, pp. 44-45;
> NAFTA, Article 1130

3. The only other opportunity for judicial oversight of an arbitral award arises when enforcement proceedings are brought in a particular jurisdiction. When this happens, a court may refuse enforcement on the limited grounds available for doing so. Even where enforcement is refused in one jurisdiction, the award remains enforceable in every other jurisdiction that is signatory to the *New York Convention* or the *Inter-American Convention*, allowing an investor to shop for a convenient and sympathetic forum.

Sornarajah Affidavit, para. 87, Application Record, Vol. 1, Tab 2, p. 45

4. While the scope of review is determined by the laws of the place of arbitration, many nations, including Canada, have defined the scope for judicial review of commercial arbitral awards very narrowly. Moreover, on two occasions Canadian courts have rejected the argument urged by the Attorney General of Canada that, because NAFTA arbitral awards often concern issues of broad public interest, an application of the pragmatic and functional analysis test should lead to a less deferential standard of review than that which should be shown in respect of awards arising from private commercial disputes.

Mexico v. Metalclad Corp., supra, at paras. 50-56;
Canada (Attorney General) v. S.D. Myers Inc, [2004] F.C.J. No. 29, 2004. FC 38 (F.C.), at paras. 33-42

5. Where the disputing parties agree, the place of arbitration may be in any of the more than 100 nations that are parties to the *New York Convention*. Needless to say, where a claim is made against Canada, but the place of arbitration is chosen to be in another country, Canadian courts have no authority to review the award.

NAFTA, Article 1130;

6. This in fact has occurred in the *United Parcel Service v. Canada* case, where a NAFTA tribunal rejected Canada as the place of arbitration, at least in part, because it was displeased with views expressed by the Attorney General of Canada in completely separate proceedings before the British Columbia Supreme Court having to do with the interpretation of provincial statute providing for the recognition and enforcement of foreign arbitral awards. Canada had taken the position that less judicial deference should be accorded NAFTA-based arbitral awards concerning matters of broad public importance than would be appropriate for awards involving purely private commercial disputes. The tribunal in *UPS* indicated that it was “troubled by Canada’s submission” that “chapter 11 Tribunals should not attract extensive judicial deference” and explicitly took this fact into account in rejecting Canada’s submission that the case should be arbitrated in Canada. Canada did not seek judicial review of the tribunal’s decision on this point. As a result, no Canadian court will have any authority to judicially review an

award made by the *UPS* NAFTA tribunal concerning the delivery of Canadian postal and related services.

Sornarajah Affidavit, paras. 74-75, Application Record, Vol. 1, Tab 2, pp. 40-41

F. NAFTA Tribunals Can Review the Decisions of Canadian Courts

1. Several investor-State claims have directly challenged the decisions of national courts, or been advanced when recourse to those courts has failed. The Respondent's witness, Professor Crawford, in addressing the role that arbitral tribunals have played in reviewing the judgments and procedures of national courts, claims that "Chapter Eleven tribunals are not courts of appellate jurisdiction". Of course no formal appellate authority could be claimed by such tribunals, but as Professor Crawford concedes, private investors can invoke Chapter Eleven procedures "to challenge judicial determinations made by the courts of a NAFTA Party." Simply put, Chapter Eleven creates a mechanism empowering private parties to invoke international arbitral to review the judgments of Canadian superior courts.

Schneiderman Affidavit, para. 13, Application Record, Vol. 4, Tab 9, pp. 1024-1025;
Sornarajah Affidavit, paras. 81-86, Application Record, Vol. 1, Tab 2, pp. 42-45;
Crawford Affidavit, Respondent's Application Record, paras. 9-16

2. In fact, Chapter Eleven tribunals, including two on which Professor Crawford sat (*Mondev International Ltd. v. The United States of America* and *Waste Management Inc. v. United Mexican States*) have carried out probing reviews of judicial proceedings and judgments to determine whether they have represented a denial of justice to a disputing investor. According to Professor Crawford, such a denial of justice may occur where domestic courts "refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way" or, if there is a "malicious misapplication of the law."

Crawford Affidavit, Respondent's Application Record, paras. 13-14

3. In the *Mondev International* arbitration, the disputing investor challenged a judgment rendered by the Massachusetts Supreme Judicial Court after the United

States Supreme Court denied the application of its U.S. subsidiary (the investment) for certiorari. In assessing the merits of the investor's claim, the tribunal reviewed the reasoning and conclusions of the Supreme Judicial Court concerning the interpretation of common law, the application of judicial precedent, and the interpretation and application of State contract law – questions that are quintessentially matters of domestic, not international, law. Nevertheless the tribunal reviewed the deliberations and conclusions of the court on their merits.

Mondev International Ltd. v. The United States of America, paras. 126-138

4. In another Chapter Eleven arbitration brought by a Canadian company against the U.S., *The Loewen Group Inc. v. The United States of America*, the tribunal rejected the U.S. argument that the definition of "measure" not be read to include judicial acts or the decision of a jury in a civil trial, holding that interpreting "measures" to include judicial acts was necessary to give effect to the objectives of NAFTA. The tribunal also rejected U.S. submissions that NAFTA be interpreted in a manner that accords deference to the sovereignty of states.

Sornarajah Affidavit, paras. 81-83, Application Record, Vol. 1, Tab 2, pp. 42-44

5. The tribunal {in} *Loewen Group* rejected the investor's claim on jurisdictional grounds, and held a judicial action cannot support a claim under Chapter Eleven unless the claimant has pursued all available avenues for appellate review before filing the claim. However, in doing so the tribunal also indicated that, if these hurdles had been overcome, it would have found the jury award in question to be a violation of the NAFTA requirement that the parties accord a minimum standard of treatment to the investments of investors of another party. In this regard the tribunal stated that "the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."

The Loewen Group Inc. v. The United States of America, June 26, 2003, para. 137

6. With respect to the standard of review to be applied to a review of a court decision, the tribunal in *Mondev International Ltd.* rejected Canada's argument that only a finding of bad faith would warrant interfering with a decision of a national court. The

tribunal concluded that a much lower threshold for review was appropriate, stating that "To the modern eye, what is unfair or inequitable need not equate with the outrageous or egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith." The tribunal went on to acknowledge that the standard it would use to review the judgment of U.S. appellate courts was "admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities."

> *Mondev International Ltd. v. The United States of America*, October 11, 2002, at paras. 116 and 127

7. Nevertheless, Professor Crawford who was a member of the tribunal in the *Mondev International Inc.* case, claims that NAFTA tribunals have shown considerable deference to domestic court decisions. This view is not only inconsistent with the approach of the tribunal in that case, but also fails to accord with the submissions made by the Respondent in *Mexico v. Metalclad Corp.,* a case brought by Mexico to set aside a NAFTA arbitral award. In its written submissions to the Court, Canada described the ruling of the tribunal as "ignoring Mexican judicial decisions and deciding issues of Mexican domestic law as if it were a Mexican domestic court of appeal".

> Attorney General of Canada's Outline of Argument *The United Mexican States v. Metalclad Corporation,* paras. 68, 69 and 72, Exhibit No. 8 to the Cross-examination of Stephen Brereton, Application Record, Vol. 5, Tab 10-H, pp. 1324-25;
> Schneiderman Affidavit, para. 8, Application Record, Vol. 4, Tab 9, 1021

The arbitral award was set aside by the British Columbia Supreme Court on other grounds, leaving Canada's concerns about the Tribunal's approach unresolved: *Mexico v. Metalclad*, *supra*.

G. Claims Against Canada Under Chapter Eleven

1. Approximately thirty investor-state claims have been brought against the NAFTA Parties. Of the ten or so that have been brought against Canada, two were settled, and two others decided, both in favour of the disputing investor. All of the cases in which Canada is or was the respondent were brought by U.S. investors or companies (often operating through Canadian subsidiaries) and claim damages arising from alleged wrong-doing by Canadian governments or public authorities, including in some cases the alleged expropriation of the investor's property.

(ii) Expropriation Claims

1. Under Article 1110 of NAFTA, foreign investors can claim damages where it is alleged that some policy, law or regulation of a Party "directly or indirectly expropriated an investment" or was a measure "tantamount to expropriation of such an investment."

2. In *Ethyl Corporation v. Canada*, a U.S. company argued that federal regulations restricting the distribution of a toxic fuel additive manufactured by the company amounted to expropriation. The company also argued that parliamentary debate regarding the environmental impacts of its product also amounted to expropriation of its good will and international reputation. Canada brought a motion to dismiss the claim on the ground that its regulation was an environmental and public health measure, and not one relating to investment. When that motion failed, Canada settled the case, paying more than $19 million in legal and other costs.

Sornarajah Affidavit, para. 73, Application Record, Vol. 1, Tab 2, p. 40;
Ethyl Corporation v. Canada, June 24, 1998

3. In *Metalclad Corporation v. Mexico*, a local municipality in Mexico denied a foreign investor a building permit to establish a hazardous waste disposal site on land already contaminated with hazardous waste. A NAFTA tribunal held that the denial of the building permit was an "expropriation" within the meaning of Chapter Eleven. The tribunal came to the same conclusion about steps taken by Mexico to establish a nature preserve that included the site chosen by the company for a hazardous waste dump.

Sornarajah Affidavit, paras. 50-51, Application Record, Vol. 1, Tab 2, p. 31

4. Mexico sought judicial review of the award in British Columbia (which had been named the place of arbitration). The B.C. Supreme Court recognized that the tribunal's definition of "expropriation" was exceptionally broad, but held it could not interfere:

> The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. **This definition is sufficiently broad to include a *legitimate* rezoning of property by a municipality or other zoning authority. However, the definition of expropriation is a question of law with which this Court is not entitled to interfere** under the International [Commercial Arbitration Act]. [emphases added]

Mexico v. Metalclad Corp. supra, at para. 99

5. Several claims brought against Canada have also alleged that certain federal or provincial government actions have amounted to expropriation under Article 1110, but these cases have either been settled, resolved on other grounds, or remain outstanding.

Exhibits B and C, Sornarajah Affidavit, Application Record, Vol. 1, Tabs 2-B and C

(iii) Claims Challenging Administrative, Governmental and Regulatory Action

UNITED PARCEL SERVICE V. CANADA

1. In *United Parcel Service v. Canada*, one of worlds largest package and courier companies is claiming US $160 million in damages against Canada on the grounds, *inter alia*, that certain practices of Canada Customs and Canada Post, and certain policies, programs and laws of the federal government, discriminate against its products and services. These include claims that:

 To date, Canadian investors have initiated several claims under Chapter Eleven, all against the U.S. To date, no claim has succeeded.

(a) Canada Post has denied UPS products as favourable treatment as it accords its own courier products by denying the company access to the Canada Post letter delivery and handling system;

(b) Canada has similarly failed to provide the favourable treatment required by NAFTA by "administering, operating, assuming all unfunded liabilities and negotiating the terms of the pension plan that governs Canada Post employees" but offering no similar support to private sector pension plans such its own;

(c) Canada Customs practices provide preferential treatment to Canada Post products and services;

(d) Canada's Publications Assistance Program (PAP) – a cultural program that subsidizes certain cultural products and activities including the distribution of Canadian magazines, and the return of library books to Canadian libraries through the mail, is administered in a manner that discriminates against it by relying on Canada Post rather than private courier companies; and that

(e) the exclusion of rural route mail carriers employed by Canada Post from the Canada Labour Code also fails to the meet the NAFTA favourable treatment standard, because UPS employees are not similarly exempted from the protections afforded by Canadian Labour laws.

Exhibit C, Affidavit of Dale Clark, Application Record, Vol. 3, Tab 6-C, pp. 667-680 ["Clark Affidavit"]

International Institute for Sustainable Development, Private Rights Public Problems, 2001, Exhibit C to the Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-C, pp. 201-203

Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, September 2001, Exhibit D to Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-D, pp. 251-253

2. Although the UPS claim raised issues that directly concerned the interests of Canada Post employees and those who rely upon Canada Post's services, no notice of the UPS claim was given to the Applicants, who represent those employees and the broader public interest respectively. Indeed, the UPS claim was initially kept secret. Because the potential consequences of the UPS claim could affect the jobs, job duties, and pensions of its more than 45,000 members, the Applicants Canadian Union of Postal Workers ("CUPW") and Council of Canadians brought an application to be added as parties or as interveners in the arbitral proceedings on the basis, *inter alia*, that the decision would affect the public interest and the direct interests of Canada Post employees.

Clark Affidavit, paras 22-25, Application Record, Vol. 3, Tab 6, pp. 641-642;
Affidavit of Maude Barlow, para. 28, Application Record, Vol. 3, Tab 5, p.513
Exhibit D, Clark Affidavit, Application Record, Vol. 3, Tab 6-D, pp. 681-857

3. The arbitral tribunal rejected the Applicants' request to be added as parties on the basis that it had no authority to make such an order under NAFTA or the UNCITRAL rules. The tribunal held that it did have authority to grant *amicus curiae* intervener status, but refused to consider whether the Applicants would be granted that status until the merits stage of the hearing. The tribunal denied the Applicants' request to be heard on questions concerning the jurisdiction of the tribunal, the place of arbitration and other procedural matters, including the confidentiality of the proceedings. Unless the parties agreed otherwise, the tribunal held, the proceedings would be held in camera. Further, the tribunal made clear that the right to amicus standing, if it was granted, would not include the right to introduce evidence, conduct cross-examinations or even make oral submissions to the tribunal. Moreover, it said, any interveners would not necessarily even be entitled to access the evidence adduced by the parties. In a further decision, the tribunal confirmed that, if intervener status was granted, the Applicants would be limited to making short written submissions. Further, while the tribunal directed the disputing parties to provide the Applicants with copies of their pleadings, it also stated that, if granted standing, the Applicants would not have access to evidence and material designated by the parties as confidential, or any opportunity to contest that designation.

Exhibit E, Clark Affidavit, paras. 69-71, Application Record, Vol. 3, Tab 6-E, pp. 884-885;
Direction of the Tribunal on the Participation of Amici Curiae, August 1, 2003

S.D. MYERS V. CANADA

1. A claim by S.D. Myers, a hazardous waste company based in the U.S., was decided in favour of the disputing investor on the grounds that a ban on the export of PCB hazardous waste to the U.S. treated the company less favourably than its Canadian counterparts, even though the ban applied to all PCB waste exports from Canada.

International Institute for Sustainable Development, Private Rights Public Problems, 2001, Exhibit C to the Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-C, pp. 179-185

Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, September 2001, Exhibit D to Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-D, pp. 235-239

2. Most remarkably the importation of PCB wastes to the U.S. during the critical period at issue, was prohibited under U.S. law. As the Respondent argued in its submissions seeking judicial review of the arbitral award in S.D. Myers: "Canada was precluded from allowing exports of PCBs or PCB wastes to the U.S. while imports of PCBs and PCB wastes were contrary to U.S. law, would have been contrary to a well-established Canadian policy requiring the disposal of PCBs and PCB wastes in Canada consistent with Canada's international obligations under the Basel Convention [on the Control of Transboundary Movements of Hazardous Wastes]". Nevertheless preferring its own view of Canada's motivation, the tribunal concluded that Canada's ban was not for a legitimate environmental purpose, because the effect of the ban would favour Canadian waste facilities to dispose of made-in-Canada waste, notwithstanding the mandate of the Basel Convention to adopt such an approach.

Schneiderman Affidavit, para. 12, Application Record, Vol. 4, Tab 9, pp. 1023-24

3. In the *S.D. Myers* case, the tribunal looked behind the face of the government measure, which was applied in precisely the same manner to would-be exporters of PCB wastes regardless of their nationality, to examine the briefing notes, memoranda and other advice of public officials. That record indicated that the Minister-responsible was offered advice that included concern about the potential impact of allowing PCB exports to occur because of Canada's obligations under the *Basel Convention*, its potential liability should it allow PCB exports to occur in contravention of U.S. law, and the effect on Canada's waste management industry. It was this last concern that was sufficient, in the tribunal's view, to impugn Canada's motives for establishing the export constraint.

International Institute for Sustainable Development, Private Rights Public Problems, 2001, Exhibit C to the Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-C, pp. 179-185

Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, September 2001, Exhibit D to Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-D, pp. 235-239

4. Professor Crawford argues that NAFTA arbitral tribunals in the *Metalclad* and *S.D. Myers* cases "failed to identify a legitimate measure adopted to defend the public interest which was at the same time contrary" to Chapter Eleven. However his assertion fails to acknowledge that the legitimacy of the measure is irrelevant where a measure is found to have expropriated an investment under Article 1110. It is also tautological in simply relying upon the tribunal's characterizations of the government actions in question as proof of their true character. Nevertheless, the legitimacy of these measures was vigorously defended by the Respondent and Mexico both before the tribunals and in subsequent proceedings for judicial review. Third, this assertion is entirely dependant upon the competence of tribunals to identify when "legitimate measures" are at issue.

Schneiderman Affidavit, para. 12, Application Record, Vol. 4, Tab 9, p. 1023-24

POPE AND TALBOT V. CANADA

1. Pope & Talbot is {a} U.S. based company that operates three sawmills in British Columbia, Canada from which {it exports} they export timber to the U.S. A portion of these shipments enter duty-free up to a limit set by the government of Canada under an overall quota determined by a U.S.-Canada Agreement on Trade in Softwood Lumber. The company initiated a claim under Chapter Eleven, alleging that it was unfairly treated by public officials responsible for allocating lumber export quotas under an administrative scheme established by the government of Canada in accordance with the Softwood Lumber Agreement it had entered into with the U.S. The tribunal found that Canada administered the difficult and complex quota allocation system among 500 softwood producers in an "open and cooperative spirit" and found "no evidence that the quota allocation system operated at any stage on the basis of the nationality of the parties". Nevertheless the tribunal found Canada liable for damages on account of the combative relationship that grew up between Canadian and company officials after the company initiated its claim under Chapter 11 {Eleven}, as Canada conducted a verification review to determine whether in fact the company had been allocated the quota to which it was entitled. According to the tribunal a major sticking point was a request by Canadian officials that company documents needed for that review be produced in Canada, and the Company's insistence that Canadian officials examine the documents at its U.S. office. Despite finding no difficulty with the actual allocation of export quota to the investment, the tribunal found that the uncivil treatment accorded the company during the verification review, amounted to administrative unfairness.

Pope and Talbot v. Government of Canada, April 10, 2001, at paras. 180-183

2. As was true in the *S.D. Myers* case, the tribunal looked behind the face of the statutory and regulatory regime, to conduct a probing review of internal government documents, memoranda, correspondence, and even cabinet briefing notes. In *Pope and Talbot*, the purpose of this exercise was to determine whether there was administrative fairness in the treatment of the foreign investment.

International Institute for Sustainable Development, Private Rights Public Problems, 2001, Exhibit C to the Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-C, pp.187-190

Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, September 2001, Exhibit D to Sornarajah Affidavit, Application Record, Vol. 1, Tab 2-D, pp. 242-244

H. The Constitutional Characteristics Of Chapter Eleven Disputes

1. The importance of investor-State litigation must be understood in the context of a trade agreement that has characteristics that are "constitutional" in nature because it represents a form of pre-commitment strategy that binds future governments, is difficult to amend, and is binding politically and, in some cases, judicially as well. As the Respondent's witness, Professor Crawford concedes, Chapter Eleven delimits the scope of "State sovereignty". Further, one of the members of the NAFTA tribunal in the *S.D. Myers* arbitration noted in his concurring opinion that trade agreements like NAFTA "have an enormous impact on public affairs in many countries." He went on to liken these agreements to "a country's constitution," because "They restrict the ways in which governments can act," he writes, "and they are very hard to change."

Sornarajah Affidavit, para. 59, Application Record, Vol. 1, Tab 2, p. 34;
Schneiderman Affidavit, para. 15, Application Record, Vol. 4, Tab 9. p. 1025;
Crawford Affidavit, Respondent's Application Record, para. 48

2. While the Respondent's witness states that Canada may withdraw from NAFTA on 6 months notice, the concurring decision in *S.D. Myers* notes that this "is often practically impossible to do … Pulling out of a trade agreement may create too much risk of reverting to trade wars, and may upset the settled expectations of many participants in the economy." Amending the terms of NAFTA would not be much easier, "just as it is usually very hard to change a provision of a domestic constitution."

Schneiderman Affidavit, para. 19, Application Record, Vol. 4, Tab 9. pp. 1027-28

3. In addition, the constitutional values entrenched by NAFTA investment rules are much more closely aligned with U.S. norms than our own. For instance, in an Interim Panel decision in *Pope & Talbot*, the tribunal found support for its interpretation of NAFTA's expropriations rule in the American Law Institute's Third Restatement of the Foreign Relations Law of the United States. The Restatement calls for state

responsibility in the event that “alien property” is subject to “taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment” of property.

Schneiderman Affidavit, para. 16, Application Record, Vol. 4, Tab 9. p. 1026

4. That the U.S. constitutional law experience informs Chapter Eleven’s interpretation is also supported by Congress’ modification of trade and investment treaty practice in the *Trade Promotion Authority Act* of 2002. The Act mandates that foreign investors receive no greater rights than those that are available to U.S. investors under the U.S. Constitution. The debates within Congress reveal that the standard of investment protection is drawn directly from the U.S. constitutional experience. This and related developments appear to have influenced the Canadian government to amend its own model investment treaty to better align it with new U.S. treaty language.

Schneiderman Affidavit, para. 17, Application Record, Vol. 4, Tab 9. pp. 1026-27

5. This standard of protection for the property of investors under NAFTA is highly discordant with Canada’s own constitutional commitments. Such property rights protections as are found in the Fifth and Fourteenth Amendments to the U.S. Constitution are not included within Canada’s *Constitution Act*. More particularly, property rights were deliberately left out of the *Canadian Charter of Rights and Freedoms.* As the Supreme Court of Canada held in *Irwin Toy Ltd. v. Quebec (Attorney General)*, “a corporation’s economic rights find no constitutional protection in that section.”

Schneiderman Affidavit, para. 18, Application Record, Vol. 4, Tab 9. p. 1027;
Irwin Toy Ltd. v. Quebec (Attorney General) (1989), 58 D.L.R. (4th) 577 (S.C.C.) at p. 633

I. The Chilling Effect of Investor-State Procedures

1. The diplomatic, strategic and economic constraints that serve to temper a State party's urge to invoke international dispute regimes do not operate in respect of private foreign investors. In this regard, State parties have an incentive to seek a balanced interpretation of trade and investment rules because they must also observe them. Private investors, on the other hand, are indifferent to the moderating influence that reciprocity often brings to bear. Evidence of this dynamic is found in the fact that not one State-to-State dispute proceeding has been brought under Chapter Eleven while more than 30 investor-State claims have been initiated.

Sornarajah Affidavit, para. 70, Application Record, Vol. 1, Tab 2, pp. 38-39

2. By according countless private investors and corporations the right to invoke international arbitration to enforce the investment provisions of NAFTA, Canada and the other State-parties to NAFTA have substantially increased their exposure to legal claims that require them to defend domestic policies and laws before international tribunals.

Sornarajah Affidavit, para. 71, Application Record, Vol. 1, Tab 2, p. 39

3. The notoriety, cost, and potential liability associated with trade challenges and investor-State claims produce a "chill" over the development of domestic policy and law by governments. Moreover the inclination to engage in this form of self-censorship is accentuated when the ambit of the constraints imposed by a particular international commitment are unknown or uncertain. Unlike dispute resolution under the World Trade Organization, which provides for the review of trade panel decisions by an appellate body comprised of permanent members, there is no formal institutional structure to impart coherence to the approach taken by NAFTA arbitral tribunals. The result to date has been a body of jurisprudence which has interpreted NAFTA rules in a manner that has varied considerably from case to case. Negotiators of NAFTA and officers implementing its provisions have stated that the nature of the litigation that has resulted from Chapter eleven were unforeseen.

Schneiderman Affidavit, para. 11, Application Record, Vol. 4, Tab 9, pp. 1022-23; Sornarajah Affidavit, paras. 72-72, Application Record, Vol. 1, Tab 2, p. 39-40;J.C Thomas, "The Experience of NAFTA Chapter 11 Tribunals to Date: A

Practitioners Perspective", Exhibit 7 to the Cross-Examination of Stephen Brereton, Application Record, Vol. 5, Tab 10-G, pp. 1310-1311

4. Moreover, as indicated above, the scope of government actions that may be impugned by investor-State claims has been defined very expansively {defined} by NAFTA tribunals. Investor-State litigation has thus created a forum in which foreign investors have been able to attach liability and consequences to the most fundamental functions of a democratic government, namely: government action in protecting and advancing the public interest {and adressing the needs and interests of vulnerable and disadvantaged groups}, and even extending to parliamentary debate and the right of the federal government to have its views on the proper interpretation of domestic law represented to a court of superior jurisdiction.

Sornarajah Affidavit, paras. 74, 76, Application Record, Vol. 1, Tab 2, pp. 40-41

5. There has been increasing reference to the threat of such litigation by foreign investors who may now unilaterally invoke enforcement procedures under Chapter Eleven. Thus threats of investor-State claims have clouded debate about such diverse public policy initiatives as plain packaging regulation for cigarettes, public automobile insurance, and even the future of medicare. As pointed out by a leading Canadian trade lawyer in a report prepared for the Romanow Commission, NAFTA investor-State claims are now an obstacle to expanding the publicly funded health care system.

Schneiderman Affidavit, para. 11, Application Record, Vol. 4, Tab 9. p. 1022-23; Jon R. Johnson, *How Will International Trade Agreements Affect Canadian Health Care?* The Commission on the Future of Health Care in Canada: Discussion Paper No. 22, Exhibit 6 to Cross-Examination of Stephen Brereton, Application Record, Volume 5, Tab 10-F, pp. 1302

J. Investor-State Procedures Are Not a Feature of the International Framework of Trade law Embodied By the World Trade Organization

1. The Respondent's witnesses do not claim that the investor-State provisions of the NAFTA are needed to achieve Canadian domestic or international policy objectives, including those related to trade. In fact, Canada did not propose that NAFTA investment rules include such provisions. Moreover, the absence of investor-State procedures from both the FTA and World Trade Organization (WTO) agreements demonstrates that robust international trade agreements can be established without the inclusion of such provisions.

> Affidavit of Professor Manfred Bienfield, paras. 3-4, Application Record, Vol. 4, Tab 8, p. 908 [hereafter "Beinfield Affidavit"]

2. Rather the Respondent's evidence setting out the rationale for this private dispute mechanism speaks to more general points, which are at best tangentially related to the question of investor-State litigation, namely that a) foreign direct investment (FDI) benefits both recipient and capital exporting nations; and b) that international investment treaties foster FDI.

> Beinfield Affidavit, para. 5, Application Record, Vol. 4, Tab 8, p. 908

3. Contrary to the Respondent's assertions, the weight of the available evidence suggests that policies focusing on the indiscriminate attraction of FDI are extremely risky and often detrimental, which is why both historic and current Canadian policies recognize the need to regulate foreign investment in the public interest. Similarly, there is significant evidence that the impact of the de-regulation of foreign investment may have detrimental, sometimes even disastrous, effects on the vulnerable social and economic frameworks of developing countries. There is certainly no evidence to support the notion that such investment flows serve the public interest or promotes the welfare of Canadians as it is defined in this country.

> Beinfield Affidavit, paras. 8-9, 12, 18, Application Record, Vol. 4, Tab 8, pp. 909-914

4. Moreover, and quite apart from the lack of evidence that FDI is inevitably a good thing, there is virtually no empirical evidence to support the contention that binding

international agreements concerning investment, actually play an significant role in facilitating or attracting such investment.

Beinfield Affidavit, paras. 8, 14, 16, Application Record, Vol. 4, Tab 8, pp 909-912

5. The weakness of the evidence supporting the claim that investment treaties are of great importance for attracting FDI or for growth and development is summarized in a recent World Bank report, which describes the disconnect between FDI and bi-lateral investment treaties (BITs) such as those negotiated by Canada, as follows:

> Clearly, a BIT is not a necessary condition to receive FDI. There are many source-host pairs with substantial FDI that do not have a BIT. Japan, the second largest source of FDI has only concluded 4 BITs. The US does not have a BIT with China, its largest developing country destination. Brazil, one of the top receivers of FDI has not ratified a single BIT. In addition, there are also numerous examples of countries that have concluded many BITs and yet have received only moderate inflows. Sub-Saharan Africa, for instance, has had difficulties in attracting FDI, though it has tried to improve the environment for FDI by entering into various agreements to protect the interests of investors. There are also examples such as Cuba, where it does not have a BIT with either Canada or Mexico, its two biggest foreign investors. On the contrary, almost 60% of the countries it does have a BIT with actually have no foreign investment in Cuba.

Hallward-Driemeier, M., *Do Bilateral Investment Treaties Attract FDI?,* World Bank DECRG, June 2003, Exhibit 3 to the Beinfield Affidavit, Application Record, Vol. 4, Tab 8-C, p. 967-968

6. As further noted in this World Bank report, the correlation between BITs and FDI has been rarely examined, but when it has, no significant correlation has been found. Thus a study by UNCTAD (1998) assessing the impact of 200 BITs on bilateral FDI found only a weak correlation between the two. As the Report concludes, “Analysing twenty years of bilateral FDI flows from the OECD to developing countries finds little evidence that BITs have stimulated additional investment.”

Hallward-Driemeier, M., *Do Bilateral Investment Treaties Attract FDI?*, World Bank DECRG, June 2003, Exhibit 3 to the Beinfield Affidavit, Application Record, Vol. 4, Tab 8-C, p. 980

7. Both the history of FDI flows into Canada, and the simple fact that China and Asian countries have received the bulk of the world’s FDI in recent years, in the

presence of relatively interventionist and selective governments, undermines the claim that international investment treaties are “necessary” to promote such financial flows.

Beinfield Affidavit, para. 13, Application Record, Vol. 4, Tab 8-C, p. 911

8. Canadian foreign investment patterns clearly conform to this pattern. Thus the overwhelming majority of Canadian direct investment abroad is destined to the United States and Europe. Moreover, the majority of developing country recipients, including the largest such recipients, are countries with which Canada has no bilateral investment treaty in force, such as Brazil. The same is true for other countries outside the European Union such as Hungary. These investment patterns belie any notion that the existence of an international investment agreement is a significant factor influencing the decisions of Canadian investors when considering investments abroad. [1]

Beinfield Affidavit, para. 15, Application Record, Vol. 4, Tab 8, p. 912;
Fourth Annual Report on Canada’s State of Trade, May 2003, Exhibit 3 to Mackenzie Affidavit, Respondent’s Application Record

9. The Respondent’s evidence also suggests that the establishment of powerful international enforcement mechanisms, such as those engendered by NAFTA investor-State procedures, serves the interests of developing nations, arguing that these procedures bring the rule of law into previously unequal relationships and foster foreign direct investment in poorer nations. As noted, there is little, if any, evidence to support the claim that developing countries benefit from these developments. Indeed, notwithstanding the rise of international foreign investment regimes, the bulk of foreign direct investment still flows to the wealthiest of nations and, if anything, the gap been rich and poor nations has grown.

Sornarajah Affidavit, para. 94, Application Record, Vol. 1, Tab 2, pp. 47-48

10. In fact, according to another report published by the World Bank, there is a real possibility that FDI can have a net negative impact, especially when it displaces domestic investment, appropriates domestic research and development capabilities, or "distorts” subsequent national policy discussion because it comes to have a

[1] A list of Canada Foreign Investment Protection Agreements, which appear to be eleven in number, are posted to the DFAIT web site and can be found at http://www.dfait-maeci.gc.ca/tna-nac/fipa_list-en.asp.

disproportionate voice in the policy process. Moreover, the lack of accountability that attends investor-State procedures fundamentally undermines, rather than fosters, the institutions of democratic governance that are fundamental to the rule of law.

Beinfield Affidavit, para. 8, Application Record, Vol. 4, Tab 8, pp 909-910

11. Given the ambiguity and the weakness of the empirical evidence supporting the broad propositions on the basis of which this country entered into its BIT agreements, and into NAFTA's Chapter Eleven, it is fair to suggest that policy support for such initiatives are fundamentally based on ideology, rather than on strong persuasive evidence.

Beinfield Affidavit, para. 21, Application Record, Vol. 4, Tab 8-C, p. 915

12. Finally, the Respondent's witness, Ms. MacKenzie, indicates that the inclusion of investor-state provisions was a priority for U.S. negotiators. But the obligations of the NAFTA parties are asymmetrical. For example, Mexico refused to accede, as Canada had done in the FTA and NAFTA, to a major U.S. objective, namely to secure access to Canadian oil and gas resources. Furthermore, reservations may be made from NAFTA investment rules, and while Canada did reserve from some rules, it left broad spheres of domestic policy and law exposed to investor-State claims. As Ms. MacKenzie acknowledges, ultimately it was the benefits that it believed Canadian investors would enjoy in the U.S. and Mexico that was an important factor in determining its approach to this negotiating point.

Mackenzie Affidavit, para. 81, Respondent's Application Record;
Schneiderman Affidavit, paras. 5-6, Application Record, Vol. 4, Tab 9. p. 1020;
Clarkson Affidavit, para. 15. Application Record, Vol. 2, Tab 3, p. 280;
NAFTA, Annex 1120.1

13. Ms. MacKenzie goes on to explain that one desirable consequence of allowing private investors to enforce a treaty under which they have no obligations is that it eliminates "the overt element of politics from investment dispute settlement. Investors can launch claims based on their own assessment of the merits of a particular dispute and their economic self interest." Thus, the central role that states have always played in representing the interests of their nationals under international law, and conversely in

taking responsibility as state actors on the world stage, is reduced in the Respondent's estimate to mere politics.

Mackenzie Affidavit, Respondent's Application Record

K. Efforts To Include Investor-State Procedures In Multi-Lateral Trade Or Investment Agreements Have Repeatedly Been Rejected

1. Notwithstanding the dubious basis for claims made about the benefits of international investment agreements, carried along by the forces of globalization and liberalization, the 1990's was a period in which there was a significant proliferation of BITS. However, developing countries have increasingly resisted these developments and have been joined in their opposition by certain governments in richer nations as well.

Sornarajah Affidavit, para. 96, Application Record, Vol. 1, Tab 2, p. 48

2. To begin with, negotiations in the Uruguay Round of international trade negotiations that ultimately led to the establishment of the WTO, failed to establish a comprehensive set of investment rules along the lines of those engendered by the FTA, let alone NAFTA, notwithstanding the persistent efforts of the U.S. to achieve that objective.

Sornarajah Affidavit, para. 97, Application Record, Vol. 1, Tab 2, pp. 48-49

3. This failure subsequently spawned efforts by the twenty-nine member countries of the Organization for Economic Co-operation and Development (OECD) to negotiate a multilateral investment treaty. These efforts also failed, this time because of resistance to the agreement in the United States Congress, the withdrawal of France from the negotiations, waning support from the business community, and the coordinated action of citizen organizations in Canada, France, New Zealand, and elsewhere.

Sornarajah Affidavit, paras. 98-100, Application Record, Vol. 1, Tab 2, pp. 49-50

4. The potential impact of the OECD's proposed investment treaty on the sovereignty, independence and regulatory roles of government, and on cultural policy, the environment; and labour rights, were the most prominent issues in the public debate

that arose in Canada, the United States and other OECD countries concerning this proposed investment treaty.

Sornarajah Affidavit, paras. 98-100, Application Record, Vol. 1, Tab 2, pp. 49-50

5. Nevertheless, certain developed countries persisted with efforts to establish more comprehensive and binding rules concerning investment as an element of the World Trade Organization. The Respondent's witness, Ms. McKenzie, refers to this initiative but does not mention the fact the fact these efforts have failed, a point acknowledged during cross examination.

Mackenzie Affidavit, Respondent's Application Record, paras. 32-33;
Investment and Law Policy Weekly News Bulletin, Sept. 14, 2003, Exhibit 1 to the Cross-examination of Stephen Brereton, Application Record, Vol. 5, Tab 10-A, pp. 1211-1212

6. In sum, the advent of international treaties according foreign investors the right to unilaterally invoke binding arbitration to assert claims against nation states represented a dramatic departure from the norms of both international and domestic law. It has not taken long for the broad, negative implications of these developments to {come to} light. There is now growing scepticism about and opposition to the establishment of international investor-State arbitral regimes such as the one established by Chapter Eleven.

Sornarajah Affidavit, paras. 102, Application Record, Vol. 1, Tab 2, p. 50

PART III - ISSUES RAISED IN THIS APPLICATION

1. The issues raised in this Application are:

A. Does the NAFTA investor-State procedure transfer the work of the superior courts, or remove or derogate the superior courts' core powers, contrary to the requirements of section 96 of the *Constitution Act, 1867*?

B. Does the NAFTA investor-State procedure contrary to the unwritten constitutional principle of constitutionalism and the rule of law?

C. Does the NAFTA investor-State procedure violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*?

D. Does the NAFTA investor-State procedure violate section 2(e) of the *Canadian Bill of Rights*?

PART IV - THE LAW

NAFTA Investor-State Procedure is Contrary to the Requirements of Section 96 of the *Constitution Act, 1867*

General Principles

1. While expressed as a power reserved to the federal Parliament to appoint the judges of the superior, district and county courts, section 96 of the *Constitution Act, 1867* has been interpreted as preventing Parliament[1] and the legislatures from impairing the status of the superior courts either by (1) transferring their work to other tribunals or (2) removing or derogating from the superior courts' core or inherent powers. The fundamental rationale underlying section 96 and related provisions of the *Constitution Act,* 1867 is the maintenance of the rule of law through the protection of an independent judicial role which cannot be encroached upon by legislative or executive action. Judicial independence is acknowledged to be an unwritten norm of the Constitution.

> *Reference Re Residential Tenancies Act* (1980), 123 D.L.R. (3d) 554 (S.C.C.), at pp. 566-567 [hereafter "*Residential Tenancies*"];
> *Ref Re Remuneration of Judges of the Provincial Court of P.E.I.* (1997) 150 D.L.R. (4th) 577 (S.C.C.), at paras 84, 88-89 ["*PEI Reference"*]

2. In *Toronto v. York,* the Privy Council made the first major pronouncement on the cumulative effect of the judicature provisions of the *British North America Act*. It regarded sections 96, 99 and 100 as protecting "the independence of the Judges" of the

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[1] In *McEvoy v. Attorney General for New Brunswick* (1983), 148 D.L.R. (3d) 25, the Supreme Court of Canada Court made it clear that, given the importance of the principle of judicial independence, s. 96 operates to limit not only the competence of the provincial legislatures but also that of the Federal Parliament. See also *Reference re Young Offenders Act (P.E.I.)* (1991), 77 D.L.R. (4th) 492 (S.C.C.), per Lamer C.J.C., at p. 500: "The constitutional deal embodied in s.96 binds Parliament as much as it binds the provincial legislatures"; *Macmillan Bloedel v. Simpson* (1995), 130 D.L.R. (4th) 385 (S.C.C.), per Lamer C.J.C. at para. 10; *Reference re Amendments to the Residential Tenancies Act (N.S.)* (1996) 131 D.L.R. (4th) 609 (S.C.C.), per McLachlin J., at para. 73 [hereafter "*Nova Scotia Residential Tenancies*"]

superior courts and labelled these provisions as “three principal pillars in the temple of justice”, which “are not to be undermined.”

> …[T]he independence of the Judges is protected by provisions that the Judges of the Superior, District, and County Courts shall be appointed by the Governor-General (s.96) that the Judges of the Superior Courts shall hold office during good behaviour (s.99) and that the salaries of the Judges of the Superior, District and County Courts shall be fixed and provided by the Parliament of Canada (s.100). These are three principal pillars in the temple of justice, and they are not to be undermined.
>
> *Toronto v. York*, [1938] 1 D.L.R. 593 (P.C.), at p. 594

3. Subsequently in *Tomko v. Labour Relations Board (Nova Scotia)*, the Supreme Court articulated the broader purposes of section 96 in these terms:

> Section 96 of the *British North America Act, 1867*, in terms of an appointing power …. is now regarded as a limitation not only on provincial power to provide for the appointment of Judges of the status of those mentioned in s. 96 but also on their power to invest agencies of their creation and members thereof appointed under their authority with jurisdiction or powers that … are broadly conformable or analogous to jurisdiction or powers exercised and exercisable by Courts which are within s. 96.
>
> *Tomko v. Labour Relations Board (Nova Scotia)* (1975), 69 D.L.R. (3d) 250 (S.C.C.), per Laskin C.J.C., at p. 255

4. In *Reference re Residential Tenancies Act,* a unanimous Supreme Court of Canada echoed and elaborated on its earlier decision in *Tomko*, stating:

> Sections 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a Province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the Superior Courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined. Section 96 has thus come to be regarded as limiting provincial competence to make appointments to a tribunal exercising s.96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.
>
> *Residential Tenancies, supra,* at pp. 566-567

5. Finally, in *Macmillan Bloedel* the Supreme Court of Canada recognized that in order to maintain the rule of law it was necessary that certain core functions exercised by superior courts not be subject to removal by legislative or governmental action.

> In the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself. Governance by rule of law requires a judicial system that can ensure its orders are enforced and its process respected. In Canada, the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law … Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment.
>
> *MacMillan Bloedel Ltd. v. Simpson*, *supra*, per Lamer C.J.C., at para. 37

6. There are two different tests for determining whether a conferral of power on an inferior tribunal violates section 96 of the *Constitution Act, 1867*. One applies to the transfer of any power equivalent or broadly analogous to a power exercised by section 96 courts at the time of Confederation 1867 (the "*Residential Tenancies* test"). Under this approach, there is a three step inquiry:

a. whether the power or jurisdiction broadly conforms to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation [the "historical inquiry"];

b. if so, whether the function is "judicial" in its institutional setting [the "judicial function inquiry"]; and

c. even if the power is judicial in nature and originally within the province of the superior courts, whether it is merely subsidiary or ancillary to the general administrative functions assigned to the tribunal [the "institutional setting inquiry"].

Residential Tenancies, supra, at pp. 571-572
Nova Scotia Residential Tenancies Act, supra, per McLachlin J., at para. 74;
Sobeys Stores Ltd. v. Yoemans (1989), 57 D.L.R. (4th) 1 (S.C.C.), per Wilson J. at pp. 9-10, 12;
Reference re Young Offenders Act, supra, per Lamer C.J.C. at 500-501

7. The second, and independent, test relates to a section 96 function which is regarded as involving the core jurisdiction of the section 96 courts, particularly relating

to the administration and maintenance of the rule of law can never be removed by action of Parliament or the legislature. Thus, section 96 has come to guarantee the core jurisdiction of superior, district and county courts against legislative encroachment.

> *MacMillan Bloedel Ltd. v. Simpson*, *supra*, per Lamer C.J.C., at para. 15;
> *Crevier v. Attorney General of Quebec* (1981), 127 D.L.R. (3d) 1 (S.C.C.), at p. 12, 13-14;
> *Canada (Attorney General) v. Law Society of British Columbia* (1982), 137 D.L.R. (3d) 1 (S.C.C.), at pp. 16-17
> *PEI Reference, supra,* at paras 84, 88-89;
> *Noël v. Société d'énegie de la Baie James* (2001), 202 D.L.R. (4th) 1 (S.C.C.), at para. 27

(ii) The Residential Tenancies Test

The Historical Inquiry

1. In determining whether the power in question "broadly conforms" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation, a court is required to determine if the power is analogous to one exercised by the superior courts.

> The first [step of the test] involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation…
>
> If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 Courts, that is the end of the matter. … If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 Courts at Confederation, then one must proceed to the second step of the inquiry.
>
> *Residential Tenancies, supra,* at p. 571

2. The focus of the historical inquiry is on the type of dispute at issue and whether it broadly conforms, or is analogous, to one which fell to be decided exclusively or predominantly by the superior courts at the time of Confederation. An objective comparison of the nature of the powers conferred on the inferior tribunal and the powers exercised by superior courts at the time of Confederation must be undertaken to see if the powers transferred are analogous. The question must be whether an aspect of the dispute resolution function dominated by the superior courts has been transferred to an administrative tribunal.

> *Nova Scotia Residential Tenancies Act, supra*, per McLachlin J., at para. 76

3. A narrow test must be employed when characterizing the power or jurisdiction at issue so as to ensure that the jurisdiction of superior courts is not undermined.

> Considering that the second and third branches of the test are designed to preserve some grants of power despite the fact that the powers were within the exclusive jurisdiction of the superior courts at Confederation, Wilson J. concluded that the test requires a strict, or narrow, approach to characterization to prevent large accretions of power.
>
> *MacMillan Bloedel Ltd. v. Simpson*, *supra*, per Lamer C.J.C. at para. 14
> *Sobeys Stores Ltd. v. Yoemans, supra,* per Wilson J., at pp. 12-13

4. Thus, the fact that new rights have been conferred, or that a tribunal may be guided by different considerations or new rules, is not sufficient to make the jurisdiction novel. Rather it must be established that the enactment in question is integral to a novel philosophy which belies ***any analogy*** to the powers exercised by superior courts at Confederation.

> *Residential Tenancies, supra,* at p. 574
> *Nova Scotia Residential Tenancies Act, supra,* per McLachlin J., at paras. 105-107

5. Further, the nature and goals of the legislative scheme are irrelevant for the purpose of the historical inquiry.

> Nor should [the inquiry] evaluate the nature and goals of the legislative scheme, which to be considered only at the third stage should it progress that far. There is no logical nexus between the policy concerns of modern legislation and the search for the historical antecedents of a given jurisdiction. Rather, the focus must be on the "type of dispute" involved: the reviewing court must look to the "subject-matter rather than the apparatus of adjudication"...
>
> *Nova Scotia Residential Tenancies Act, supra,* per McLachlin J., at para. 76

6. Similarly, the type of remedies granted by the tribunal are not relevant in assessing the nature of the jurisdiction. Rather, the focus remains on whether the type of dispute is broadly analogous to disputes determined by section 96 courts at the time of Confederation.

> *Sobeys Stores Ltd. v. Yoemans, supra,* per Wilson J., at p. 12

7. Applying the historical inquiry to this case, the central functions performed by NAFTA tribunals, *de facto* and *de jure*, is to determine whether the state acting through its legislative, executive or judicial powers, has interfered with the property or

contractual rights of foreign corporations. This includes alleged expropriation of property and more generally the fairness and appropriateness of governmental administrative and regulatory actions taken in the public interest. The judicial function of determining whether governments have improperly interfered with the rights of individual foreign investors or the companies they may own was reserved to section 96 courts at the time of Confederation. The disputes that are the subject of investor-State claims are not only broadly analogous, but at times, as in the case of expropriation, are virtually identical to those that fell to be decided by superior courts at the time of Confederation.

Lajoie Affidavit, paras. 17-64, Application Record, Vol. 2, Tab 4, pp. 448-467

8. The rights accorded to investors under Chapter Eleven are broadly analogous to those rights which investors enjoyed at the time of Confederation. In this regard, the concepts of non-discriminatory treatment of aliens/foreign corporations so far as enjoyment of property was concerned was well entrenched in statute at the time of Confederation. Similarly, regimes for compensation in the event of expropriation by the state existed at the time of Confederation and were largely administered by the superior courts. Finally, general notions of fairness or natural justice constituted a bedrock element of Canadian administrative law even at the time of Confederation. Thus, Chapter Eleven transfers the authority to resolve these types of disputes arising from alleged wrong-doing by the legislative, executive and judicial branches of government (which at the time of Confederation were the exclusive jurisdiction of Canadian superior courts) to *ad hoc* and constitutionally unaccountable NAFTA tribunals.

Lajoie Affidavit, paras. 58-60, Application Record, Vol. 2, Tab 5, pp. 464-465

9. Chapter Eleven has not changed the legal relationship between the parties to a dispute. Rather, the legal relationship between foreign investors and the state remains the same as it was prior to Confederation.

Nova Scotia Residential Tenancies Act, supra, per McLachlin J., at para. 94;
Lajoie Affidavit, paras. 58-63, Application Record, Vol. 2, Tab 4; pp. 464-467

10. Chapter Eleven does not serve a new defining social purpose, but rather is animated by the same policy rationale that conferred extensive legal rights on aliens/foreign corporations at the time of Confederation, that is, to encourage foreign

investment. The protection of proprietary and contractual interests were fundamental values of the legal order of the Confederating provinces, which values were accorded to foreign investors and furthered this policy.

> *Nova Scotia Residential Tenancies Act, supra*, per McLachlin J., at para. 98;
> Lajoie Affidavit, paras 62-63, Application Record, Vol. 2, Tab 4; pp. 466-467

11. The Respondent may submit that the subject matter of the disputes before NAFTA tribunals differs from those reserved to superior courts due to the international character of NAFTA claims. However, as the courts have made clear, the inquiry under section 96 is a functional one, requiring a court to examine the true substance of the underlying dispute rather than relying on formal legal characterizations. Thus, the nature of the dispute remains unaltered, namely claims for damages brought by individual foreign investors against alleged interference with their contractual or proprietary interests as a result of the exercise of governmental regulatory authority.

12. In addition, as indicated above, Chapter Eleven empowers NAFTA tribunals to review the determinations of section 96 courts. This appellate function is one that has always been within the exclusive preserve of section 96 appellate courts.

a. Judicial Function

13. The second branch of the *Residential Tenancies* test requires the reviewing court to consider whether the tribunal exercises a judicial function:

> …[T]he hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.

> *Residential Tenancies, supra,* at p. 578;
> See also: *Labour Relations Board of Saskatchewan. v. John East Iron Works Ltd*., [1948] 4 D.L.R. 673 (P.C.), at pp 680-681

14. Thus, courts have held the *indicia* of a judicial function to include the following:

> (a) whether there is a *lis* between parties whether between the Crown and subject or between subject and subject;

(b) whether the parties alone have the power to initiate or defend or compromise the proceedings;

(c) whether the adjudication deals primarily with the rights and obligations of the parties to the dispute rather than considerations of the collective good of the community as a whole;

(d) whether the rights and duties of the parties are established in accordance with a recognized body of rules in a manner consistent with fairness and impartiality;

(e) whether the power which the tribunal may invoke and the remedies which it may award are established by law;

(f) whether in each case there is an analysis of law, an application of the law to the facts and a judicial decision and consequent order;

(g) whether the tribunal has the power to impose sanctions and to award remedies for the infringement of rights;

(h) whether the resulting decision binds the parties and is enforceable by processes provided for by law; and

(i) whether disobeying a tribunal's order is an offence.

Labour Relations Board of Saskatchewan. v. John East Iron Works Ltd., supra, *Massey-Ferguson Industries Ltd. v. Saskatchewan* (1981), 127 D.L.R. (3d) 513 (S.C.C.), at p. 526;
Sobeys Stores Ltd. v. Yoemans, supra, at pp. 26-29

15. The *raison d'etre* of NAFTA tribunals is to deal with disputes between individual foreign corporations and the state. NAFTA tribunals are established only where a foreign corporation has initiated a complaint; they cannot act on their own initiative. NAFTA tribunals are established using an adjudicative arbitral model (albeit one previously reserved for commercial contractual and property disputes) which requires that the tribunal afford the parties a hearing generally consistent with the requirements of natural justice and fairness (at least as between the parties themselves). NAFTA

tribunals have no inquisitorial or mediative powers. NAFTA tribunals apply their legal analysis to the facts and evidence before them. A NAFTA tribunal's powers and remedial authority are determined by the terms of Chapter Eleven; the tribunal has no broad general power independent of determining the rights of the parties to, nor does it have authority to made a decision based on considerations of equity or public policy. Where the tribunal finds an infringement of investor rights it can award damages and its decision is binding on the parties and it is enforceable under Chapter Eleven and domestic law providing for enforcement of tribunal awards, which in Canada are set out by the *Commercial Arbitrations Act*. Decisions of a NAFTA tribunal can be filed and enforced as court orders.

> NAFTA Articles 1135 and 1136;
> *Commercial Arbitration Act, supra*

a. Institutional Setting

16. The third stage of the *Residential Tenancies* test requires the Court to look at the context in which the analogous judicial power is exercised. It may be that the power has been transformed by a new legislative and administrative context in such a way that it is no longer a section 96 power, but rather a power that is subsidiary or ancillary or to the broader non-adjudicative functions of the tribunal or regulatory body exercising the section 96 judicial function. If so, there will be no violation of section 96.

> *Sobeys Stores Ltd. v. Yoemans, supra,* per Wilson J., at pp. 29-30

17. Where the adjudicative function is a sole or central function of the tribunal, or forms a dominant aspect of the function of the tribunal such that the tribunal itself must be considered to be acting 'like a shadow court', then the conferral of the power is *ultra vires*. Thus, notwithstanding the institutional setting, a scheme will be offend section 96 where the adjudicative function is established as the sole or central function of the tribunal.

> The Residential Tenancies test may thus be seen as a functional test. It does not attempt to define precluded areas of transfer by how the power itself is characterized, for example, by calling it a criminal power, or contract power, or the exercise of an inherent jurisdiction. Rather it

> identifies precluded transfers by how the power *functions* in the setting Parliament or the legislature has proposed. Does the tribunal use the power as a mere aid to the achievement of a larger administrative goal, or does it use the power to make itself a shadow court?
>
> *MacMillan Bloedel Ltd. v. Simpson*, *supra*, per McLachlin, J., concurring, dissenting, at para. 66
>
> …An administrative tribunal may be clothed with power formerly exercised by s. 96 Courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal itself must be considered to be acting 'like a Court', then the conferral of the power is *ultra vires.*
> *…*
> …The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal … so that the tribunal can be said to be operating "like a s.96 Court".
>
> *Residential Tenancies, supra,* at p. 570-571, 572

18. Adjudication is not simply the dominant function of NAFTA tribunals, it is their *sole and exclusive* function. The only purpose of NAFTA tribunals is to enforce the specific investor rights contained in Chapter Eleven; they do not play any other role in relation to the broader context of NAFTA rights and obligations outside Chapter Eleven. Moreover, rather than being a permanent regulatory body exercising extra judicial administrative and regulatory functions based on accumulated institutional experience and expertise, NAFTA tribunals are *ad hoc* in nature, and engage only exist for the purpose of judicially resolving disputes.

(iii) The Core Jurisdiction of Superior Courts

1. As set out above, in light of the centrality of superior courts to the operation of our judicial system to the administration of justice, neither Parliament nor the legislatures may remove or impair certain core powers or hallmark features of the superior courts which are essential for the operation and maintenance of the rule of law. In determining whether a particular power falls within the scope of the superior courts' "core" or "inherent" jurisdiction, it is necessary to consider "a broader constitutional context" including "the preamble to the *Constitution Act, 1867*, the principle of the rule of law, and the central place of the superior courts in our system of governance".

> I arrive at this conclusion, in part, by considering the tenability of the opposite position - that the Canadian Constitution already contains explicit provisions which are directed at the protection of judicial independence, and that those provisions are exhaustive of the matter. Section 11(d) of the *Charter* … protects the independence of a wide range of courts and tribunals which exercise jurisdiction over offences. Moreover, since well before the enactment of the *Charter*, ss. 96 to 100 of the *Constitution Act, 1867*, separately and in combination, have protected and continue to protect the independence of provincial superior courts.
>
> *PEI Reference, supra* at para. 84;
> *MacMillan Bloedel Ltd. v. Simpson, supra*, per Lamer C.J.C., at paras. 1-2*,*
> *Noël v. Société d'énegie de la Baie James, supra*, at para. 27

2. Chapter Eleven usurps the core functions of section 96 courts in three separate ways and thereby undermines the Canadian constitutional order and the role of section 96 courts in that structure. First, section 96 courts necessarily play a crucial role in policing the boundaries of legitimate legislative and executive regulatory actions taken in the public interest. Where individuals are given a right to challenge fundamental aspects of our government structure, including the power to enact and apply laws and regulations, such review must always inhered in an independent judiciary, rather than in *ad hoc* bodies who are appointed without any of these fundamental constitutional safeguards.

3. Second, the courts in our constitutional system must have the power to review and determine the constitutionality of governmental action. By allowing foreign investors to raise issues which impact upon constitutional rights of Canadians before *ad hoc* NATFA tribunals, without the opportunity for independent review before section 96 courts on a standard of correctness, Chapter Eleven eliminates this core and constitutionally protected judicial function.

> *U.F.C.W., Local 1518 (U.F.C.W.) v. KMart Canada Ltd.* (1999), 176 D.L.R. (4th) 607 (S.C.C.), at para. 69 [and cases cited therein];
> *Canada v. Law Society of British Columbia, supra*, at pp. 16-17

4. Third, as the Courts have repeatedly held, the ability of superior courts to review administrative action is a core function of the section 96 courts. Chapter Eleven allows foreign investors and the Canadian government to evade judicial review by Canadian

courts through the simple device of choosing a location for the arbitration outside Canada. Indeed, NAFTA tribunals themselves have determined to locate arbitration outside Canada in order to avoid judicial review by Canadian courts (see paragraph 33 above). Further, given that Canadian courts have held that the interpretation of the scope of the rights and obligations under Chapter Eleven by NAFTA tribunals may be unreviewable, the core jurisdiction of section 96 courts to review administrative action has been eviscerated even where Canada is the place of arbitration.

Crevier v. Attorney General of Quebec, supra;
Schneiderman Affidavit, para. 9, Application Record, Vol. 4, Tab 9, p. 1021

(iv) Judicial Independence

1. NAFTA tribunals have arrogated to themselves the power to review judicial determinations made by domestic courts, in essence assuming the mantle of courts of appeal residing entirely outside of the Canadian judicial structure as mandated by the Constitution and in particular section 96. As set out above, in at least two cases NAFTA tribunals have reviewed the reasoning and conclusion of domestic courts concerning the interpretation and application of domestic law, or the fairness of judicial proceedings. In so doing, they have applied a standard of review which has been characterized by one of the tribunals as “open-ended: and allows them to review whether courts have subjected investors to “unfair and inequitable treatment” (see paragraphs 35 to 39 above). Vesting such authority in NAFTA tribunals interferes not only with the operation of core judicial functions but also with judicial independence by establishing a super jurisdictional framework of review by arbitral tribunals that is akin to the supervisory authority exercised by appellate courts respecting the interpretation and application of domestic law (including constitutional law).

Sornarajah Affidavit, paras. 80-85, Application Record, Vol. 1, Tab 2, pp. 42-44;
Schneiderman Affidavit, paras. 13-14, Application Record, Vol. 4, Tab 9. pp. 1024-25

2. The empowerment of NAFTA tribunals to review the decisions of superior courts curbs the power of such courts to control their own process and fundamentally undermines their core and inherent jurisdiction to be the final the decision-maker in

matters of judicial procedure, and the interpretation of statutory and constitutional law. While NAFTA tribunals have no *de-jure* authority to overrule a decision rendered by a superior court, they do have the authority to make legally binding orders against Canada. Moreover those orders may award precisely the same relief, damages, that were sought by the disputing investor in the domestic legal proceedings. It is submitted that it is entirely inconsistent with the principle of judicial independence guaranteed by section 96 for Parliament to empower constitutionally unaccountable *ad hoc* tribunals to supervise and potentially sanction the exercise of authority by superior courts.

3. The Court has held that "in order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government." The authority of Parliament and the executive branch with respect to the Judicature is accordingly bounded by ss. 96-101 of the *Constitution Act*, which empowers Parliament to create " a General Court of Appeal for Canada" and additional courts for the better administration of the laws of Canada. These provisions do not contemplate or permit the establishment of independent tribunal to review the judgment of Superior Courts with respect to the interpretation and application of Canadian law.

> *Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385 (S.C.C.), at para. 32

B. NAFTA Investor-State Procedure Violates Constitutionalism and the Rule Of Law

1. The Applicants submit that, even if the NAFTA investor-State procedure is consistent with section 96 of the Constitution Act, 1867, it remains unconstitutional because it is contrary to the unwritten constitutional principle of "constitutionalism and the rule of law".

2. The Applicants submit that the adjudication of legal disputes between individual investors and the state, impacting upon a wide range of legislation and public policy and engaging fundamental rights and values, cannot be placed beyond the reach of Canadian constitutional principles. NAFTA tribunals are neither competent nor authorized to consider and apply distinctive Canadian constitutional principles or the Charter. It is therefore unconstitutional to grant adjudicative authority to them.

3. In the *Quebec Secession Reference,* the Supreme Court of Canada held that the Constitution embraces unwritten, as well as written, rules. Of particular importance to the present case is the principle of "constitutionalism and the rule of law." The rule of law, recognized in the Constitution Acts of 1867 and 1982 is "a fundamental postulate of our constitutional structure." The rule of law conveys "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."

> *Reference re Secession of Quebec, supra,* at para. 32;
> *PEI Reference, supra*, at para. 92

4. With the adoption of the *Constitution Act, 1982* and the Charter, the rule of law has been reinforced by the principle of constitutionalism. The relationship between the individual and the state is now governed by the constitutional supremacy of rights and freedoms guaranteed to citizens. Courts act as "trustees" or "arbiters" of a new "social contract", resolving disputes over the meaning of rights and freedoms and the justification for any qualification or infringement of them. As Chief Justice McLachlin has noted, quoting former Chief Justice Dickson: "It is only where the law is interpreted by an independent judiciary with vision, a sense of purpose, and a profound sensitivity to society's values, that the rule of law, and therefore the citizen's rights and freedoms, are safe."

> *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.), at paras. 131, 134-136
> The Right Honourable Beverley McLachlin, P.C., "Judicial Independence" (May 11, 2001) online: Supreme Court of Canada http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/independence_e.asp

5. Where Parliament or the legislatures assign the adjudication of disputes to tribunals, commissions or other administrative bodies, these too are subject to the principle of constitutionalism and the rule of law, and must exercise decision-making

authority consistently with the Charter and constitutional principles. As Chief Justice McLachlin explains:

> The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.
>
> *Cooper v. Canada (Human Rights Commission)* (1996), 140 D.L.R. (4th) 193 (S.C.C.), per McLachlin C.J.C., cited with approval in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* (2003), 231 D.L.R. (4th) 385 (S.C.C.), at. para. 29;
> *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.), at paras. 59-66

6. Pursuant to the principle of constitutionalism and the rule of law, the role of courts and tribunals is not limited to explicit constitutional challenges to legislation or government action. Equally important is the guarantee that legal disputes, particularly those arising from the relationship between individuals and the state, will be resolved through the application of legal rules and the reasonable exercise of discretion, in accordance with constitutional principles.

7. As noted by Justice L'Heureux-Dubé in *Baker v. Canada*, tribunals and other administrative decision-makers exercise a wide range of discretionary choices which must be properly informed by constitutional values and principles. Justice L'Heureux-Dubé's observations apply *a fortiori* to NAFTA tribunals in their role of interpreting and applying NAFTA, which frequently requires them to fill in gaps or clarify provisions of NAFTA, and thereby exercise a wide latitude of discretion. Terms such as "public purpose", "expropriation", "investment," and "measures adopted or maintained by a party" may be subject to a wide range of alternative interpretations.[1] The interpretive choices made by NAFTA tribunals shape the application of NAFTA to Canadian legislation and policy, directly engaging Canadian constitutional norms.

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[1] Article 110. NAFTA panels have admitted that: "as in U.S. constitutional law, the line between 'taking' and regulation is sometimes uncertain." Schneiderman Affidavit, para. 17, Application Record, Vol. 4, Tab 9, 1026-27; *Ethyl Corporation v Canada*, *supra*, where the NAFTA Tribunal adopts a broad interpretation of "investor". See also *Pope & Talbot v. Canada, supra*, where the Tribunal adopts a broad interpretation of the term 'investment' in Article 1110; *The Loewen Group, supra* where the Tribunal found that judicial decisions are "measures adopted or maintained by a party."

Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193 (S.C.C.), at paras. 54, 56;
Sornarajah Affidavit, paras. 47-51, Application Record, Vol. 1, Tab 2, pp. 28-31

8. In comparison to Canadian courts and tribunals, NAFTA tribunals have been granted a unique "procedural autonomy" and are provided a "wide discretion" to determine appropriate procedure. As noted by the NAFTA tribunal considering a claim by the CUPW to standing in the *UPS v. Canada* case: a "liberal framework" is provided, that is "unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place." Although ostensibly subject to basic requirements of procedural fairness and equal treatment of the parties, the exercise of the tribunal's broad discretionary powers is not subject in any way to the requirements of the Charter or to distinctive Canadian constitutional values and principles. In particular, contrary to courts and tribunals acting in conformity with Canadian constitutional norms, NAFTA tribunals have no obligation "to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*."

UPS v. Canada, 17 October 2001 at para. 38;
Canadian Council of Churches v. Canada (Minister of Employment and Immigration), *supra*, at p. 203;
Sornarajah Affidavit, paras. 28, 30, Application Record, Vol. 1, Tab 2, pp. 20-22

9. As Professor Schneiderman notes, the standard of protection for investors under NAFTA is "highly discordant with Canada's own constitutional commitments." NAFTA tribunals have largely applied U.S. constitutional jurisprudence with respect to "takings" and property rights, with no consideration of Canada's distinctive constitutional architecture, in which property rights were intentionally excluded from constitutional protection. The framework of private international commercial arbitration is applied to issues which engage public policy and the relationship between individuals and the state, despite the fact that, as noted by the tribunal in *UPS v. Canada* case, "[s]uch proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties."

Schneiderman Affidavit, paras 17-18, Application Record, Vol. 4, Tab 9, pp. 1026-1027;
Sornarajah Affidavit, paras. 61-69, Application Record, Vol. 1, Tab 2, pp. 35-38
UPS v. Canada, supra, at para. 70

10. Challenges under Chapter Eleven impact broadly on the relationship between Canadian governments and citizens, which must be governed by the principle of the rule of law and constitutionalism. Applying a private commercial arbitration model, that operates entirely outside of Canada's constitutional framework, to the resolution of Investor-State disputes under NAFTA, is contrary to the principle of constitutionalism and the rule of law, on which Canada's democratic system and the protection of fundamental human rights is based.

11. The Chapter Eleven procedure offends both the principles of constitutionalism and the rule of law by submitting the exercise of legislative and governmental action, as well as the exercise of supervisory authority, to arbitral review by tribunals which are unbound by legal precedent, subject to no right of appeal, and which operate entirely outside the framework of the constitution. Moreover, under this regime, executive accountability is not to legal authority, but to semi-private arbitral tribunals which are themselves subject to no supervision by Canadian courts, particularly where the place of arbitration is outside Canada. Thus, quite apart from displacing the authority of section 96 courts, the Chapter Eleven procedures represent a fundamental assault on the very foundations of our structure of government including a judicial system which makes superior courts the ultimate arbiter of the legality of government action.

Reference re Secession of Quebec, supra, paras. 70-71

C. NAFTA Investor-State Procedure Violates Charter of Rights and Freedoms

1. The Applicants submit that, even if the NAFTA investor-State procedure is consistent with section 96 of the *Constitution Act, 1867* and with unwritten principles of constitutionalism and the rule of law, it remains unconstitutional because it violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

2. Chapter Eleven adjudication can involve laws, regulation and public policy in critical areas affecting individual and community health, security and well-being, including the protection of essential public services in health, education, communications and social services, environmental protection, and special employment measures for local communities and vulnerable workers, among other areas. In all of these areas, individual and collective Charter interests, relating to equality and to life, liberty and security of the person, are engaged.

> Sornarajah Affidavit, paras. 13, 46, Application Record, Vol. 1, Tab 2, pp. 13-15, 28-29
> Schneiderman Affidavit, para. 11, Application Record, Vol. 4, Tab 9, p. 1022-23

3. Monetary awards ordered by NAFTA tribunals against Canadian governments may also have significant fiscal consequences affecting governments' ability to fund critical social programs and services, or discourage the establishment or maintenance of public health, environment and other measures, which are directly linked to governments' obligations to ensure individual equality, life, liberty and security guaranteed under sections 7 and 15 of the Charter.

> Schneiderman Affidavit, para. 11, Application Record, Vol. 4, Tab 9. p. 1022-23;
> Jon R. Johnson, *How Will International Trade Agreements Affect Canadian Health Care?* The Commission on the Future of Health Care in Canada: Discussion Paper No. 22, Exhibit 6 to Cross-Examination of Stephen Brereton, Application Record, Volume 5, Tab 10-F, pp. 1302

4. Despite the serious public policy and fiscal implications of NAFTA adjudication, NAFTA tribunals are neither authorized nor competent to consider or apply the Charter in interpreting NAFTA provisions; in exercising discretion; in making determinations as to appropriate remedies; or in ensuring that Canadian residents are provided with information and participatory rights necessary to guarantee that their constitutional interests receive appropriate consideration. The applicants submit that delegating the adjudication of Chapter Eleven disputes to NAFTA tribunals operating beyond the reach of the Charter violates substantive and procedural rights to equality and to life, liberty and security of the person guaranteed under sections 7 and 15.

General Constitutional Principles Relating to the Exercise of Discretionary Authority

5. The principle that Parliament or the legislatures may not avoid their Charter obligations by conferring governmental functions on private entities beyond the reach of the Charter has been clearly established by the Supreme Court of Canada. As discussed above, the Court has also held that where legislation confers or delegates discretionary decision-making authority, that discretion must be exercised in conformity with the Charter.

> *Eldridge v. British Columbia (A.G.)* (1997), 151 D.L.R. (4th) 577 (S.C.C.), at para. 40;
> *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.), p. 444;
> *McKinney v. University of Guelph* (19900, 76 D.L.R. (4th) 545 (S.C.C.) at 265

6. In his affidavit, Professor Crawford argues that NAFTA adjudication does not raise constitutional concerns because NAFTA tribunals are not empowered to invalidate national laws or decisions, only to make monetary awards. Quite apart from the fact that monetary awards or the threat of them have a significant impact on governments' ability to legislate and fund critical public programs, the idea that Charter review is restricted to governments' legislative function has been clearly rejected in Canadian jurisprudence on the scope of Charter rights:

> We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. ... To say that the Charter is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the Charter was enacted.

> *Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545 (S.C.C.), per La Forest J at p. 621;
> Crawford Affidavit, Respondent's Application Record, paras. 41, 48

7. The requirement of Charter-consistent adjudication and exercise of discretion is itself a critical component of Charter protection. In particular, the right to life, liberty and security of the person under section 7 and the right to equality under section 15,

guarantee respect for fundamental human rights in both the substance and the administration of law. Sections 7 and 15 are core constitutional rights, protecting individual interests that are directly engaged in NAFTA investor-State dispute resolution, such as the scope and extent of regulatory legislation or special measures for local populations. By failing to integrate consideration of these rights into its decision-making, NAFTA Chapter Eleven adjudication violates both substantive and procedural guarantees under sections 7 and 15 of the Charter.

(ii) NAFTA Investor-State Procedure Violates Section 7 Of The Charter

Scope of Section 7 Interests

1. The Applicants submit that the delegation of Chapter Eleven adjudication to tribunals that may not consider the distinctive Canadian values implicit in the guarantees of life, liberty and security of the person violates the Applicants' rights under section 7 of the Charter.

2. The Supreme Court has held that section 7 "expresses some of the basic values of the Charter." It protects interests related to human life, liberty, personal security, physical and psychological integrity, dignity and autonomy. Section 7 rights are "intrinsically concerned with the well-being of the living person ... based upon respect for the intrinsic value of human life and on the inherent dignity of every human being." They have far-reaching implications for both substantive and procedural guarantees in Canadian law.

> *Blencoe v. British Columbia (Human Rights Commission)* (2000), 190 D.L.R. (4th) 513 (S.C.C.), per LeBel J. at paras. 55, 188;
> *Singh v.Canada (Minister of Employment and Immigration).*(1985), 17 D.L.R. (4th) 422 (S.C.C.);
> *Rodriguez v. B.C. (A.G.)* (1993), 107 D.L.R. (4th) 342 (S.C.C.)

3. In understanding the scope and meaning of section 7 it is important, as the Supreme Court held in *Irwin Toy v. Quebec*, to distinguish "corporate-commercial economic rights" from "such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter". The Supreme Court of Canada has expressly left open the prospect that section 7 imposes

positive obligations on governments in respect of social and economic rights "fundamental to human survival." Canadian courts have confirmed that section 7 includes a positive right to adequate health care, and that measures restricting access to such services must accord with principles of fundamental justice. There is also no dispute that section 7 imposes positive obligations on governments with respect to the administration of justice - both civil and criminal.

> *Irwin Toy Ltd. v. Quebec (A.G.), supra* at 632-33;
> *Gosselin v. Quebec (A.G.)* (2002), 221 D.L.R. (4th) 257 (S.C.C.), at para. 8;
> *Chaoulli c. Québec (P.G.)*, [2002] R.J.Q. 759 (C.A.), aff'g [2000] R.J.Q. 479 (C.S.); leave to appeal to S.C.C. granted May 8, 2003, appeal heard June 8, 2004;
> *Collin v. Lussier*, [1983] 1 F.C. 218 (T.D.);
> *New Brunswick (Minister of Health and Community Services) v. G.(J.)* (1999), 177 D.L.R. (4th) 124 (S.C.C.), at paras. 65, 90-91

4. In contrast to the U.S. constitution, the right to "enjoyment of property" was deliberately excluded from section 7, largely due to concerns that entrenching such a right would interfere with environmental, public ownership, zoning and other government regulation. On that basis, the Supreme Court has made it clear that section 7 does not include corporate-commercial rights. The right to liberty in section 7 must also be distinguished from the focus in U.S. constitutional law on contractual liberty and property rights. Rather, it is to be understood in terms of the complex of interacting values protected by the Charter including: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."

> *Irwin Toy, supra*, at pp. 632-33;
> *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C,), at p. 225
> J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. Law Rev. 548 at 550;
> A. Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Can. J. Pol. Sci. 309 at 319-22;
> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* (1990), 1 S.C.R. 1123 at 1179;

a. Chapter Eleven Adjudication Infringes Liberty And Security Of The Person

5. In the adjudication of claims affecting the provision of public programs and services, decision-making authority and discretion must be exercised in a manner that reflects and respects Canadian understandings of liberty and security of the person. NAFTA has deprived the Applicants and others like them of these rights by delegating adjudication of critical disputes to a tribunal operating beyond the reach of the Charter. The Applicants and others like them have thereby been deprived of a fundamental legal interest protected by section 7, namely, the assurance that their rights and needs will receive appropriate consideration in the adjudication of public policy issues.

6. The present claim is clearly distinguishable from *Operation Dismantle v. Canada*. Contrary to the situation in that case, the Applicants' allegation of a section 7 violation relates not to a hypothetical future outcome, but rather involves a "cognizable threat to a legal interest" – the deprivation of the guarantee that adjudication of critical public policy issues relating to public services and diverse areas of regulation essential to human security and dignity will be informed by Charter values. This deprivation is not a hypothetical future event but rather a loss of a legal right upon implementation of the NAFTA agreement.

Operation Dismantle Inc. v*. Canada* (1985), 18 D.L.R. (4th) 481 (S.C.C.)

7. Further, the deleterious effect of NAFTA investor-State adjudication on the ability of governments to protect the positive components of section 7 guarantees in the areas of health, social services and environmental protection is neither speculative nor hypothetical. Rather, this adverse impact has been clearly established in the affidavit evidence filed by the Applicants in this case. It is self-evident that monetary awards by NAFTA tribunals will have far-reaching effects on the ability of governments to provide essential social programs and services and will discourage the establishment or maintenance of environmental, public health or other regulatory measures. In its recent decision in *Newfoundland (Treasury Board) v. N.A.P.E*., the Supreme Court underscored the polycentric nature of compensatory awards paid by governments, and their effect on other areas of governmental responsibility.

Sornarajah Affidavit, para. 72, Application Record, Vol. 1, Tab 2, p. 39;
Schneiderman Affidavit, para. 11, Application Record, Vol. 4, Tab 9. p. 1022-23;
Jon R. Johnson, *How Will International Trade Agreements Affect Canadian*

Health Care? The Commission on the Future of Health Care in Canada: Discussion Paper No. 22, Exhibit 6 to Cross-Examination of Stephen Brereton, Application Record, Volume 5, Tab 10-F, pp. 1302;
Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66

8. *Operation Dismantle* must also be distinguished on the basis of the international agreement at issue in that case, characterized by Justice Wilson as involving the relationship between states, as opposed to between the state and individual members of its political community. The central issue in this case: whether the federal government can, by way of inter-state agreement or otherwise, contract out the core role of the Canadian judiciary, creating a new mechanism for the adjudication of individual claims against governments and placing this decision-making beyond the reach of the Charter, was not at issue in *Operation Dismantle.*

a. Chapter Eleven Adjudication Violates The Principles Of Fundamental Justice

9. An infringement of a section 7 right will offend the "principles of fundamental justice" if it violates "basic tenets of our legal system." These tenets include principles recognized both in domestic law and under international conventions. The principles of fundamental justice require a consideration of core values that are fundamental to our legal system.

Re B.C. Motor Vehicle Act (1985) 24 D.L.R. (4th) 536 (S.C.C.), at p. 550;
United States v. Burns (2001), 195 D.L.R. (4th) 1 (S.C.C.), at paras 79-80;
Suresh v. Canada (Minister of Citizenship and Immigration) (2002), 208 D.L.R. (4th) 1, at para. 46;
Godbout v. Longueil (City of) (1997), 152 D.L.R. (4th) 577 (S.C.C.), at para. 74;
R. v. Malmo-Levine; R. v. Caine (2003), 233 D.L.R. (4th) 415 (S.C.C.), at para. 113

10. As noted by Professor Crawford in his affidavit, Canada and many other countries have signed a wide variety of international agreements in areas such as environmental protection and human rights that, to various degrees, place limits on state action. None, however, is comparable to NAFTA in conferring authority to adjudicate disputes involving fundamental issues of public policy to a non-judicial body operating beyond the reach of domestic constitutional norms. Where adjudication of

individual rights has been delegated to international bodies in other treaties, such delegation has been crafted so as to respect the basic tenets of Canada's legal system, including the paramount status of individual human rights and the central role of the judiciary in protecting principles of fundamental justice.

11. For example, as noted by Professor Crawford, Canada has ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), whereby individuals may file communications with the U.N. Human Rights Committee, alleging that a right under the ICCPR has been infringed. Canada recently acceded to a similar procedure under the Convention on the Elimination of All Forms of Discrimination Against Women. No optional complaints procedure has yet been created under the International Covenant on Economic, Social and Cultural Rights [ICESCR]. Canada has not supported proposals for creating such a procedure, noting "the difficulty of subjecting economic, social and cultural rights to an individual complaint structure which necessarily requires a finding of State compliance or violation." Canada has maintained that "many problems in the economic, social and cultural rights domain are systemic in nature and better suited to a review resulting in broad recommendations, rather than narrow findings of fault in individual circumstances."

> Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976);
> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 54/4, UN Doc. A/54/49 (Vol. 1) (2000) (entered into force 22 December 2000, accession by Canada 18 October 2002);
> Commission on Human Rights, Fifty-fourth session, Agenda item 13, Status of the International Covenants on Human Rights: Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Report of the Secretary-General, Addendum. UN Doc. E/CN.4/1998/84/Add.1 (16 March 1998) at para.7

12. Mechanisms for considering individual human rights complaints, such as the Optional Protocol to the ICCPR, present a striking contrast with Chapter Eleven of NAFTA. Individual communications are only admissible subject to the exhaustion of available domestic remedies. Where a communication is deemed admissible, the submissions of the petitioner along with those of the respondent government are considered by a Committee of eighteen acknowledged international experts in

international human rights law, elected by the 152 {states parties} to the ICCPR. The Committee has no authority to make remedial orders or to award monetary damages to victims of human rights violations. Rather, it provides non-binding "views" as to whether rights under the ICCPR have been breached. These Committee opinions may be influential, but they are not legally binding and cannot be enforced by Canadian or any other courts.

13. As noted, the Supreme Court has emphasized the strong convergence of values between international human rights law and the principles of fundamental justice. The views of U.N. human rights treaty monitoring bodies have been considered in determining the scope of Charter rights on the basis that international human rights law reflects "those values and principles that underlie the Charter itself." There is no such convergence, however, between principles of fundamental justice and NAFTA. To the contrary, the status given investors' property rights under NAFTA is highly discordant with Charter values and principles, which allow for the weighing of individual rights and collective interests, and the balancing of freedom from government interference with the right to necessary measures of protection. The failure to ensure that substantive domestic and international human rights norms are taken into account in NAFTA Chapter Eleven decision-making affecting life, liberty and security directly and significantly infringes section 7 principles of fundamental justice.

14. In addition to the substantive requirements of fundamental justice, the Supreme Court has made it clear that decisions which are likely to have a significant impact on an individual's health, well-being or other section 7 interests, will also violate principles fundamental justice where appropriate procedural safeguards are not in place. These include the right to adequate notice of a decision, the right to respond and the right to be heard by a fair and impartial decision-maker. Where necessary to ensure meaningful participation in decision-making affecting section 7 interests, fundamental justice can also require state funded legal counsel.

> *Singh v. Canada, supra*, per Wilson J. at 464-466;
> *R. v. Morgentaler* (1988), 44 D.L.R. (4th) 385 (S.C.C.);
> *Suresh v. Canada, supra*, at paras. 122-126;
> *New Brunswick (Minister of Health and Community Services) v. G.(J.), supra*, at para. 91

15. Canadian citizens and residents do not have standing in NAFTA investor-State disputes and have no participatory rights in those proceedings, even where laws and government policies protecting their section 7 rights may be at issue. As such, NAFTA Chapter Eleven adjudication does not meet the basic procedural requirements of fundamental justice, and thereby violates section 7 of the Charter.

(iii) Chapter Eleven Adjudication Violates Section 15 of the Charter

1. The requirement that adjudicative discretion be exercised in conformity with the Charter is a critical benefit which the Charter affords – one upon which disadvantaged groups rely for the protection of their right to equality. The delegation of NAFTA disputes beyond the reach of the Charter therefore infringes the rights of disadvantaged groups to the equal protection and equal benefit of the law guaranteed under section 15.

General Principles

2. The broad wording of section 15 was intended to guarantee "a positive right to equality in both the substance and the administration of the law". The equality guarantee constitutes an over-arching democratic and constitutional principle, which must inform all interpretation and application of the law in Canada. Both in and beyond the direct Charter context, the Supreme Court has affirmed that approaches that favour substantive equality and the amelioration of disadvantage must be preferred over those that do not.

> *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.), at p. 15;
> *Reference re Secession of Quebec, supra*;
> *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.), at pp. 15-16
> *Marzetti v. Marzetti* (1994), 116 D.L.R. (4th) 577 (S.C.C.) at 602;
> *Moge v. Moge* (1992) 99 D.L.R. (4th) 456 (S.C.C.) at pp. 479, 485, 494 and 497

3. Disadvantaged groups such as women, people with disabilities or poor people have limited access to courts and tribunals and may often be unable to appear as a party to proceedings which may impact their rights and interests. In these cases, they rely on adjudication being informed by the Charter and by the central value of equality

rights and social justice and they depend on courts and tribunals to interpret and apply the law in a manner that ensures that the Charter "does not become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."

Eldridge, supra at para. 29

4. The paramount value of equality means that, in adjudicating legal challenges launched by corporate or more advantaged interests, a critical consideration will be the need for laws and other actions by government to redress inequalities in society. The role of law as a countervailing force to counteract substantive inequality must be a critical consideration, particularly in the adjudication of challenges to legislation and other government measures designed to protect disadvantaged groups or to ameliorate disadvantage. As the Court explained in *Slaight Communications*:

> Most of what we call protective legislation – legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether – must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

Slaight Communications, supra at p. 424, quoting P. Davies and M. Freedland, *Kahn-Freud's Labour and the Law*, 3d ed. (London: Stevens and Sons, 1983)

5. Section 15 cases have made it clear that a central component of the equality guarantee for people with disabilities and other disadvantaged groups is the right to decision-making and the exercise of discretionary authority that is informed by, and consistent with, the right to substantive equality. This process-related element of the section 15 right is at least as important as the guarantee that laws themselves must comply with equality principles.

6. In *Eldridge v. British Columbia*, for example, the Supreme Court considered a challenge to the under-inclusiveness of the province's health and hospital insurance legislation. The appellants alleged that the failure of the *Medical and Healthcare Services Act* to specify that sign language interpretation was a "medically required service" violated section 15. However, the Court concluded that the legislation did not

have to specify precisely what was required for compliance with section 15. Rather, the Court emphasized that section 15 guarantees that decision-makers acting pursuant to statutory authority must make their decisions in a manner consistent with the right to equality. A similar result was reached in *Little Sisters Book and Art Emporium v. Canada*, where the Court found that it was the decisions of customs agents authorized by the *Customs Act* to consider the obscenity provisions of the *Criminal Code* that violated section 15, rather than the statutory provisions themselves. The Court emphasized that: "it is well established that such discretion must be exercised in accordance with the Charter."

> *Eldridge, supra* at para. 29
> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000), 193 D.L.R. (4th) 193 (S.C.C.), at paras. 71-72 and 133

7. It is this critical component of the equality guarantee: that decision-making authorized by statute must be consistent with section 15, which has been effectively revoked in granting NAFTA tribunals authority to adjudicate investor-State disputes without considering the Charter. NAFTA tribunals are routinely called upon to interpret {ill-defined} trade rules and terms that are open to a variety of interpretations, terms {similar to} {considerably less precise in plain meaning} than "medically required services" in *Eldridge* or the obscenity provisions of the *Criminal Code*. They are then empowered to apply these terms to diverse spheres of domestic policy and law ranging from environmental protection and land-use controls to the delivery of public services and the rendering of judicial rulings. Yet NAFTA tribunals have been granted the power to exercise their authority to interpret and apply NAFTA without any obligation to consider the right to equality under section 15 of the Charter. The Applicants submit that this amounts to a clear violation of section 15.

> Sornarajah Affidavit, paras. 49, 82-84, Application Record, Vol. 1, Tab 2, pp. 30, 43-44

a. Chapter Eleven Adjudication Fails To Meet The Requirements Of The *Law* Test

8. In its decision in *Law v. Canada*, the Supreme Court held that section 15 is infringed where a law imposes differential treatment, directly or by its adverse effects,

based on a prohibited ground of discrimination, in a manner that is substantive discriminatory in light of section 15's purpose of combating prejudice, stereotyping, and historical disadvantage and promoting human dignity.

> *Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.), at para. 88

9. In the present case, differential treatment is created by depriving the Applicants of the benefit and protection of the equality guarantee itself. By delegating NAFTA decision-making beyond the reach of the Charter, Parliament has removed the protection afforded by section 15, and has also implicitly denigrated the importance of constitutional equality principles generally. As such, Chapter Eleven adjudication draws a distinction between the members of disadvantaged groups, who need and benefit from the protection of section 15, and members of more advantaged groups who do not. The differential treatment in the present case is akin to that found by the Supreme Court to be unconstitutional in *Vriend*, and in *N.A.P.E.*

10. The Court affirmed in *Vriend* that the important comparison in that case was between gays and lesbians, who require statutory human rights protection, and heterosexuals who do not have the same need for protection. In *N.A.P.E.*, Justice Binnie held that when *the Public Sector Restraint Act* revoked a pre-existing pay equity award, the legislation drew "a clear formal distinction between those who were entitled to benefit from pay equity, and everyone else." Similarly, in the present case, depriving disadvantaged groups who rely on section 15, of the protection of Charter equality guarantees in NAFTA decision-making, draws a distinction between those who qualify for and need the protection of section 15 and "everyone else."

> *Vriend, supra,* at para. 82;
> *N.A.P.E., supra,* at para. 42

11. The distinction drawn between those who require the protection of section 15 and those who do not is based on both enumerated and analogous grounds. In particular, disability and sex are enumerated grounds. Poverty and reliance on social assistance have also been recognized as analogous grounds of discrimination under section 15.

Law, supra, at para. 88;
Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R (4th) 224 (N.S.C.A.), at p. 233
Falkiner v. Ontario, (2002), 59 O.R. (3d) 481 (C.A.), at para. 84

12. In terms of the discriminatory nature of the distinction, all of the contextual factors identified in *Law* point to the conclusion that Chapter Eleven adjudication is substantively discriminatory within the meaning of section 15. Clearly, those most adversely affected by the delegation of NAFTA adjudication have experienced historical and continuing discrimination within Canadian society. Second, as argued above, the individuals and groups qualifying for the protection of section 15 are those who are least likely to have effective access to decision-making that affects them, and so are most reliant on the requirement that decision-makers comply with equality rights and other constitutional principles. Delegating NAFTA adjudication beyond the reach of the Charter undermines, rather than reflects the real situation and needs of the Applicants and others protected under section 15.

Law, supra at para. 88

13. Third, in considering the "ameliorative purpose or effect" of legislation challenged under section 15. The issue is not whether any of the groups protected by section 15 may benefit from NAFTA. Rather, the question is whether depriving disadvantaged groups of the benefits of section 15, and of the Charter generally, in the adjudication of investor-state disputes has any ameliorative purpose or effect. The Applicants submit that the answer is clearly no.

14. Finally, in terms of the nature of the interest affected, it is difficult to imagine an interest more fundamental, or more directly connected to "a fundamental social institution" than the one infringed in the present case. As argued above, the delegation of NAFTA adjudication beyond the reach of the Charter deprives the Applicants' and other Canadians' individual and collective rights to constitutionalism, the rule of law, and the protection of Charter rights in the adjudication of investor-State disputes.

Law, supra, at para. 74

15. Based on the above, the Applicants submit that, insofar as NAFTA tribunals lack competence and authority to ensure that their decision-making is properly informed by and consistent with substantive equality rights and other overarching constitutional guarantees, the NAFTA investor-State procedure violates section 15 of the Charter

D. CANADIAN BILL OF RIGHTS

1. Section 2 of the *Canadian Bill of Rights* provides that

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it should operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to …
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

2. The Bill of Rights is not merely a tool for the interpretation of legislation; rather, "if a law of Canada cannot be 'sensibly construed and applied' so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative 'unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*.'"

> *Regina v. Drybones* (1969), 9 D.L.R. (3d) 473 (S.C.C.), per Ritchie J., at p. 482;
> *Authorson v. (Canada) Attorney General* (2003), 227 D.L.R. (4th) 385 (S.C.C.), at para. 32

3. The relevance of the *Canadian Bill of Rights* has not been diminished by enactment of the *Charter of Rights and Freedoms*. As noted by Beetz J. in *Singh*,

> …[T]he *Canadian Bill of Rights* retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or *quasi*-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the *Canadian Charter of Rights and Freedoms* and almost tailor-made for certain factual situations…

Singh v. Canada, supra, per Beetz J., at p. 430;
MacBain v. Canadian Human Rights Commission et al. (1985), 22 D.L.R. (4th) 119 (F.C.A.) at pp. 134-135

4. Section 2(e) applies more broadly than section 7 of the Charter in at least one key respect: while section 7 protection [guarantees fundamental justice where {the right to life, liberty or security of the person are engaged}, under section 2(e), "what is protected by the right to a fair hearing is the determination of one's 'rights and obligations', ***whatever they are*** and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada" [emphasis added].

Singh v.Canada., supra, per Beetz at p. 433;
Authorson v.(Canada) Attorney General, supra, at para. 34;

5. The right to a fair hearing under s. 2(e) applies not just to court processes, but to proceedings before a "tribunal or similar body."

Authorson v. (Canada) Attorney General, supra, at para. 61

6. There is no absolute definition of what constitutes a fair hearing in accordance with the principles of natural justice. Courts have recognized that "the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

A.-G. Can. v. Inuit Tapirisat of Canada et al. (1980), 115 D.L.R. (3d) 1 (S.C.C.), quoted in *Singh v. Canada., supra,* per Beetz J., at p. 434

7. However, natural justice requires, at minimum, that those who may be adversely affected by a decision have an opportunity to be provided with notice of the impending proceedings, to know the opposing party's case, to adduce and challenge evidence, to be heard by those charged with the power to make the decision, and to be judged fairly by a non-biased tribunal.

> The principle that no one should be condemned or deprived of his rights without being heard, and above all without having received notice that his rights would be put at stake, is of a universal equity…

Alliance des Professeurs Catholiques de Montreal v. Labour Relations Board, [1953] 4 D.L.R. 161 at p. 174 (S.C.C.), quoted in *Re Singh v. M.E.I., supra*, per Beetz, J., at p. 437

> Under s. 2(e) of the Bill of Rights no law of Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

Duke v. the Queen (1972), 28 D.L.R. (3d) 129 (S.C.C.) quoted in *Singh v. Canada., supra*, at p. 464

8. In certain situations, it is the public at large, in addition or as opposed to an individual or a particular group of individuals, that must be accorded participatory rights in fulfilment of the dictates of natural justice and fairness. Indeed, as governmental activity has taken on an increasingly public dimension, the notion of public rights has gained importance, warranting an extension of participatory rights to public interest groups in proceedings where the validity of such governmental activity is at issue. As the Supreme Court of Canada stated in *Canadian Council of Churches*:

> …[T]here can be no doubt that the complexity of society has spawned ever more complex issues for resolution by the courts. Modern society requires regulation to survive. Transportation by motor vehicle and aircraft requires greater regulation for public safety than did travel by covered wagon. Light and power provided by nuclear energy requires greater control than did the kerosene lamp.
>
> The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts…
>
> …The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest.

Canadian Council of Churches v. Canada (1972), 88 D.L.R. (4th) 193 (S.C.C.), at pp. 202 and 204

9. The breadth of investor-State arbitration under NAFTA extends to government policies and laws relating to economic, environmental and social concerns that are of paramount importance to the public and which may affect the interests of third parties. As the Respondent and more than one NAFTA tribunal have acknowledged, investor-State arbitration affects interests far beyond those of the two disputing parties. Thus, it is submitted that section 2(e) of the *Bill of Rights* demands, at minimum, that where the rights and obligations of third parties are affected, they must be accorded the right to a fair hearing in accordance with the principles of fundamental justice, including the right to notice of the investor's claim, full access to the claim and evidence upon which it is based, standing before the tribunal, including the right to call evidence, conduct cross-examination and present argument.

10. The existing procedures governing investor-State arbitration under NAFTA utterly fail to meet this basis threshold of natural justice required by section 2(e) of the Bill of Rights. Indeed, as set out above, the Applicants CUPW and COC were denied standing as parties in the *UPS v. Canada* arbitral proceeding even though the claim raised broad issues of public interest and concern, and the decision would potentially affect their direct interests.

11. NAFTA tribunals also lack the quality of judicial independence that is essential under section 2(e). As noted above, arbitrators play various roles from proceeding to proceeding – serving as the president of a tribunal convened to interpret NAFTA decisions in one proceeding, as a party's nominee in another, and as an advocate in yet another proceeding. This structure allows for the possibility that an adjudicator, seeking to attract or maintain a particular client base, would be influenced to render decisions that favour the interests of this constituency. This lack of separation between adjudicative and advocacy roles gives rise to a reasonable apprehension of institutional bias. Indeed, the Supreme Court of Canada has cautioned that "prosecuting counsel must in no circumstances be in a position to participate in the adjudication process. The functions of prosecutor and adjudicator cannot be exercised together in this manner."

> *2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool)* (1996), 140 D.L.R. (4th) 577 (S.C.C.), per Gonthier J., at para. 56;
> *MacBain v. Canadian Human Rights Commission et al, supra*.

PART V - ORDER REQUESTED

1. The Applicants request that the Court issue the declarations set out in their Amended Notice of Application (Application Record, Vol. 1, Tab 1, pp. 3-6) and grant their costs of this application.