Court File No.: 01-CV-208141

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Applicants

and

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

Respondent

# RESPONDENT'S MEMORANDUM OF FACT AND LAW


Brian J. Saunders
Senior General Counsel
**Per:**
**Graham Garton**
**Donald J. Rennie**
Department of Justice, Room 1112,
Bank of Canada Bldg.
234 Wellington Street
Ottawa, Ontario K1A 0H8

Tel: (613) 957-4863
Fax: (613) 954-1920

Counsel for the Respondent

TO: SACK GOLDBLATT MITCHELL
Barristers and Solicitors
312 Cooper Street
Ottawa, Ontario K2P 0G7

Steven Shrybman
Tel: 613-233-4897
Fax: 416-591-7333

Steven Barrett
Tel: 416-977-6070
Fax: 416-591-7333

Counsel for the Applicants

**TABLE OF CONTENTS**

Court File No. 01-CV-208141

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

Applicants

and

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

Respondent

# RESPONDENT'S MEMORANDUM OF FACT AND LAW

## Overview

1. The essential premise of the Applicants' case is that Canada is prohibited by its domestic laws from entering into any international agreement that contains a dispute resolution mechanism, unless the mechanism provides that all claims against Canada under the agreement be resolved by Canadian courts in

accordance with Canadian laws and practice. Obviously, no other state would ever agree to such a one-sided arrangement. Thus, on the Applicants' theory, Canada cannot join with the rest of the industrialized world in agreements like the NAFTA, the CUSFTA, the WTO Agreement, Canada's Foreign Investment Protection Agreements (FIPA) and the Convention on the Law of the Sea or accept the compulsory jurisdiction of the International Court of Justice under Article 36(2) of its Statute, because at the international level Canada, unlike other states, is fettered by the provisions of its domestic laws.

2. More fundamentally, the provisions of Canada's Constitution and its other domestic laws do not apply to non-Canadian international bodies administering international law, like the NAFTA Chapter 11 arbitral tribunals. Domestic law and international law are distinct legal systems that operate in different spheres. In the domestic sphere, constitutional requirements like s. 96 exist because the Constitution must make provision for the establishment and operation of Canadian government. The courts are one of the three branches of government. They are created by the legislative branch, their membership is determined by the executive branch, and they exercise governmental power by adjudicating on the rights and obligations of Canadians. They do not adjudicate on the rights and obligations of nations because, manifestly, such matters are not matters of domestic governance.

3. In order to advance their case, the Applicants distort the true nature and extent of the NAFTA dispute resolution mechanism, and raise false spectres of usurpation of the Canadian public policy agenda, displacement of superior court jurisdiction

and violation of Canadian constitutional imperatives. Section B of the NAFTA Chapter 11 does none of these things. It merely empowers an international arbitral tribunal to (1) the NAFTA; (2) determine if there is any inconsistency between the two; (3) determine if financial or other losses have been caused to investors as a result of any such inconsistency; and (4) order Canada to pay compensation or make restitution for any such losses. A NAFTA Tribunal has no power to overturn, invalidate, set aside or otherwise affect Canadian law, policy, judicial decisions or the constitutional rights and freedoms of Canadians. Rather, the Tribunal's only power is to order Canada to compensate entities injured by its failure to abide by international treaty obligations.

4. The Applicants' *Charter* allegations must also be rejected as they fail to establish any nexus or causality between the existence of a Chapter 11 tribunal and the infringement of a *Charter* right, or are otherwise premature or speculative.

## PART I - FACTS

### CANADA'S INTERNATIONAL TRADE AND INVESTMENT POLICY OBJECTIVES

5. The Canadian economy is highly dependent on international trade and investment for economic survival and growth. Canada is richly endowed with natural resources, which historically have attracted foreign investment. These resources fetch far higher prices on world markets than they could ever command if they were sold only in the relatively small domestic market. In turn, firms that have prospered in the Canadian market place can, in a world of open markets, invest in

other countries, and develop and produce additional resources, using a wide range of Canadian services to do so. As Canadian firms produce more goods and services than can be absorbed domestically, Canadian exporters look to foreign markets to broaden their customer bases. Exports in turn create investment opportunities. Since 1996, Canada has been a net exporter of capital, the stock of Canadian direct investment abroad having surpassed the stock of inward foreign direct investment into Canada.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, para 27.

6. Foreign Direct Investment ("FDI") is widely recognized to benefit both recipient and exporting countries. According to the Applicants' own witness Professor Bienefeld, "foreign direct investment has economic benefits, both inwards and outwards" and the "weight of the economic evidence is in favour of the idea that foreign direct investment is beneficial".

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, para 27-29.

Cross-examination of Prof. Bienefeld, **Respondent's Application Record, Vol. 3,** pp 30 and 32.

7. A principal objective of Canada's international trade and investment policy is to secure and maintain reliable access to foreign markets for Canadian exporters, service providers and investors through the negotiations of comprehensive free trade agreements such as the *Canada-United States Free Trade Agreement*

(CUSFTA), the *North American Free Trade Agreement* (NAFTA) and Foreign Investment Protection Agreements (FIPAs). Such agreements promote investment by reducing the level of risk associated with foreign markets through the creation of a rules based system with effective dispute settlement mechanisms. The Applicants' witness, Professor Bienefeld, admits that investment protections and recourse to a remedy to enforce such protections would be a factor influencing a decision to invest.

Affidavit of Denyse Vigors Mackenzie,
**Respondent's Application Record**, vol. 1, para 11.

Cross-examination of Prof. Bienefeld, **Respondent's Application Record, Vol. 3,** Q. 191 and 192.

8. One of the foundations of Canada's modern international trade and investment policy is the 1985 *Royal Commission on the Economic Union and Development Prospects for Canada*, chaired by the Honourable Donald S. MacDonald. The so-called MacDonald Commission published a report recommending that Canada negotiate a free trade agreement with the United States.

Affidavit of Denyse Vigors MacKenzie,
**Respondent's Application Record**, vol. 1, para 21.

9. Canada signed the CUSFTA on January 2, 1988. In 1989, Canada initiated the Foreign Investment Protection Agreement (FIPA) Programme and signed its first FIPA in 1990 with Poland. To date, sixteen FIPAs are in force between Canada and other states.

Affidavit of Denyse Vigors MacKenzie, **Respondent's Application Record**, vol. 1, paras 36 and 38.

10. Almost three years after the conclusion of the CUSFTA and building on the foundation laid by that agreement, the United States, Mexico and Canada signed the NAFTA in December 1992. The NAFTA entered into force on January 1, 1994.

Affidavit of Denyse Vigors MacKenzie, **Respondent's Application Record**, vol. 1, paras. 22, 84.

**INTERNATIONAL INVESTMENT OBLIGATIONS**

11. All of Canada's investment agreements provide for similar obligations concerning the treatment of investors from other state parties to such agreements. These obligations are contained in Chapter 16 of the CUSFTA, Chapter 11 of the NAFTA, Chapter G of the *Canada-Chile Free Trade Agreement* and Canada's FIPAs.

12. In NAFTA, the obligations are set out in Section A of Chapter 11 and include:

(i) Article 1102 – National treatment: This refers to the obligation to accord National Treatment to the investors of another State Party and their investments by according them no less favourable treatment than is accorded, in like circumstances, to a State Party's own investors and their investments.

(ii) Article 1103 – Most favoured Nation Treatment: State Parties must accord to investors of another State Party and their investments no less favourable

treatment than is accorded, in like circumstances, to investors from any other nation, or to their investments.

(iii) Article 1104 – Standard of Treatment: a State Party must accord to investors of another State Party and their investments the better of National Treatment or Most Favoured Nation Treatment.

(iv) Article 1105 – Minimum Standard of Treatment: a State Party must accord to foreign investments treatment in accordance with international law, including fair and equitable treatment and full protection and security.

(v) Article 1106 – Performance requirements: Parties shall not impose or enforce requirements, in relation to a foreign investment from a State Party, such as obligations to source goods and services locally.

(vi) Article 1109 – Transfers: State Parties must permit financial transfers relating to an investment of another Party's investor to be made freely and without delay.

(vii) Article 1110 – Expropriation: Parties are prohibited from taking any action which directly or indirectly expropriates an investment of another Party's investor except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of compensation.

13. Articles 1102, 1105 and 1110 of Chapter 11 give expression to certain basic substantive principles which western (capital exporting) States, including Canada, have affirmed in order to foster and protect international investment. The basic

rules include non-discrimination, minimum standards of due process and protection against uncompensated taking of property.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 44.

**INTERNATIONAL INVESTMENT DISPUTE RESOLUTION**

14. Under international law, an investor who considers that it has been wronged by a foreign state could seek the intervention of its home state in order to protect its interests. If it chose to act, the investor's home state could espouse the investor's claim in accordance with international law, under the rubric of "diplomatic protection". The principle of diplomatic protection is part of customary international law and is a general principle of international law. Essentially this means that every State has the right of diplomatic protection of its nationals. As a consequence, when a national is injured by an act contrary to international law the State itself is injured. Typically, international investment disputes were submitted to an international judicial or arbitral body which would resolve the dispute in accordance with applicable international law.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, para. 50.

Brownlie, Ian, *Principles of Public International Law*, fifth ed., 1998, at p. 479-483, **Respondent's Supplementary Authorities**, Tab 12.

International Law Commission's Articles on State Responsibility (2002), Articles 33, 44(a); Articles on Diplomatic Protection, (adopted 2004) International Law Commission Report 2004, Articles 3 & 19, at 29, para.1, 90, para.7.

15. Provisions for the settlement of international trade and investment disputes have been included in international treaties as early as the late eighteenth century. In 1794, the United States and Great Britain entered into the Treaty of Amity, Commerce and Navigation (the "Jay Treaty"), which provided for the creation of a standing commission to resolve disputes stemming from the treatment of British investors in the United States during and after the American Revolution.

Treaty of Amity Commerce and Navigation between the United Kingdom and the United States of America (Signed Nov. 19, 1794 and In Force Oct. 28, 1795). British and Foreign State Papers, BSP 1/784, **Respondent's Supplementary Authorities,** Tab 17.

16. In the 1970s and 1980s, Canada concluded numerous bilateral Foreign Investment Insurance Agreements (FIIA) with countries that host Canadian outward investment. Typically, FIIAs grant Canada subrogation rights in cases where Canada makes a payment to an investor under a contract of insurance for any loss by reason of war, seizure, expropriation or any action by the host government that deprives the investor of any right in connection with an investment in the host country. These treaties also typically provide that either State Party can submit disputes concerning the interpretation and application of provisions of the treaty or any claim arising out of investments insured in accordance with the treaty to an *ad hoc* international tribunal for settlement in accordance with applicable principles and rules of public international law.

Exchange of Notes Constituting a Foreign Investment Insurance Agreement (Morocco), CTS 1974/28, **Respondent's Supplementary Authorities,** Tab 14.

Exchange of Notes Constituting a Foreign Investment Insurance Agreement (People's Republic of China), CTS 1984/9, **Respondent's Supplementary Authorities,** Tab 15.

17. The practice of resolving international investment disputes in accordance with state-to-state dispute settlement procedures was continued in the CUSFTA. The settlement of disputes concerning investment obligations in Chapter 16 of the CUSFTA was by means of the generally applicable state-to-state dispute settlement procedures contained in Chapter 18 of that agreement. However, subsequent to the entry into force of the CUSFTA, Canada concluded its first Foreign Investment Protection Agreement (FIPA) with Poland, in 1990. In addition to state-to-state dispute settlement procedures, this first FIPA, as well as all subsequent FIPAs, contained investor-state arbitration provisions.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, paras. 34 to 40 and 45.

18. Investor-state arbitration provisions permit a foreign investor to enforce the rights of its home state by initiating proceedings against another State Party to the agreement. This approach marks a departure from the traditional state-to-state model for dispute settlement at international law. It reflects a determination by states to strengthen international law by permitting their nationals to invoke international law directly, without requiring espousal by the home state. The fact that the claims can be brought by nationals rather than the state itself does not alter the fact that the claim is one being made in accordance with international law, and that the tribunal is an international tribunal assessing whether the state

has complied with its obligations at international law. The grant of standing to investors to bring their own claims at international law is intended to eliminate the overt element of politics from investment dispute settlement and reduce the potential impact such disputes could have on the relations of the home and host states.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, paras 36-39, and 45.

Affidavit of M. Sornarajah, **Applicants' Application Record**, Tab 2, para 18.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, paras. 40 to 44.

19. The modern system of investor-state arbitration builds on the practice of international claims commissions which were widespread even before the First World War. Many thousands of decisions were issued by mixed claims commissions, mixed arbitral tribunals or other *ad hoc* tribunals in the period from 1920-1960. A similar model was used when the Iran-United States Claims Tribunal was established in 1980.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 44.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, paras 35-39.

Convention between His Majesty and the President of the United Mexican States for the settlement of British Pecuniary Claims in Mexico, arising from loss or damage from revolutionary acts between

November 20, 1910, and May 31, 1920, CTS 1928/1, **Respondent's Supplementary Authorities,** Tab 13.

20. Investor-state arbitration is now widespread and broadly established. One hundred and forty states are party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (International Centre for the Settlement of Investment Disputes Convention - "ICSID Convention"). This Convention provides a framework for resolution of investment disputes between investors and State Parties to the Convention. There are more than 2000 bilateral and regional investment treaties, almost all of which provide in some measure for investors to bring investment disputes to arbitration on their own account.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol.3, Tab. B, para. 45.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, paras. 54 to 62.

21. Like Canada's FIPAs and the many bilateral and regional investment agreements in existence between states around the world, NAFTA Chapter 11 provides for investor-state arbitration. Section B of Chapter 11 grants standing to investors from a NAFTA Party to bring claims for damages against another NAFTA Party arising from breaches of basic and long-established international standards for the treatment of foreign investors.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para 40-45.

**DISPUTE RESOLUTION UNDER NAFTA**

22. The NAFTA provides three mechanisms to achieve its objective of creating effective procedures for the resolution of disputes:

(a) State-to-State Dispute Settlement under Chapter 20

(b) Bi-National Panel Review of Anti-Dumping and Countervailing Duty matters under Chapter 19; and

(c) Investor-State Dispute Settlement under Chapter 11.

**(a) Chapter 20 – State-to-State Dispute Settlement**

23. With the exception of matters covered by Chapter 19 and matters specifically deemed non-arbitrable, the dispute settlement provisions of Chapter 20 of the NAFTA apply to all disputes between NAFTA Parties regarding the interpretation or application of the NAFTA. Proceedings under Chapter 20 are initiated by a request for consultations. If the Parties involved cannot resolve the dispute at this stage, either Party may request the establishment of an arbitral panel.

NAFTA, Articles 2004, 2006 and 2008

24. The Panel makes findings of fact, determines if a measure is inconsistent with the NAFTA obligations and makes recommendations for the resolution of the dispute. The Panel's decision is binding on the parties. A disputing Party whose measure

is successfully challenged is expected to bring its measure into compliance with NAFTA obligations, failing which, the successful Party may suspend benefits under the NAFTA until compliance is achieved. Alternatively, the Parties may negotiate compensation.

Affidavit of Denyse Vigors MacKenzie,
**Respondent's Application Record**, vol. 1, para 50.

NAFTA Articles 2016, 2018 and 2019

25. The dispute settlement provisions of Chapter 20 are available to resolve disputes arising from the interpretation and application of Chapter 11 investment obligations. In all cases where investors have brought claims under the investor-state arbitration procedures of Section B of Chapter 11, the home state of the investor could have invoked the dispute settlement procedures of Chapter 20 in order to resolve the dispute.

NAFTA, Article 2004

**(b) Chapter 19 – Bi-National Panel Dispute Resolution**

26. Under Chapter 19, a NAFTA Party's domestic anti-dumping and countervailing duty law may be reviewed by a bi-national panel at the request of another NAFTA party or one of its nationals. Consequently, a national of a NAFTA Party may, albeit indirectly, initiate international dispute settlement to determine whether the investigating authority of the importing Party has properly applied its

antidumping and countervailing duty law.

NAFTA, Article 1904(5)

**(c) Chapter 11 – Investor-state arbitration**

27. Section B of Chapter 11 allows an investor of a NAFTA Party to initiate proceedings against another NAFTA Party on the ground that it has breached its Section A obligations, resulting in loss or damage to the investor. Such proceedings are in addition to state-to-state dispute settlement under Chapter 20. They are also in addition to any proceedings available in domestic tribunals and courts.

NAFTA, Articles 1116 and 1117

28. Before an investor initiates a claim under Section B of Chapter 11, the investor must waive its right to initiate or continue proceedings before administrative tribunals or courts of any NAFTA Party with respect to the measure that is alleged to be the source of the breach of Section A obligations. This waiver does not apply to proceedings for injunctive, declaratory or extraordinary relief. Thus, NAFTA Chapter 11 provides an alternative mechanism to resolve investment disputes available at the option of the investor. Chapter 11 does not displace any rights of action an investor may have under domestic law unless the investor elects to pursue a claim under Chapter 11.

NAFTA, Article 1121

Affidavit of Denyse Vigors MacKenzie,
**Respondent's Application Record**, vol. 1, para 94.

29. Generally, a Tribunal established under Chapter 11 is composed of three arbitrators. Each party to the dispute appoints one arbitrator and endeavours to agree to the appointment of the third, who is the presiding arbitrator. If the parties cannot agree, the Secretary-General of the ICSID appoints the presiding arbitrator. Thus, no one State can determine the membership of the Tribunal.

NAFTA, Articles 1123 and 1124

30. Chapter 11 provides for a choice of three sets of arbitration rules for use in investor-state dispute settlement:

(a) The ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States;

(b) The ICSID Additional Facility rules; and

(c) The United Nations Commission on International Trade Law ("*UNCITRAL*") *Arbitration Rules.*

NAFTA, Article 1120

31. As Canada is not a party to the ICSID Convention, claims against Canada may only be governed by the ICSID Additional Facility rules and the UNCITRAL Arbitration rules.

Affidavit of Denyse Vigors MacKenzie,
**Respondent's Application Record**, vol. 1, para 107.

32. The place of arbitration is determined by agreement of the parties to the dispute, and failing agreement, by the Tribunal seized of the matter in accordance with the applicable arbitral rules. The Tribunal must hold the arbitration in the territory of one of the NAFTA parties unless the parties to the dispute agree otherwise.

NAFTA, Article 1130

Affidavit of Denyse Vigors MacKenzie,
**Respondent's Application Record**, vol. 1, para 97.

33. As a matter of policy, Canada consents, and requests the consent of disputing investors, that Chapter 11 hearings be held in public, except as required to ensure the protection of confidential information. The last four hearings of Chapter 11 hearings have been open to the public. Moreover, Canada publishes extensive information relating to these proceedings, including pleadings and awards, on its website.

Affidavit of Denyse Vigors MacKenzie,
**Respondent's Application Record**, vol. 1, paras 129,140,153,159 and 173.

34. A Chapter 11 tribunal's jurisdiction is limited to determining the issues before it in accordance with the terms of the NAFTA and applicable rules of international law. In addition, the tribunal is bound by interpretations of the NAFTA rendered by the NAFTA Free Trade Commission ("FTC"), a body comprising cabinet level representatives of the NAFTA Parties or their designees.

NAFTA, Article 1131

Affidavit of Denyse Vigors MacKenzie, **Respondent's Application Record**, vol. 1, para 98.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 21

35. The remedial powers of a Chapter 11 tribunal are restricted to awarding monetary damages and interest and ordering restitution of property. In the latter case, in lieu of restitution, the NAFTA Party found liable has the option of paying monetary damages. A Chapter 11 tribunal has no jurisdiction to invalidate or, as a matter of law, affect in any manner the impugned governmental measure.

NAFTA, Article 1136(1)

Affidavit of R. Sornarajah, **Applicants' Application Record**, Tab 2, para. 66.

Affidavit of Denyse Vigors MacKenzie, **Respondent's Application Record**, vol. 1, para 99.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 48

36. Final awards are binding only on the parties to the dispute and only in respect of the particular case at issue. A successful party may only enforce the award after proceedings to revise, set aside or annul the award, if any, have been concluded.

NAFTA, Article 1136

Affidavit of Denyse Vigors MacKenzie, **Respondent's Application Record**, vol. 1, para 100.

37. Final awards made under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules are reviewable by the domestic courts of the state in which the arbitration was held. If the place of arbitration is in Canada, either disputing party may apply to a domestic superior court to set aside or refuse to recognize or enforce an award of a Chapter 11 Tribunal pursuant to the *Commercial Arbitration Act*, R.S. 1985 c. 17, or equivalent provincial legislation. The *Commercial Arbitration Act* contains as a schedule the *Commercial Arbitration Code*, which sets out in Articles 34 and 35 the grounds upon which a domestic court may set aside or refuse to recognize or enforce an arbitral award. In all three instances where a Chapter 11 tribunal award has been reviewed by a domestic court (one award was against Canada and the other two were against Mexico), the review took place in Canada.

Affidavit of Denyse Vigors MacKenzie, **Respondent's Application Record**, vol. 1, para 102.

Affidavit of James Crawford, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B , para. 20.

United States of Mexico v. Metalclad [2001] B.C.J. No. 950, 2001 BCSC 664 (B.C.S.C.), **Respondent's Supplementary Authorities,** Tab 9.

*United Mexican States v. Feldman Karpa*, 2003 CanLII 34011 (ON S.C.), appeal to Ontario C.A. dismissed, **Respondent's Supplementary Authorities,** Tab 10.

38. In summary:

(a) NAFTA Chapter 11 provides an alternative mechanism to domestic tribunals and courts to resolve investment disputes available at the option of the investor;

(b) Chapter 11 tribunals apply the NAFTA, applicable rules of international law and interpretations issued by the NAFTA FTC; they do not apply domestic law or make determinations as to rights under domestic law;

(c) Chapter 11 tribunals only have the power to award monetary damages or restitution of property; however, in lieu of restitution, the unsuccessful Party may opt to pay damages; and

(d) Decisions of Chapter 11 tribunals have no binding force except between the disputing parties and in respect of the particular case at issue and do not affect the rights of Canadians generally.

## CHAPTER 11 TRIBUNAL DECISIONS

39. The Applicants have mischaracterized the nature and effect of the Chapter 11 tribunal decisions rendered to date in order to support their argument that 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."

Factum of the Applicants, para. 63.

### Claims against Canada

40. To date, four arbitration proceedings have been initiated against Canada under Chapter 11. Three of these have been concluded and involved settlements or damage awards in the total amount of approximately $27,800,000. No claim for expropriation against Canada has been successful.

Affidavit of James Crawford affidavit, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 34.

41. Ethyl Corporation brought the first Chapter 11 proceeding against Canada,

claiming damages arising from trade restrictions imposed on the fuel additive MMT by the *Manganese-based Fuel Additives Act*, S.C. 1997, c.11. The parties eventually settled the claim for approximately $20 million. In their description of this case, the Applicants fail to mention that four provinces (Alberta, Quebec, Nova Scotia and Saskatchewan) successfully challenged the *Manganese-based Fuel Additives Act* under the *Agreement on Internal Trade* ("AIT"), an agreement between the federal and provincial governments relating to trade liberalization within Canada. A dispute settlement panel established under the AIT concluded that the *Manganese-based Fuel Additives Act* was inconsistent with obligations under the AIT and recommended the removal of the inconsistency. In light of this ruling, Canada amended the *Manganese-based Fuel Additives Act* to delete MMT from the list of controlled substances and settled the NAFTA Chapter 11 claim brought by Ethyl Corporation.

Factum of the Applicants, para. 43

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, paras. 125 and 126.

Affidavit of James Crawford affidavit, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 37.

Report of the Article 1704 Panel concerning a dispute between Alberta and Canada regarding the Manganese-based Fuel Additives Act, File No. 97/98 – 15 – MMT – P058, **Respondent's Supplementary Authorities,** Tab 16.

42. With respect to *Pope & Talbot* v. *Canada*, the Applicants argue that the Tribunal conducted a "probing review […] to determine whether there was administrative

fairness in the treatment of the foreign investment." Contrary to the Applicants' assertions, the review to which they refer was conducted to determine whether the challenged measures constituted a violation of NAFTA Article 1105 which sets out the minimum standard of treatment to be accorded to aliens under customary international law.

Factum of the Applicants, para. 55

*Pope & Talbot* v. *Canada*, Award on the Merits of Phase 2, 10 April 2001 paras. 105-193, **Respondent's Supplementary Authorities,** Tab 6.

43. In relation to *S.D. Myers v. Canada*, the Applicants fail to acknowledge the evidence emanating from Canada's Department of the Environment, as relied on by the Tribunal, which stated that "it cannot be demonstrated that closing the border is required to deal with a significant danger to the environment or to human health." Based in part on this evidence, the Tribunal found that "there was no legitimate environmental reason for introducing the ban." The Applicants also fail to mention that the Federal Court of Canada, on an application by Canada to set aside the Tribunal's award, stated that "there is no dispute that the Canadian ban on PCB exports sought to protect Canadian companies from U.S. competition, and was not for a legitimate environmental purpose."

Factum of the Applicants, para. 51

Affidavit of James Crawford affidavit, July 15, 2004, **Respondent's Application Record,** vol. 3, Tab B, para. 38.

*S.D. Myers* v. *Canada*, Partial Award, 13 November 2000, para. 195, **Respondent's Supplementary Authorities,** Tab 7.

Canada (Attorney General) v. S.D. Myers, [2004] FC 38, para. 73, **Respondent's Supplementary Authorities,** Tab 4.

44. In relation to *UPS v. Canada*, as a matter of policy, Canada has sought to make public all documents submitted to or issued by Chapter 11 Tribunals, subject only to redaction for genuinely confidential information. Canada promptly places material on-line for the public to access. The hearings in *UPS v. Canada* have been and will continue to be open to the public. In October 2001, the Tribunal declared that it had the power to accept written *amicus* briefs from the Petitioners, which included the Council of Canadians.

Factum of the Applicants, para. 48

Affidavit of Denyse McKenzie, **Respondent's Application Record**, vol. 1,paras. 122 , 157 and 158.

*UPS* v. *Canada,* Decision of the Tribunal on Petitions and for Intervention and Participation as Amicus Curiae, 17 October 2001, para. 73, **Respondent's Supplementary Authorities,** Tab 11.

## PART II – ISSUES

45. This application raises the following issues:

(a) The Challenge is misconceived. Canada's domestic law does not apply to international treaties like the NAFTA

(b) Alternatively, Chapter 11 gives effect to a new international trade policy on foreign investors and investments that is consistent with s. 96 of the *Constitution Act*, 1867 and the rule of law

(c) Section 2(e) of the Canadian Bill of Rights does not apply and in any event is not infringed, because NAFTA arbitral tribunals do not determine Canadians' rights

(d) There are no implicit limitations on the power of the executive to enter into international treaties

(e) Unwritten constitutional principles do not apply to proceedings in which Canadians' rights and obligations are not determined

(f) Section 7 and 15 of the *Charter* are not infringed, and, if infringed, the infringement is a justifiable limit.

(g) In the event of a finding of unconstitutionality, judgment should be suspended to allow the Government of Canada and Parliament to consider options.

## PART III – ARGUMENT

### I. *The challenge is misconceived. Section 96 of the Constitution Act, 1867 does not apply to, and Charter rights are not engaged by, the entry into international treaties like the NAFTA*

46. The Applicants' challenge confuses domestic law with international law, and misconceives the nature and purpose of Chapter 11 arbitrations. The effect of their argument is that Canada is prohibited by its domestic laws from entering into any international agreement that contains a dispute resolution mechanism, unless the mechanism provides that all claims against Canada under the agreement be resolved by Canadian courts in accordance with Canadian laws and practice. Obviously, no other state would ever agree to such a one-sided arrangement. Thus, on the Applicants' theory, Canada cannot join with the rest of the industrialized world in agreements like the NAFTA, the World Trade Organization Agreement, and the Convention on the Law of the Sea, or accept the compulsory jurisdiction of the International Court of Justice under Article 36(2) of its Statute, because at the international level Canada, unlike other states, is fettered by its domestic laws.

47. This attempt to extend domestic law into the international sphere ignores the fundamental differences between the two legal systems. Domestic law like s. 96 of the *Constitution Act, 1867* is concerned with Canada's internal governance, not its international relations. As for the *Charter*, it protects Canadians against infringement of their rights by their governments, not against decisions of international tribunals under international law that have no impact on Canadians' rights. The NAFTA has <u>not</u> been incorporated into Canada's domestic law, hence

it cannot be subject to s. 96 and, in the absence any impact on Canadians' rights, it does not engage the guarantees of the *Charter*.

**(a) Section 96 of the *Constitution Act, 1867* does not apply**

48. The Supreme Court of Canada made it clear in the *Residential Tenancies* case that s. 96 is only intended to serve the domestic purpose of providing a "base for national unity, through a unitary judicial system". It was never designed for the purpose of providing Canada with a home court advantage in the international legal system, as the Applicants would have it. Section 96 promotes national unity by requiring the creation of a court system for the determination of Canadians' domestic rights and obligations that has the same "core" jurisdiction from province to province. It is not a requirement that Canada, as an international legal entity, must have all of its international obligations determined by its own courts. A requirement of this nature would have no connection with the goal of promoting Canadian unity.

*Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. at p. 728 [**Respondents' Authorities, Vol. 3, Tab 22.**

49. As Professor Hogg, in his *Constitutional Law of Canada* explains, the framers of the Constitution envisaged that the conduct of international affairs would remain with the imperial government in the United Kingdom. Thus, the *Constitution Act, 1867* contains no mention of a treaty making power, and instead accepts that the conduct of foreign affairs is a matter for the Sovereign, in the exercise of the royal prerogative. In these circumstances, it is evident that the framers, consistent with

the intent identified by the Supreme Court in the *Residential Tenancies* case, had no thought that the making of treaties should be subject to a provision like s. 96. The Sovereign's authority in this area was unfettered by any such limitation, and when the Sovereign delegated its prerogative powers, including the treaty making power, to the Governor General in 1947, there was no suggestion that the power was to be anything less than what the Sovereign had previously enjoyed. Section 96 did not suddenly take on a dimension it was never intended to have.

Peter Hogg, *Constitutional Law of Canada*, looseleaf edition, at pp. 11-2 and 11-10 [**Respondents' Authorities, Vol. 3, Tab 31.**

50. The fact that Parliament, in the *North American Free Trade Agreement Implementation Act*, has approved the NAFTA does not mean that the NAFTA has been incorporated into Canada's domestic law. As Lord Atkin for the Privy Council observed in the *Labour Conventions* case:

> It will be essential to keep in mind the distinction between (1.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. <u>But it has never been suggested, and it is not the law, that such an expression of approval operates as law</u>,

> or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it." [Underlining added]
>
> *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, at pp. 199-200, **Respondent's Supplementary Authorities,** Tab 1.

51. The Applicants' argument does not understand that Parliamentary approval does not constitute incorporation into the domestic law. It wrongly assumes that the NAFTA must be subject to domestic constitutional requirements merely because it is mentioned in the *North American Free Trade Agreement Implementation Act*.

52. The reason why mere approval of an international treaty does not constitute incorporation of it into domestic law was explained by Lemieux J. of the Federal Court in *Pfizer Inc. v. Canada*. As he said, Parliament's approval of a treaty only "anchors" Canada's participation in the international agreement, including the agreement's dispute resolution procedures. It does not evidence any intention to incorporate the treaty as a whole into the domestic law because Parliament, in its implementing statute, has gone on to enact specific amendments to domestic laws. These amending provisions indicate the precise extent to which Parliament intends the domestic law to be altered by the treaty. Lemieux J. explained it this way:

> When Parliament said, in section 3 of the *WTO Agreement Implementation Act*, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in

> section 8 of the *WTO Agreement Implementation Act* that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law. Indeed, it could not, because some aspects of the WTO Agreement could only be implemented by the provinces under their constitutional legislative authority pursuant to section 92 of the Constitution Act, 1867. What Parliament did in approving the Agreement is to anchor the Agreement as the basis for its participation in the World Trade Organization, Canada's adherence to WTO mechanisms such as dispute settlement and the basis for implementation where adaptation through regulation or adjudication was required.
>
> *Pfizer Inc. v. Canada, [1999] 4 F.C. 441 (T.D.), at para. 48* ***Respondent's Supplementary Authorities,*** *Tab 5. See also: UL Canada Inc. c. Québec (Procureur Général), [1999] J.Q. No. 1540 (QL),* ***Respondent's Supplementary Authorities,*** *Tab 8.*

53. Consequently, the NAFTA remains a matter of international law, and s. 96 does not affect its establishment of arbitral tribunals to administer the international law that it creates. Domestic law and international law are distinct legal systems that operate in different spheres. In the domestic sphere, constitutional requirements like s. 96 exist because the Constitution must make provision for the establishment and operation of Canadian government. The courts are one of the three branches of government. They are created by the legislative branch, their membership is determined by the executive branch, and they exercise governmental power by adjudicating on the rights and obligations of Canadians. They do not adjudicate on the rights and obligations of other nations or of Canadians under international law because, manifestly, such matters are not matters of domestic governance.

54. Since international treaties like the NAFTA are matters of international rather than domestic law, disputes arising under them are determined by international bodies and not the national courts. Disputes concerning the interpretation and application of a treaty may be submitted to dispute settlement as provided for in the treaty (*e.g.*, Chapter 20 of the NAFTA, and Chapter 18 of the CUSFTA), and disputes arising from customary international law may be submitted to established international courts (*e.g.*, the Statute of the International Court of Justice). Unlike domestic courts, such bodies are neither created by, nor constitute a branch of, any one national government. Instead, like the Chapter 11 arbitral tribunals, they are created by State Parties under an international agreement, and they are not emanations of any one of the Parties. Thus it is that, as Article 1123 of the NAFTA makes clear, no one State Party can determine the membership of an *ad hoc* tribunal.

55. Because they were established by the three State Parties under international law and are not a branch of any one Party, NAFTA tribunals are what Prof. Brownlie terms a "joint agency of States". As he explains, a joint agency of States is an international body that may be created for a variety of purposes, including the settlement of disputes. Such dispute settlement is governed by international law. That is why, in the case of Chapter 11 tribunals, Article 1131 requires that issues be decided in accordance with the NAFTA, with the applicable rules of international law, and with interpretations issued by the NAFTA Free Trade Commission established under Article 2001. The domestic laws of the State Parties do not apply.

Ian Brownlie, *Principles of Public International Law*, 5th ed., 1998, at p. 62 **Respondents' Authorities, Vol. 3, Tab 29.**

56. International law is the only law that governs the authority of states to establish international bodies like the Chapter 11 tribunals because the disputes brought before such bodies involve the rights and obligations of the State Parties themselves, not of individual investors. Historically, an investor wishing to bring a claim against a foreign government first had to convince its own government to espouse its claim, and had to waive the right to pursue its own rights. Under the NAFTA, each Party agrees to arbitrate claims without requiring that they be espoused by the home government. However, this modification in procedure does not affect the right which is being asserted. While an investor of a Party may submit a claim against another Party to arbitration, the right asserted by the investor is not his own right:

> Although Chapter 11 allows an investor direct access against a Party for damage claims, and does not procedurally require the exhaustion of local remedies or the interposition of his government in order to espouse a claim, an investor still has no valid claim unless he can establish state responsibility of the Party. The investor may be the claimant in procedure, but in substance, he is asserting the right of his Party to obtain compliance by the other Party with the obligations set out in Section A of Chapter 11. [Underlining added].

Patrick G. Foy, "Effectiveness of NAFTA's Chapter 11 Investor-State Arbitration Procedures", in *Proceedings of the 31st Annual Conference of the Canadian Council on International Law*, October 2002, at p. 41 **Respondents' Authorities, Vol. 3, Tab 30.**

57. The fact that the rights in issue in a Chapter 11 proceeding are only those of a State Party means that the nature of the proceeding is fundamentally different from a civil action at domestic law. This difference was explained as follows by the NAFTA tribunal in the *Loewen* arbitration:

> Rights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law: see Articles 1121, 1131, 2021 and 2022. It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. [Underlining added]
>
> *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, case No. ARB (AF)/98/3, Award, June 26, 2003, at par. 233 **Respondent's Authorities, Vol. 2, Tab 13.**

58. The Applicants' arguments do not understand this difference and thus erroneously seek to apply Canada's domestic law in the international sphere. They overlook the fact that the mere approval by Parliament of the NAFTA does not incorporate

the treaty into domestic law. They confuse an arbitration of Canada's rights and obligations as an international legal entity under the NAFTA with a determination of the obligations that Canada may owe to its own citizens under domestic law, by assuming that the decisions of Chapter 11 tribunals determine the domestic rights of Canadians. However, Chapter 11 tribunals only have the jurisdiction to adjudicate on a State Party's fulfilment of its obligations at international law. Their authority does not extend in any way into the domestic sphere.

**(b) *Charter* rights have not been engaged**

59. When a foreign investor claims that a Canadian law or government practice violates a provision of Chapter 11, no issue arises as to whether the law or practice, if found to be inconsistent with the Chapter 11 requirement, should be allowed to remain in force in Canada. The tribunal's jurisdiction is limited to the determination of the international law issue before it. If the tribunal should find that Canada has not fulfilled its NAFTA obligations, it may only award the remedies prescribed by Article 1135. It has no authority to order a change to Canada's domestic law or government practices.

60. The remedies prescribed by Article 1135 are limited to monetary damages, restitution of property, and interest. These remedies are only awarded against State Parties in their capacities as international legal entities. The remedies have no effect on domestic laws or government practices. As the Applicants' experts Professors Sornarajah and Clarkson both agree, nothing in the NAFTA compels Canadian governments to amend domestic laws and practices. They accept that

the only enforceable remedies as a result of Chapter 11 arbitrations are those prescribed in Article 1135.

> Affidavit of M. Sornarajah, **Application Record of the Applicants**, vol. 1, p. 37, para. 66; Affidavit of Stephen Clarkson, **Application Record of the Applicants**, vol. 2, p. 286, para. 32.

61. The only domestic impact the Applicants can envisage (at paragraphs 130 and 131 of their factum) is entirely speculative. They suggest that "Chapter 11 adjudication can involve laws, regulation and public policy in critical areas" (underlining added) and that monetary awards may "have significant fiscal consequences affecting governments' ability to fund critical social programs and services", which could cause governments to infringe *Charter* ss. 7 and 15 rights. In this regard, they cite (at paragraph 142) the recent decision of the Supreme Court of Canada in *Newfoundland (Treasury Board) v. N.A.P.E.* as evidence that governments faced with large monetary demands might have to make difficult choices. However, the *N.A.P.E.* case merely underscores the point that only governments, not Chapter 11 tribunals, have the authority to affect Canadians' rights.

62. Significantly, because *N.A.P.E.* involved concrete facts rather than speculation, the Supreme Court was able to see that, on the evidence, the Newfoundland government's action was justified. The government had acted as it did in order to address a fiscal crisis generated by numerous demands on its limited resources, not just to avoid its obligation to the respondents. By contrast, in this case there can be no similar evidence of context and thus no proper assessment of whether

rights have been affected because the claim is wholly conjectural and is made without regard for any particular circumstance.

*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, at paras. 59-62 **Respondent's Authorities, Vol. 2, Tab 17**.

63. As the Supreme Court has repeatedly stated, *Charter* rights must be evaluated in context, not in a factual vacuum. In this case, there will be no facts and no context until a government actually takes some action that arguably impacts on the rights of Canadians. If that should occur, Canadians who believe that the government is breaching obligations owed to them under Canada's domestic law will be entitled to vindicate their rights by challenging the government action in Canadian courts.

*R. v. Jarvis*, [2002] 3 S.C.R. 757, at paras. 63-64 **Respondent's Authorities, Vol. 2, Tab 20**; *Reference re Same-sex Marriage*, 2004 SCC 79, at para. 51 **Respondent's Authorities, Vol. 3, Tab 24**.

64. The rights of Canadians therefore remain as fully protected now as they were prior to the implementation of the NAFTA. The relationship between Canadians and their governments continues to be subject to the same rules as before. While Canada has assumed the new Chapter 11 obligations at international law, the arbitration of claims that Canada has failed to honour those obligations does not affect or determine the rights of Canadians. For that reason, domestic laws and constitutional requirements do not apply to the establishment or the proceedings of the international NAFTA tribunals. The Applicants' challenge is

misconceived.

## II. Alternatively, Chapter 11 gives effect to a new international trade policy on foreign investors and investments that is consistent with s. 96 of the Constitution Act, 1867.

65. Section 96 of the *Constitution Act, 1867* serves to protect the jurisdiction of the superior courts, as it existed in 1867, in order to provide some uniformity across the country in the judicial system. The question of whether a modern dispute resolution mechanism intrudes on this jurisdiction is resolved by applying the test developed by the Supreme Court in *Re Residential Tenancies Act, 1979*. The test was summarized as follows by McLachlin J. (as she then was) in *Reference re Amendments to the Residential Tenancies Act (N.S.)*:

> The test for determining whether a conferral of power on an inferior tribunal violates s. 96 of the *Constitution Act, 1867* ...consists of three steps, represented by the following questions: (1) does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation? (2) if so, is it a judicial power? (3) if so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?
>
> *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, *per* Lamer C.J. concurring at para. 26; *per* McLachlin J. at paras. 72 and 74 **Respondents' Authorities, Vol. 3, Tab 23.**

66. In *MacMillan Bloedel Ltd. v. Simpson*, Lamer C.J. added that, in cases like the present, where an exclusive jurisdiction is conferred on a body other than a superior court, a further factor must be considered: whether the conferral of jurisdiction amounts to the removal of an element of the "core jurisdiction" of

superior courts. As McLachlin C.J. subsequently affirmed in *Babcock v. Canada (Attorney General)*, while there is no clear test for defining this core jurisdiction, it "is a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and the preservation of its foundational role within our legal system." [Underlining added].

*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 15 and 18 **Respondent's Authorities, Vol. 2, Tab 16**.

*Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, *per* McLachlin C.J. at para. 59, **Respondent's Authorities, Vol. 1, Tab 1**, quoting Lamer C.J. in *Reference re Amendments to the Residential Tenancies Act (N.S.)*, *supra* para. 64, at para. 56.

67. The "core jurisdiction" test is similar to the first branch of the *Residential Tenancies* test in that both are concerned with the historic jurisdiction of the superior courts. Both tests are designed to assess whether there has been a subtraction from the existing jurisdiction of the superior courts. Thus it is that the "core jurisdiction" analysis in *MacMillan Bloedel* began with a consideration of the "historic basis" of the Canadian judicial system, and in *Babcock* it began with a reference to the pre-Confederation jurisdiction of the superior courts. Clearly, then, if the subject matter under consideration is one over which superior courts, in 1867, had no jurisdiction, there will be no subtraction from the historic jurisdiction of the superior courts. Likewise, if the jurisdiction is a new one that did not previously exist, the grant of jurisdiction would be upheld because in such

circumstances there would be no subtraction from the jurisdiction of the s. 96 courts.

> *MacMillan Bloedel Ltd. v. Simpson*, *supra* para. 65, at para. 29 **Respondent's Authorities, Vol. 2, Tab 16.**
>
> *Babcock v. Canada (Attorney General)*, *supra* para. 65, at para. 60 **Respondent's Authorities, Vol. 1, Tab 1.**

68. In order to apply the first branch of the *Residential Tenancies* test and the "core jurisdiction" test properly, it is necessary at the outset to characterize the nature of the dispute over which jurisdiction has been conferred, rather than the remedy that may be granted. McLachlin J. explained this as follows in the *Nova Scotia Reference*:

> ... the focus of the historical inquiry is on the type of dispute involved. The function of the s. 96 courts was and is dispute resolution. The question must therefore be whether an aspect of the dispute resolution function dominated by the superior courts has been transferred to an administrative tribunal. … [T]he reviewing court must look to the "subject-matter rather than the apparatus of adjudication": [authorities omitted]. [Underlining added].
>
> *MacMillan Bloedel Ltd. v. Simpson*, *supra* para. 65, at para. 14 **Respondent's Authorities, Vol. 2, Tab 16.**
>
> *Reference re Amendments to the Residential Tenancies Act (N.S.)*, *supra* para. 64, at para. 76 **Respondent's Authorities, Vol. 3, Tab 23.**

69. Accordingly, an understanding of the subject matter is achieved by examining the context in which the modern tribunal functions, not just the provisions that create

its adjudicative powers. The subject matter of Chapter 11 dispute settlement is the determination, at the instance of a foreign investor, of whether a governmental measure is consistent with a State Party's obligations set out in Section A of Chapter 11. Manifestly, so far as Canadian superior courts are concerned, no Canadian court has ever had the jurisdiction to determine the rights and obligations of another sovereign state at international law, or to determine the consistency of Canada's laws with its international treaty obligations.

70. To put it in the terms of the s. 96 tests, the powers conferred upon Chapter 11 tribunals do not bear any resemblance to the powers exercised by superior courts in 1867. Chapter 11 tribunals are entrusted with the authority to determine consistency with international obligations and, in appropriate cases, to award damages. Superior courts have never had that jurisdiction. Further, since international treaties and conventions are not part of Canadian law unless they have been incorporated by statute, it necessarily follows that superior courts today, as in 1867, have no jurisdiction to adjudicate disputes arising from international treaties which, like the NAFTA, have not been so incorporated.

*Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 819, at paras. 69 and 77, **Respondent's Supplementary Authorities,** Tab 3.

71. In addition, a proper examination of the tribunal's powers in their context demonstrates that they represent a fresh conceptualization, and that they also create a new jurisdiction, and thus are novel. The novelty of the conception or of the jurisdiction are decisive factors, as McLachlin J. pointed out in the *Nova*

*Scotia Reference*, and, as she went on to observe, even if challenged powers were within the historic jurisdiction of the superior courts, they will still be regarded as "new" under the s. 96 analysis if they are part of a scheme that adopts a new approach to an old problem. She explained these considerations as follows:

> Section 96 cannot be infringed by the conferral of a jurisdiction that the superior courts never exercised before 1867. The historical inquiry undertaken in the first step of the *Residential Tenancies* test searches for pre-Confederation analogs of the superior court jurisdiction at issue. If none are found, the grant of power is valid: *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, [1949] A.C. 134 (P.C.). In *John East*, the Privy Council held that the modern system of collective bargaining in industrial relations was sufficiently distinct from the traditional 19th century conceptualization of the master-servant relationship, as expressed through individual contracts of employment, to constitute a novel jurisdiction. Similarly, in *Sobeys*, La Forest J. held in a concurring minority judgment that a comprehensive regime of new rights and entitlements for unorganized workers amounted to a new jurisdiction. A jurisdiction historically exercised by the superior courts may also cease to be analogous if its current manifestation is animated by a distinctly different organizational or operational principle or philosophy. Hence, the majority of this Court in *Reference Re Young Offenders Act* also reasoned that a comprehensive legislative scheme for young offenders, treating a discrete class of individuals differently by emphasizing rehabilitation rather than punishment, constituted a new jurisdiction which could be conferred on youth courts without violating the strictures of s. 96. [Underlining added]
>
> *Reference re Amendments to the Residential Tenancies Act (N.S.)*, *supra* para. 64, at para. 94
> **Respondent's Authorities, Vol. 3, Tab 23.**

72. Chapter 11 is novel in all of these respects. It gives effect to a different philosophy that aims to protect and promote international investment by granting to individual investors the legal capacity to bring a variety of claims at

international law against sovereign states. This grant of capacity to investors to assert claims under international procedures relying on obligations owed to their home states reflects a new subject matter of adjudication that was unheard of in 1867, and which was only recognized by Canada for the first time in 1990, when Canada entered into a bilateral foreign investment protection agreement (FIPA) with Poland.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, p. 10, paras. 36-37.

73. This subject matter is novel because, in the words of McLachlin J. in the *Nova Scotia Reference*, it relies on a "distinctly different organizational or operational principle or philosophy." Prior to the advent of investor-state arbitration, the interests of investors could only be protected by their home states, which had to espouse their claims under the rubric of diplomatic protection. The grant of standing to investors to bring their own claims at international law is intended to eliminate the overt element of politics from investment dispute settlement and reduce the potential impact such disputes could have on the relations of the home and host states. Moreover, investor-state arbitration is intended to ensure that an investor whose interests have been harmed is compensated for the loss, a departure from the traditional rules of diplomatic protection. Such proceedings are an entirely novel jurisdiction that has no equivalent at domestic law.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, pp. 13-14, para. 50.

74. The new philosophy underlying Chapter 11, and indeed the investor-state arbitration provisions of all of Canada's FIPAs, is the belief of the State Parties that they will achieve greater protection for foreign investments made by their own nationals, and their own domestic economies will benefit from greater investment by foreign nationals, if they accept certain obligations in relation to both the treatment and the protection of foreign investments. The novelty of this concept is affirmed by the Applicants' affiant, Professor Clarkson. He says that, prior to the 1989 CUSFTA, Canada's international trade obligations "were essentially limited to government policy and law concerning international trade in goods", and that enforcement of the obligations "was a matter of goodwill", not of legal right. He traces the process by which Canada came to accept the need for international trade rules concerning foreign investments and investors to initiatives undertaken by the United States in the mid-1980s. The initial result of those initiatives was CUSFTA, in which Canada committed itself to treating U.S. investors the same way that it treated Canadians – "a concession that Canada had long resisted".

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, vol. 1, p. 19, paras. 77-79.

Affidavit of Stephen Clarkson, **Application Record of the Applicants**, vol. 2, pp. 277-279, paras. 6 and 13.

75. Chapter 11 extends the new philosophy introduced in CUSFTA by creating what Professor Clarkson agrees is "an extraordinary remedy" and "a major innovation":

putting "the arbitration machinery of international commercial regimes at the direct service of foreign investors to enforce rights established by an international treaty to which they were not parties, and under which they had no obligations." Professor Sornarajah for the Applicants shares this view, asserting that it represents "a dramatic departure from the norms of both international and domestic law." Thus, the Applicants' affiants accept that the subject matter of adjudication under Chapter 11 – the right of foreign investors to make claims for damages against sovereign states based on alleged breaches of an international treaty – is a new right, in a new context, in which a new philosophy of international investment is given legal effect.

Affidavit of Stephen Clarkson, **Application Record of the Applicants**, vol. 2, p. 289, para. 38.

Affidavit of M. Sornarajah, **Application Record of the Applicants**, vol. 1, pp. 13 and 50, paras. 13(i) and 102.

76. While Professors Clarkson and Sornarajah object to the creation of the new jurisdiction, their arguments establish that the Applicants' s. 96 challenge is without merit. They oppose the new jurisdiction precisely because it is part of a regime that effects a fundamental change in long standing international trade and investment policy, by creating "a new legal order". Thus, they agree that a "distinctly different organizational or operational principle" has been brought to bear. A new conceptualization like this is, by itself, conclusive that no violation of s. 96 has occurred. There is no need to consider whether a similar jurisdiction might nevertheless have existed in the superior courts prior to 1867.

Affidavit of Stephen Clarkson, **Application Record of the Applicants**, vol. 2, p. 281, para. 18. (Prof. Sornarajah describes it as "a new international constitutional order": **Application Record of the Applicants**, vol. 1, p. 34, para. 59.)

77. However, the Applicants ignore the novelty of the underlying philosophy and instead focus on the dispute resolution mechanism in isolation, in an attempt to contradict their affiants' evidence that it constitutes a "major innovation" and a "dramatic departure". They proffer the view of Prof. Lajoie to the effect that, before Confederation, a jurisdiction existed in the superior courts over claims arising from expropriations.

78. Obviously, this line of argument is erroneous, for two reasons. First, it fails to understand that the issues in a Chapter 11 arbitration involve the obligations of a State Party, not the rights of an individual foreign investor. No Canadian court has ever had the jurisdiction to determine the rights and obligations of another sovereign state at international law or to determine the consistency of Canada's laws with its international treaty obligations. Still less has any Canadian court ever had the jurisdiction to consider such issues at the instance of a foreign investor.

79. Second, Prof. Lajoie's argument wrongly assumes that Chapter 11 is concerned only with expropriation. She apparently could not find anything resembling a pre-Confederation comparator for any of the other claims, such as a failure to accord national treatment (Article 1102) or most favoured nation treatment (Article 1103), or a denial of treatment in accordance with international law

(Article 1105), so she ignores them. Her study is confined to the Article 1110 right to compensation as a result of expropriation, but even this limited analysis is flawed because it does not understand that the Article 1110 obligation is based on international legal principles, not the statutory right that exists at domestic law.

80. Professor Lajoie's narrow focus results in a failure to assess the challenged arbitral jurisdiction in its context. She disregards most of Chapter 11, and therefore does not properly identify the subject matter of adjudication. She described her methodology as follows:

> … I have reviewed NAFTA's chapter 11 Section B Investor-State arbitral provisions and their analysis in the affidavit of M. Sornarajah, sworn in these proceedings. I have thus ascertained that the Investor-State arbitral tribunals can be empowered to resolve claims concerning government policy, law and regulation alleging that such measures represent expropriation of the disputing investor's investment. Furthermore, the awards which may arise from such proceedings are final and binding, and are subject only to limited, and in certain cases no judicial review by Canadian courts. My review of the jurisdiction of superior courts at the time of Confederation focuses therefore on the question of expropriation claims by aliens arising from the actions of government, or other authorities. [Underlining added]

Affidavit of Andrée Lajoie, **Application Record of the Applicants**, vol. 2, pp. 447-448, para. 16.

81. This is the sum total of Professor Lajoie's analysis of Chapter 11. As she says, it is based entirely on a consideration of the arbitration mechanism of Section B – the "apparatus of adjudication", as it was described by McLachlin J. in the *Nova Scotia Reference* – rather than the subject matter, as the s. 96 test requires. She thus does not consider the range of state obligations that are created in Section A,

and mistakenly "focuses … on the question of expropriation claims by aliens".

82. Professor Sornarajah, on whom Professor Lajoie relies for her understanding of NAFTA, makes it clear that Chapter 11 is not just about expropriation. He acknowledges the obvious, that a number of different state obligations have been created. Article 1110 is only one obligation of a matrix of obligations designed to promote investment amongst the NAFTA Parties. Even if the jurisdiction historically exercised by domestic superior courts over issues concerning expropriation were considered to be analogous to the jurisdiction exercised by Chapter 11 tribunals, when considered within the context of Chapter 11 as a whole that jurisdiction ceases to be analogous by reason of the "distinctly different organizational or operational principle or philosophy" inherent in investor-state arbitration.

Affidavit of M. Sornarajah, **Application Record of the Applicants**, vol. 1, pp. 25-26, paras. 40-41.

83. The pre-Confederation right on which Professor Lajoie bases her argument was created by legislation that authorized compensation claims by anyone (not just the discrete class of foreigners) whose property (usually land, not a broad range of investments) was taken by government for its use. Her attempt to compare this right with the variety of obligations created by Chapter 11 is inapt because it overlooks what Professor Hogg, in his *Constitutional Law of Canada*, terms "the international character of the obligations" in trade treaties like NAFTA. In 1867, obligations of this nature (other than expropriation) were not even arbitrable

between sovereign states, much less capable of assertion by private persons in domestic courts, because they did not then exist. They are modern creations that are the subject of modern dispute resolution mechanisms. There can be no pre-Confederation power comparable to the Chapter 11 jurisdiction because Chapter 11 is an entirely new concept.

> Peter Hogg, *Constitutional Law of Canada*, *supra* para. 48, at p. 11-15 **Respondents' Authorities, Vol. 3, Tab 31.**

84. While the Applicants argue (in paragraphs 111-114 of their factum) that Chapter 11 transfers "core jurisdiction" over judicial review to NAFTA tribunals, it is manifest that tribunals are not authorized to perform any of the functions they suggest. All three of the functions referred to by the Applicants ("policing the boundaries" of government action, determining the constitutionality of government action, and review of administrative action) involve the application of domestic legal principles in order to determine whether governments have respected the limits of their authority at domestic law. NAFTA tribunals have no jurisdiction to do that. They may only determine whether a State Party has fulfilled its Chapter 11 obligations. As discussed in paragraphs 14-18 above, the authority to "police" government action for compliance with domestic law remains with the domestic courts, and if a government, in response to a tribunal decision, should take action that affects Canadians' rights, that action may be challenged in the superior courts.

85. Similarly, while the Applicants argue (in paragraphs 115-117) that Chapter 11

empowers tribunals to review decisions of superior courts, this submission misportrays the authority that tribunals actually exercise. In determining whether action by a State Party, including action by the Party's judicial branch, is compatible with Chapter 11 requirements, a NAFTA tribunal has no authority to assess the validity of the action under domestic law or to grant any remedy other than damages, restitution of property and costs. In particular, it cannot overturn or nullify a decision made by a domestic court.

86. In sum, the Applicants' argument denies that the "core" jurisdiction of the superior courts is "very narrow", and erroneously seeks to expand that jurisdiction into the international sphere, to include a subject matter that has never existed, whether in 1867 or subsequently. The Applicants ignore the evidence of their own affiants Professors Clarkson and Sornarajah as to the novelty of both the conceptualization underlying Chapter 11 and the arbitral jurisdiction that it creates, and rely on an argument by Professor Lajoie that understands neither the international character of the obligations at issue nor the context in which the dispute resolution mechanism exists. If s. 96 of the *Constitution Act, 1867* applies, its requirement plainly has not been violated.

## III. Constitutionalism and the rule of law are not infringed.

87. Constitutionalism and the rule of law are unwritten principles of the Constitution. As explained by the Supreme Court in *Reference re Secession of Quebec*, constitutionalism "requires that all government action comply with the Constitution," and the rule of law "requires that all government action must

comply with the law, including the Constitution." The Applicants contend that even if Canada has respected the requirements of s. 96 of the *Constitution Act, 1867*, the unwritten principles contain prohibitions (unheard of until this case) which prevent Canada from having its obligations as an international person determined in Chapter 11 dispute resolution proceedings.

*Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, at para. 72 **Respondents' Authorities, Vol. 3, Tab 25.**

88. In *Lalonde v. Ontario (Commission de restructuration des services de santé)*, the Court of Appeal noted that unwritten principles may be used to "flesh out" the express terms of the Constitution, that is, to fill in gaps in the express terms of the constitutional scheme "by adopting an interpretation that is most consistent with the underlying logic of the existing text." However, the Court of Appeal emphasized that the unwritten principles "do not confer on the judiciary a mandate to rewrite the Constitution's text", and cannot "be taken as an invitation to dispense with the written text".

*Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R.(3d) 505, at paras. 118-119 and 121 **Respondents' Authorities, Vol. 1, Tab 9.**

89. The Applicants ask this Court to dispense with the Constitution's written text. They seek an alteration of the ambit of s. 96 as determined by the Supreme Court. While the language of s. 96 is not explicit as regards superior court jurisdiction, the Supreme Court has examined its "underlying logic" – what Dickson J. in *Re*

*Residential Tenancies Act, 1979* termed its "intended effect" – and, from that, has determined the scope of the constitutional requirement. The requirement is reflected in the judicially-developed *Residential Tenancies* and "core jurisdiction" tests. Accordingly, if, as submitted in respect of the preceding issue, the arbitral jurisdiction conferred on Chapter 11 tribunals does not infringe that requirement, that is the end of the matter. No unwritten principle can be used to alter the requirement, because the requirement already captures the "underlying logic" of the Constitution's written text.

*Re Residential Tenancies Act, 1979*, *supra* para. 47, at p. 728 **Respondents' Authorities, Vol. 3, Tab 22.**

90. In addition, it is important to bear in mind that, as McLachlin C.J. said in *Babcock v. Canada (Attorney General)*, "the unwritten principles must be balanced against the principle of Parliamentary sovereignty." This is another reason why the limit imposed by s. 96, as articulated by the Supreme Court, is the only constitutional restraint on Parliament and the legislatures when they set out to create adjudicative jurisdictions. If they respect that express limitation, no unwritten principle of the Constitution may then be invoked to challenge their legislative action, because the only purpose of such an exercise would be to deny Parliamentary sovereignty. Here, Parliament has expressed its sovereign will in the *North American Free Trade Agreement Implementation Act*, and constitutionalism and the rule of law cannot be used to override it.

*Babcock v. Canada (Attorney General)*, *supra* para. 65, at paras. 55-56 **Respondents' Authorities, Vol.**

**1, Tab 1.** McLachlin C.J. expressly approved the reasoning in *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.) **Respondents' Authorities, Vol. 3, Tab 28** on this point (see, in particular, paras. 12 and 31-36 of *Singh*).

91. As with all of their arguments, the Applicants' submissions on this issue suggest, without explanation or analysis, that NAFTA tribunals determine Canadian domestic law and affect the rights of Canadians. In paragraph 125 they complain that the tribunals have no obligation to grant standing "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*." However, as discussed with respect to the first issue, the only authority given to tribunals is to determine whether a State Party has fulfilled its Chapter 11 obligations. Tribunals have no jurisdiction to invalidate domestic laws or government practices, and exclusive responsibility for those laws and practices remains with the State Party concerned.

92. Moreover, the Applicants suggest (in paragraphs 123 and 124) that the principles of constitutionalism and the rule of law are violated because "interpretative choices" of Chapter 11 tribunals, characterized by the Applicants as mere acts of "discretion", are uninformed by Canadian constitutional values and principles. The Applicants ignore the fact that, in interpreting the text of the NAFTA, Chapter 11 tribunals are governed by established principles of treaty interpretation, such as those found in the *Vienna Convention on the Law of Treaties*. The Applicants are implicitly seeking to require international tribunals to interpret international treaties to which Canada is party by reference to Canadian constitutional values and principles. Such an approach is patently at odds with the long-standing body of international law regarding treaty

interpretation. If accepted, it would effectively prevent Canada from entering into treaties with dispute settlement mechanisms.

*Vienna Convention on the Law of Treaties*, 8 ILM (1969), Articles 31 and 32, **Respondent's Supplementary Authorities,** Tab 18.

## IV. The claims under the Charter and the Canadian Bill of Rights are wholly conjectural and therefore untenable.

93. It is apparent that nothing in the *North American Free Trade Implementation Act* works any infringement of anyone's rights under either ss. 7 and 15(1) of the *Charter* or s. 2(*e*) of the *Canadian Bill of Rights*. The Applicants' whole case rests on allegations of future harm. As discussed in paragraph 60 above, they speculate that Canadian governments might take action in response to NAFTA tribunal decisions that could have an impact on Canadians' rights.

94. Purely conjectural assertions like these do not constitute legally cognizable claims. As the Supreme Court stated in *United States of America v. Kwok*, the "basic premise" is that "remedies must generally await infringement." While the Court has recognized that there could be exceptional cases in which judicial intervention might be warranted prior to the actual occurrence of harm, it has emphasized that such cases must involve a "high degree of probability" that an infringement will occur. Here, the Applicants' arguments merely involve sweeping, unparticularized allegations about theoretical possibilities, and do not identify anything resembling a reasonable probability.

*United States of America v. Kwok*, [2001] 1 S.C.R. 532, at para. 83 **Respondent's Authorities, Vol. 3, Tab 28.**

*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 458 **Respondent's Authorities, Vol. 2, Tab 18**; *Phillips v. Nova Scotia (Westray Mine Inquiry)*, [1995] 2 S.C.R. 97, at pp. 158-159 **Respondent's Authorities, Vol. 2, Tab 19.**

95. The Supreme Court has made it clear that the requisite "high degree of probability" can only be established by reference to concrete facts. Arguments made in the abstract, like the ones made here, cannot be entertained because (as discussed in paragraph 13 above) *Charter* analysis is contextual, and is dependent upon the establishment of particular facts. The Supreme Court has often repeated that "*Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel", but unsupported hypotheses are all that the Applicants can offer in this case.

*Phillips v. Nova Scotia (Westray Mine Inquiry)*, *supra* para. 93, **Respondent's Authorities, Vol. 2, Tab 19.**

*MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-362 **Respondent's Authorities, Vol. 2, Tab 15**; *Danson v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at pp. 1100-1101 **Respondent's Authorities, Vol. 1, Tab 5**; *U.S.A. v. Kwok*, *supra* para. 93, at para. 73 **Respondent's Authorities, Vol. 3, Tab 28.**

96. The Applicants' arguments are based on conjecture about the effects of possible government action on the rights of Canadians. Even if one accepts their prediction that government will likely take some form of legislative or administrative action in response to a NAFTA tribunal decision, there is still no

evidence whatsoever as to what the action might actually entail or what particular effect it might really have. This Court has simply been invited to accept the Applicants' conjecture as a matter of faith, and to require the respondent to justify what it has not done, and has not evinced any intention of doing, with evidence that does not exist. No evidence will exist unless and until the respondent actually does something that impacts on Canadians' rights.

97. The fact that the Applicants' argument rests exclusively on conjecture is surprising given that, to date, three Chapter 11 arbitrations against Canada have been concluded or been settled. The Applicants have made no attempt to show, because they cannot, that in these specific circumstances Chapter 11 tribunal decisions have infringed their s. 7 or s. 15 rights. In relation to claims made by *Ethyl Corporation* (cited at paragraph 43), the Applicants fail to mention that four provinces (Alberta, Quebec, Nova Scotia and Saskatchewan) successfully challenged the *Manganese-based Fuel Additive Act* ("the *Act*"), the federal legislation that prohibited the interprovincial and international trade in the fuel additive MMT, under the *Agreement on International Trade (AIT)*, an agreement between the federal and provincial governments. A dispute settlement panel established under the *AIT* found the *Act* to be inconsistent with obligations under the *AIT* and recommended the removal of the inconsistency. In light of this ruling, Canada amended the *Act* to delete MMT from the list of controlled substances under the *Act* and settled the NAFTA Chapter 11 claim brought by the investor. At no point have the Applicants specifically challenged the government's actions in amending the *Act* in domestic courts.

Report of the Article 1704 Panel concerning a dispute between Alberta and Canada regarding the *Manganese-based Fuel Additives Act*, File No. 97/98 – 15 – MMT – P058, **Respondent's Supplementary Authorities,** Tab 16.

Affidavit of Denyse Vigors Mackenzie, **Respondent's Application Record**, paras. 125 and 126.

98. In relation to the *Pope & Talbot* and *S.D. Myers* proceeding, the Applicants have failed to show how the tribunal decisions in those cases infringe their rights or otherwise support their arguments in this proceeding. In relation to *Pope & Talbot*, the Applicants have not even attempted to demonstrate how an award of damages in the amount of US$461,566 to the investor in that proceeding infringes the Applicants' rights.

*Ibid.*, para. 142.

99. Similarly, the Applicants fail to demonstrate how the tribunal's decision in *S.D. Myers* affects their rights. The Applicants avoid any discussion of the tribunal's reasoning or the Federal Court of Canada's review of the tribunal's decision, specifically the Court's conclusion that "there is no dispute that the Canadian ban on PCB exports sought to protect Canadian companies from U.S. competition, and was not for a legitimate environmental purpose." The Applicants also fail to indicate that the Council of Canadians and the Sierra Club had sought leave to intervene in the review proceedings before the Federal Court and that their motion was denied, in part, on the basis that "the social policy concerns of the moving parties, including Canada's trade policy, would not assist in the determination of

the legal issues which arise under the Government's application for judicial review."

*Attorney General of Canada v. S.D. Myers*, 2004 FC 38, at para. 73, **Respondent's Supplementary Authorities,** Tab 4.

*Attorney General of Canada v. S.D. Myers*, Reasons for Order, FCC, 11 April 2001, Rouleau, J,, appeal to the Federal Court of Appeal dismissed, leave to appeal to the Supreme Court of Canada denied, **Respondent's Supplementary Authorities,** Tab 2.

100. Thus, absent any specific factual basis for the assertion that their rights have been infringed, the Applicants must resort to conjecture and speculation. However, this case reaches an even higher level of abstraction than existed in the *MacKay* and *Danson* cases mentioned in paragraph 94 above, where the Supreme Court underscored the need for evidence of alleged effects. In those cases, there was at least specific government action (a law in *MacKay*, and a rule of practice in *Danson*) that provided a basis for the challengers' hypotheses. Here, there is no specific governmental action, and the Applicants cannot even begin to speculate about what such action might involve because no one can know the precise context in which action might conceivably be taken.

101. Aside from the conjectural nature of the claims and the fact that they are asserted in an evidentiary vacuum, the Applicants' hypotheses do not engage any of the provisions they invoke. The Applicants merely state (in paragraph 130) that ss. 7 and 15 of the *Charter* are implicated because "Chapter 11 adjudication can involve laws, regulation and public policy in critical areas affecting individual and

community health, security and well-being", and they suggest (in paragraph 169) that s. 2(*e*) of the *Canadian Bill of Rights* must also apply because its coverage is even broader than that of s. 7 of the *Charter*. Nowhere in their submissions do the Applicants explain how the decisions of NAFTA tribunals could, by themselves, work an infringement of Canadians' rights. All of their arguments are premised on the assumption that the actual effect on rights will be the result of consequent government action.

102. With particular reference to s. 7 of the *Charter*, all the Applicants can say (at paragraph 136) is that their rights are infringed because Chapter 11 tribunals are not obliged to "consider the distinctive Canadian values implicit in the guarantees of life, liberty and security of the person". They contend (at paragraph 140) that this impairs their own liberty and security interests because there is no assurance that their "rights and needs will receive appropriate consideration in the adjudication of public policy issues." But they do not, because they cannot, demonstrate that tribunal decisions will actually affect any of their own rights. Their s. 7 argument is all about a process that is of no consequence to their liberty and security interests. Those interests can only be affected by government action in the domestic sphere.

103. The Applicants' argument under s. 15(1) of the *Charter* proceeds in the same vein. It is said (in paragraph 159) that since NAFTA tribunals need not be informed by s. 15(1) "Chapter 11 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." Here again, no

attempt is made to demonstrate that NAFTA tribunals have any authority to affect domestic law and practices. The argument depends entirely on the hypothesis that tribunal awards will force Canadian governments to infringe rights, and it ignores the ability of Canadians to vindicate their rights in the domestic courts.

104. The argument under s. 2(*e*) of the *Canadian Bill of Rights* is the same. That provision requires a fair hearing in proceedings where a person's rights and obligations will be determined. While NAFTA tribunals of course make determinations that affect foreign investors, those investors are parties to the proceeding and there is no suggestion that they do not receive a fair hearing. The absence of the Canadian public is irrelevant because none of *their* rights and obligations are being determined, as is apparent from Article 1136: "An award made by a Tribunal shall have no binding effect except between the disputing parties and in respect of the particular case."

105. In all of their submissions under the *Charter* and the *Canadian Bill of Rights*, the Applicants are contradicted by their own experts. As noted previously, both Professors Sornarajah and Clarkson accept that the only enforceable remedies as a result of Chapter 11 arbitrations are those prescribed in Article 1135, and they agree that nothing in NAFTA compels Canadian governments to amend domestic laws and practices. Quite apart from the fact that Chapter 11 tribunals are international bodies to which domestic law does not apply, they are not given the jurisdiction to determine Canadians' rights at domestic law and thus the *Charter* and the *Canadian Bill of Rights* do not apply to them in any event.

Affidavit of M. Sornarajah, **Application Record of the Applicants**, vol. 1, p. 37, para. 66; Affidavit of Stephen Clarkson, **Application Record of the Applicants**, vol. 2, p. 286, para. 32.

## V. In any event, no infringement of the *Charter of Rights and Freedoms*

### Section 7

106. The creation of investor-state arbitration panels under Chapter 11 of the NAFTA do not fall within the scope of the protection created by section 7 of the *Charter of Rights and Freedoms*.

107. Section 7 protection is triggered only where an individual can establish that "life, liberty or security of the person" is in imminent risk of infringement, and that the infringement is not taking place in accordance with the principles of fundamental justice. If these core components are not met, the section 7 analysis ends at the threshold.

*Blencoe* v. *B.C. (Human Rights Commission)* [2000] 2 S.C.R. 307 **Respondent's Authorities, Vol. 1, Tab 3.**

108. At a minimum, there must be "state action which directly engages the justice system and its administration". The analysis is focused on the specific circumstances and requires evidentiary basis indicating impending risk.

109. The Applicants' case fails because there is no evidence of deprivation of a protected interest, let alone that the deprivation is not in accordance with the

principles of fundamental justice. The Applicants here make no credible causal link between the existence of Chapter 11 panels and their personal autonomy.

110. While the Applicants hold the view that the NAFTA provides an unjustifiable or disproportionate influence in the ability of foreign investors to influence Canadian public policy, section 7 does not provide a forum in re-dress of that concern. Section 7 does not allow the courts to engage in a free-standing inquiry whether a particular legislative measure "strikes the right balance" between individual and societal interests.

*R.* v. *Malmo-Levine* [2003] 3 S.C.R. 571
**Respondent's Authorities, Vol. 3, Tab 21.**

111. The Applicants' argument avoids having to address the threshold tests inherent in a section 7 analysis. It does so by inviting the court to consider whether the balance of rights is correct, independent of, or divorced from, any identified principle of natural justice.

112. In any event, there is no evidence upon which a section 7 violation could be based. The Applicants seek to attribute government decisions with which they apparently disagree to the so-called "chilling effects" of NAFTA Chapter 11. However, in alleging that certain public policy initiatives were abandoned because of threats of litigation under Chapter 11, the Applicants conveniently ignore relevant jurisprudence from Canada's own Supreme Court (*e.g.* plain packaging for tobacco products). In the case of public automobile insurance in New Brunswick, Professor Schneiderman conspicuously ignores the many of

factors that were considered by the provincial government. In the context of environmental regulation Chapter 11 has not prevented Canada from adopting a broad range of environmental regulations.

Cross-Examination of Prof. Bienefeld, **Respondent's Application Record, Vol. 3,** Q. 191, exhibit 3, tab 4.

Affidavit of David Schneiderman, **Application Record of the Applicants**, pp.4 and 5, para. 11.

113. Moreover, section 7 does not address economic or property rights. The right to "life, liberty and the security of the person" is directed to fundamental life choices, not economic interests. It is incumbent on the Applicants to establish therefore that Chapter 11 of the NAFTA infringes "the matters which can be characterized as fundamentally or inherently personal such that, by their very nature, implicate basic choices going to the core of what it means to enjoy individual dignity and independence".

*Siemens* v. *Manitoba (A.G.)* [2003] 1 S.C.R. 6 **Respondent's Authorities, Vol. 3, Tab 26.**

114. This Court has also rejected the use of section 7 to reshape economic consequences of political or legislative choice. The claim advanced here requires:

> …value-policy judgements which should properly be addressed by legislatures and responsible organs of government, not by courts under the guise of "principles of fundamental justice".

*Clark* v. *Peterborough Utilities Commission* (1995) 24 O.R. (3rd) 7 (Gen.Div.) **Respondent's Authorities, Vol. 1, Tab 4.**

115. Even accepting that there is a causal link or nexus between Chapter 11 of the NAFTA and the consequences alleged by the Applicants, the Supreme Court of

Canada has not accepted that section 7 should be interpreted to include the interests advanced by the Applicants, such as rights to social security and environmental health.

*Irwin Toy Ltd.* v. *A.G. (Quebec)* [1989] 1 S.C.R. 927 **Respondent's Authorities, Vol. 1, Tab 8.**

**Section 15**

116. The purpose of section 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotype, or political or social prejudice. It has as its object, the promotion of a society in which all person enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

*Law* v. *Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 **Respondent's Authorities, Vol. 1, Tab 10.**

117. The analysis under s. 15(1) proceeds in three stages, each with close regard to context. At the first stage the claimant must show that the law, program or activity imposes differential treatment between the claimant and others with whom the claimant may fairly claim equality. The second stage requires the claimant to demonstrate that this differentiation is based on one or more of the enumerated or analogous grounds. The third stage requires the claimant to establish that the differentiation amounts to a form of discrimination that has the effect of demeaning the claimant's human dignity. The "dignity" aspect of the test is

designed to weed out trivial or other complaints that do not engage the purpose of the equality provision.

*Law v. Canada (Minister of Employment and Immigration), supra* para. 115 **Respondent's Authorities, Vol. 1, Tab 10.**

*Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37 **Respondent's Authorities, Vol. 2, Tab 12.**

118. The analysis under s. 15 is contextual, and requires first a clear or distinct group within Canadian society who is somehow disadvantaged, or treated unequally. The Applicants' s. 15 allegation fails to establish a disadvantaged group or segment. Indeed, the proper comparator group for the purpose of the s. 15 analysis are Canadian investors with assets in the United States or Mexico. These Canadians receive, of course, the same opportunities as U.S. or Mexican investors with investments in Canada.

119. Viewed in this light, the Applicants' s. 15 claim fails. First, the NAFTA does not draw a formal distinction between the claimant and others on the basis of one or more personal characteristics. All Canadians are treated alike, and Canadian investors abroad are accorded the same rights as U.S. or Mexican investors in Canada.

120. Secondly, the Applicants do not stand in a disadvantaged position within Canadian society, such that the NAFTA results in substantively different treatment between them and others.

121. Third, even if it were a valid comparator the differential treatment (namely Canadian investors in Canada do not have the same rights against the Canadian government as do U.S. investors) is not discriminatory within the meaning of s. 15. Not all legislated distinctions are discriminatory. In order for a legislated distinction to be discriminatory, it must impose a burden or withhold a benefit in a manner which reflects the stereotypical application of presumed group or personal characteristics, and which has the effect of demeaning the claimants' human dignity.

*Law*, *supra* para. 115 **Respondent's Authorities, Vol. 1, Tab 10.**

*Bear* v. *Canada (A.G.)* [2002] 2 F.C. 356 **Respondent's Authorities, Vol. 1, Tab 2.**

122. The contextual analysis of a legislative scheme includes its purpose. The Court, as part of the s. 15 analysis, must look to the purpose of the distinction and assess the distinction in light of values that underlie s. 15. Perfect correspondence or symmetry of treatment is not mandated by s. 15, indeed, the courts have recognized that this may in fact lead to inequities.

## VI. Any Infringement is Justifiable Under Section 1 of the *Charter*

123. While the substance of the test under section 1 has essentially remained constant, its application varies with the circumstances. The test is flexible, and must be applied with sensitivity to the particular factual economic, social and political context.

*Dunmore v. Ontario (A.G.)* [2001] 3 S.C.R. 1016
**Respondent's Authorities, Vol. 1, Tab 6.**

124. The evidence before this Court is uncontroverted as to the value to Canada of foreign direct investment and a rules-based system for resolving trade-disputes. The inquiry thus shifts to the proportionality test – whether the benefits which accrue from the limitation are proportionate to its deleterious effects.

125. Again, the evidence as to proliferation of trade agreements with similar provisions between Canada and non-NAFTA nations, and between other nations inter-se , is conclusive of the linkage between the objective and the requirement of access to the rules-based system for investors.

126. Moreover, in conducting the proportionality test, the court cannot look at Chapter 11, divorced and separated from the NAFTA as a whole. The NAFTA was negotiated as a single undertaking with two other nations, the United States and Mexico. The court cannot proceed on the assumption that, if driven back to the negotiating table with those countries, Canada will be able to maintain provisions of the NAFTA which work solely in its interest. Unlike the legislative process, where Parliament is master of its own process, treaty negotiation involves bargaining and trade-offs on specific matters and issues which may not be in Canada's best interests. Hence, the proportionality of Chapter 11, in this context, is not to be assessed on the assumption that it can neatly and surgically be severed from the NAFTA without broader implications and/or costs to Canada.

127. Parliament is not required to search out and adopt the absolutely least intrusive

means of attaining its objective of enhancing Canada's international trade opportunities. Even if a different vehicle for regulating trade-disputes could be identified, a court must consider whether a less intrusive means would achieve the same result, or would achieve the same result as effectively. A failure to satisfy the minimal impairment will only be found if there are alternative measures "clearly superior to the measures currently in use."

*Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569 **Respondent's Authorities, Vol. 2, Tab 11.**

*Harvey v. New Brunswick (A.G.)* [1996] 2 S.C.R. 876 **Respondent's Authorities, Vol. 1, Tab 7.**

## PART IV – ORDER SOUGHT

128. The respondent requests that this application be dismissed with costs.

129. In the alternative, should this Honourable Court find that the *NAFTA Implementation Act* is unconstitutional, the Attorney General requests that any declaration of invalidity be suspended for a period of 24 months.

130. It is inappropriate to strike down legislation of this nature, since it would create a lacunae in what is a complex and inter-related set of trade rules. Suspension of a declaration of invalidity would allow Canada to undertake the consideration of options in a comprehensive and thorough manner and to explore the receptivity of any identified options with its NAFTA partners. Moreover, as the corrective measures required is contingent on the legal basis which underlies the grant of a declaration, productive and responsive proposals cannot be tabled until the judgment has been issued.

*M v. H* [1999] 2 S.C.R. 3 **Respondent's Authorities, Vol. 2, Tab 14.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Ottawa this 20th day of January, 2005.

*"Donald J. Rennie"*

**Graham Garton**
**Donald J. Rennie**
Counsel for the Respondent

## PART V – LIST OF AUTHORITIES

**CASES**

*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326

*Attorney General of Canada v. S.D. Myers*, Reasons for Order, FCC, 11 April 2001, Rouleau, J,, appeal to the Federal Court of Appeal dismissed, leave to appeal to the Supreme Court of Canada denied

*Babcock v. Canada (Attorney General)* [2002] 3 S.C.R. 3

*Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 819

*Bear* v. *Canada (A.G.)* [2002] 2 F.C. 356

*Blencoe* v. *B.C. (Human Rights Commission)* [2000] 2 S.C.R. 307

*Canada (Attorney General) v. S.D. Myers*, [2004] FC 38

*Clark* v. *Peterborough Utilities Commission* (1995) 24 O.R. (3rd) 7 (Gen.Div.)

*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086

*Dunmore v. Ontario* (A.G.) [2001] 3 S.C.R. 1016

*Harvey v. New Brunswick (A.G.)* [1996] 2 S.C. R. 876

*Irwin Toy Ltd.* v. *A.G. (Quebec)* [1989] 1 S.C.R. 927

*Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R.(3d) 505

*Law* v. *Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497

*Libman v. Quebec (Attorney General)* [1997] 3 S.C.R. 569

*Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC

*(The) Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, case No. ARB (AF)/98/3, Award, June 26, 2003

*M v. H* [1999] 2 S.C.R. 3

*MacKay v. Manitoba*, [1989] 2 S.C.R. 357

*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725

*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66

*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441

*Pfizer Inc. v. Canada*, [1999] 4 F.C. 441 (T.D.)

*Phillips v. Nova Scotia (Westray Mine Inquiry)*, [1995] 2 S.C.R. 97

*Pope & Talbot* v. *Canada*, Award on the Merits of Phase 2, 10 April 2001

*R. v. Jarvis*, [2002] 3 S.C.R. 757

*R.* v. *Malmo-Levine* [2003] 3 S.C.R. 571

*Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714

*Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186

*Reference re Same-sex Marriage*, 2004 SCC 79

*Reference re Secession of Quebec* [1998] 2 S.C.R. 217

*S.D. Myers* v. *Canada*, Partial Award, 13 November 2000

*Siemens* v. *Manitoba (A.G.)* [2003] 1 S.C.R. 6

*Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185

*United States of America v. Kwok*, [2001] 1 S.C.R. 532

*UL Canada Inc. c. Québec (Procureur Général)*, [1999] J.Q. No. 1540 (QL)

*United States of Mexico v. Metalclad* [2001] B.C.J. No. 950, 2001 BCSC 664 (B.C.S.C.)

*United Mexican States v. Feldman Karpa*, 2003 CanLII 34011 (ON S.C.), appeal to Ontario C.A. dismissed

*UPS* v. *Canada,* Decision of the Tribunal on Petitions and for Intervention and Participation as Amicus Curiae, 17 October 2001

**TEXTS/REFERENCES**

Ian Brownlie, *Principles of Public International Law*, 5th ed., 1998

Convention between His Majesty and the President of the United Mexican States for the settlement of British Pecuniary Claims in Mexico, arising from loss or damage from revolutionary acts between November 20, 1910, and May 31, 1920, CTS 1928/1

Exchange of Notes Constituting a Foreign Investment Insurance Agreement (Morocco), CTS 1974/28

Exchange of Notes Constituting a Foreign Investment Insurance Agreement (People's Republic of China), CTS 1984/9

Patrick G. Foy, "Effectiveness of NAFTA's Chapter 11 Investor-State Arbitration Procedures", in *Proceedings of the 31st Annual Conference of the Canadian Council on International Law*, October 2002

Hogg, *Constitutional Law of* Canada, Looseleaf edition

North American Free Trade Agreement (NAFTA), Parliamentary Committee Working Version, (Minister of Supply and Services Canada, 1993), CTS1994/2

Report of the Article 1704 Panel concerning a dispute between Alberta and Canada regarding the Manganese-based Fuel Additives Act, File No. 97/98 – 15 – MMT – P058

Report of the Article 1704 Panel concerning a dispute between Alberta and Canada regarding the *Manganese-based Fuel Additives Act*, File No. 97/98 – 15 – MMT – P058

Treaty of Amity Commerce and Navigation between the United Kingdom and the United States of America (Signed Nov. 19, 1794 and In Force Oct. 28, 1795). British and Foreign State Papers, BSP 1/784.

*Vienna Convention on the Law of Treaties*, 8 ILM (1969), Articles 31 and 32