Council of Canadians and ors v R., First instance application for constitutional challenge, Court No 01-CV-208141, 2005 CanLII 28426, ILDC 751 (CA 2005), 8th July 2005, Superior Court of Justice [ONSC]

Date: 08 July 2005
Content type: Domestic court decisions
Jurisdiction: Superior Court of Justice [ONSC]

Citation(s): Court No 01-CV-208141 (Official Case No)
2005 CanLII 28426 (Neutral Citation)
ILDC 751 (CA 2005) (OUP reference)
Product: Oxford Reports on International Law [ORIL]
Module: International Law in Domestic Courts [ILDC]

Parties: Council of Canadians (Canada [ca]), Dale Clark, Deborah Bourque, George Kuehnbahm, Members of the Canadian Union of Postal Workers, Bruce Porter, Sarah Sharpe, Members of the Charter Committee on Poverty Issues
R (Canada [ca])

Judges/Arbitrators: Pepall

Procedural Stage: First instance application for constitutional challenge

Subsequent Development(s):
Appeal to Ontario Court of Appeal; *R v Council of Canadians*, 2006 CanLII 400222; 217 OAC 316

Subject(s):

International courts and tribunals — NAFTA (North American Free Trade Agreement) — International customs law — Most-favoured-nation treatment (MFN) — Public procurement — Rules of origin — Subsidies — Technical barriers to trade — Sovereignty — Treaties, application — Treaties, binding force — Dualism — Incorporation — Judicial review — Transformation

Core Issue(s):

Whether Canada's obligations under Chapter 11 of the North American Free Trade Agreement violated the Constitution.

Facts

F1 The applicants brought an application challenging the investor-state provisions in Chapter 11 of North American Free Trade Agreement (12 December 1992) US Gov't Printing Office (1992), entered into force 1 January 1994 ('NAFTA')—a free trade agreement between Canada, the United States, and Mexico.

F2 In Canada, the North American Free Trade Implementation Act, SC 1993, c 44 ('the NAFTA Act') came into force in January 1994. Section 4 provided that the purpose of the NAFTA Act was to implement NAFTA. Section 10 stated that NAFTA 'is hereby approved'. Part II of the NAFTA Act contained modifications to existing statutes to ensure compliance with NAFTA treaty obligations.

F3 Pursuant to Section B of Chapter 11 of NAFTA, investors (persons, corporations) of a NAFTA party may initiate a claim to determine through international arbitration whether another party has violated treaty obligations. The arbitration tribunal shall decide the issues in dispute in accordance with NAFTA and applicable rules of international law.

F4 The arbitration rules applicable to investor-state disputes under Chapter 11 were those found in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966 ('ICSID Convention'); the Additional Facility Rules, Doc ICSID/11/Rev.1, International Centre for Settlement of Investment Disputes, 1 January 2003; and the UNCITRAL Arbitration Rules, UN Doc A/31/98; 31st Session Supp No 17, UN General Assembly, 1976.

F5 Awards made by an arbitration tribunal under NAFTA are reviewable by the domestic courts of the place of arbitration. In Canada, a party may apply to a court to set aside or refuse to recognize or enforce a Chapter 11 award. A high degree of judicial deference is given to NAFTA tribunal decisions.

F6 The applicants in the present case contend that the international procedure vested authority in arbitrators to adjudicate and determine claims involving Canadian domestic laws, thus violating the Constitution, (Canada). Specifically, they argued that Chapter 11 of NAFTA deprived the superior courts of Canada of their authority to adjudicate upon matters reserved to them by Section 96 of the Constitution Act, 1867.

F7 The Attorney-General's position was that Section 96 did not apply to international treaties like NAFTA and, accordingly, the investor-state procedure under Chapter 11 did not concern the Constitution.

F8 The applicants sought a declaratory judgment, holding that Chapter 11 of NAFTA was inapplicable because it was unconstitutional.

Held

H1 The application was dismissed on all grounds (paragraph 69), including on the basis of constitutional infringement. (paragraph 44)

H2 A treaty like NAFTA was an agreement binding in international law that entailed restrictions on sovereignty. (paragraph 33)

H3 In Canada, the conclusion of treaties and the implementation of treaties are separate and distinct. The executive branch of Government concludes treaties, while the legislative branch (Parliament) incorporates treaty obligations within Canada's legal system through implementing legislation. (paragraphs 33–4)

H4 Parliament may give its approval to Canada's important treaties. Such an 'approval' concerns the conclusion of treaties, not the incorporation of treaties. The Canadian Parliament gave its

approval to the conclusion of NAFTA. Section 10 of the NAFTA Act explicitly says that the treaty 'is hereby approved'. (paragraph 35)

H5 However, such an approval did not have any effect on the incorporation of NAFTA obligations within Canada's legal system. With no explicit legislative implementation, NAFTA was not part of the law of Canada and could not enter into conflict with Section 96 of the Constitution. (paragraph 37)

Date of Report: 20 September 2007

Reporter(s): Dr Stéphane Beaulac

Analysis

A1 This judgment decided against the incorporation of NAFTA within Canada's legal system, drawing a sharp distinction between parliamentary 'approval' at the conclusion stage and parliamentary 'implementation' at the incorporation stage. The Federal Court of Canada held similarly in *Pfizer Inc v Canada*, (1999) 4 CF 441 (referred to by the Ontario Superior Court (paragraph 35)), concluding that the Agreement Establishing the World Trade Organization, 1994 ('WTO Agreement') was not part of the laws of Canada either, even though the World Trade Organization Agreement Implementation Act, SC 1994, c 47, a federal statute, states (like the NAFTA Act) that its purpose was to implement the treaty and, also, explicitly approved the WTO Agreement.

A2 In order to address the conceptual framework of NAFTA and the appropriate characterization of the investor-state provisions in its Chapter 11, the court insisted on the fact that the international legal plane is separate and distinct from domestic legal spheres. 'International law and domestic law are distinct legal systems that operate in different spheres'. (paragraph 41) Particularly in the context of NAFTA, the court added: 'This issue of the distinction between the two arenas was addressed in *The Loewen Group, Inc and Raymond L. Loewen v United States*,' ICSID Case No ARB(AF)98/3 (41)), a NAFTA arbitration tribunal case. Clearly, the dualist logic still applies with full force in Canada.

A3 It is noteworthy that the court considered that the obligations protected through the Chapter 11 of NAFTA procedure were still essentially international in nature, albeit open to non-state actors. In other words, such NAFTA cases remain founded on international obligations, to be adjudicated by international courts. On the other hand, as the court pointed out: 'Our courts [in Canada] do not adjudicate on treaty rights and attendant obligations of nations'. (paragraph 43) International courts and tribunals were competent over international law, obligations, and duties, while domestic courts and tribunals were competent over domestic law, obligations, and duties. There is no role for domestic courts as regards treaty obligation unless incorporated by means of implementing legislation (which was not the situation here).

Date of Analysis: 20 September 2007
Analysis by: Dr Stéphane Beaulac

Instruments cited in the full text of this decision:

International

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966

UNCITRAL Arbitration Rules, UN Doc A/31/98; 31st Session Supp No 17, UN General Assembly, 1976

Agreement Establishing the World Trade Organization 1994

North American Free Trade Agreement (12 December 1992) US Gov't Printing Office (1992), entered into force 1 January 1994

Additional Facility Rules, Doc ICSID/11/Rev 1, International Centre for Settlement of Investment Disputes, 1 January 2003

Constitution

Constitution, (Canada)

Cases cited in the full text of this decision:

North American Free Trade Agreement Arbitration Tribunal

The Loewen Group, Inc and Raymond L Loewen v United States of America, ICSID Case No ARB (AF)98/3

Mondey International Ltd v United States, ICSID Case No ARB (AF)99/2

SD Myers, Inc v Canada, 12 November 2000

Pope & Talbot, Inc v Canada, 10 April 2001

Canadian domestic courts

Re Arrow River and Tributaries Slide and Boom Co, (1932) SCR 495

Attorney-General for Canada v Attorney-General for Ontario (Labour Conventions Case), (1937) AC 326 (PC)

Bitter v Secretary of State of Canada, (1944) 3 DLR 482 (SCC)

Pfizer Inc v Canada, (1999) 4 CF 441

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Decision - full text

Pepall J.

Pepall J.

Nature of the Application

[1] The Applicants, the Council of Canadians, members of the Canadian Union of Postal Workers, and members of the Charter Committee on Poverty Issues, bring this application challenging the investor state provisions contained in Section B of Chapter 11 of the North American Free Trade Agreement ("NAFTA"). As a result of these provisions, an investor of a NAFTA signatory may initiate a claim to determine through international arbitration whether another signatory state has violated obligations set out in the Agreement. It is the Applicants' position that the provisions and procedures under Section B of Chapter 11 vest authority in arbitrators to adjudicate and determine claims involving laws of governments in Canada and that this violates the Canadian Constitution. The Applicants state that by entering into and implementing Section B of Chapter 11, the Government has deprived Canadian superior courts of their authority to adjudicate upon matters reserved to them by s. 96 of the *Constitution Act, 1867* and in so doing has interfered with and usurped the core and inherent jurisdiction of Canadian superior courts. In addition, the Applicants allege that fundamental constitutional principles, sections 7 and 15 of the *Charter of Rights and Freedoms* and section 2(e) of the *Canadian Bill of Rights* have been infringed. The standing of the Applicants to bring this application is not in issue and no objection was taken to any of the evidence filed.

The NAFTA

(i) Its origins

[2] In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada (the MacDonald Commission) reported on its examination of the long term economic potential, prospects and challenges facing Canada, the national goals for economic development and the institutional and legal arrangements most appropriate for attaining these goals. The Commission recommended that Canada negotiate a free trade agreement with the United States. The Canada-U.S. Free Trade Agreement was signed on January 2, 1988 and came into force on January 1, 1989. Three years later, Canada, the U.S. and Mexico (the "Parties") signed the NAFTA and it came into force on January 1, 1994.

[3] The Applicants state that the NAFTA went well beyond simply changing economic policies, rather, it established new and comprehensive disciplines to which the policies, laws and constitutional norms of its member states now have to conform.[1] In contrast, the Respondent advocates the desirability of the NAFTA and states that a principle 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 negotiation of comprehensive free trade agreements such as the NAFTA and other foreign investment protection agreements ("FIPAs") that Canada has entered into with other countries. The Respondent states that 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 resolution mechanisms. Since the NAFTA, 16 FIPAs have been signed and are in force between Canada and other states.[2]

(ii) Relevant Provisions of the NAFTA

[4] To understand the nature of this application, one must examine the NAFTA in general and Chapter 11 in particular. The "Parties" to the agreement are the Governments of Canada, the

United States and Mexico. The NAFTA investment provisions are set out in Chapter 11 of the treaty. Chapter 11 is divided into three parts, Sections A, B and C. Section A addresses the obligations of the Parties; Section B governs the settlement of disputes between a Party and an investor of another Party; and Section C encompasses definitions. Chapter 11 applies to measures adopted or maintained by a NAFTA Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party;

and

(c) with respect to Articles 1106 (Performance Requirements) and 1114 (Environmental Measures), all investments in the territory of a Party. [3]

Measure is defined as including "any law, regulation, procedure, requirement or practice."[4] "Investment" is defined in Article 1139 and includes an enterprise, equity securities, debt securities, and loans to an enterprise.

[5] The obligations of a NAFTA Party to investors and investments of investors of the other Parties include:

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

(ii) Article 1103 — Most Favoured Nation Treatment: Parties must accord to investors of another 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 Party must accord to investors of another Party and their investments the better of National Treatment or Most Favoured Nation Treatment.

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

(v) Article 1106 — Performance Requirements: No Party shall impose or enforce certain requirements such as obligations to source goods and services locally in relation to an investment of another Party.

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

(vii) Article 1110 — Expropriation and Compensation: A Party is prohibited from taking any action which directly or indirectly expropriates an investment of another Party's investor or takes a measure tantamount to expropriation of such an investment except for a public purpose, on a nondiscriminatory basis, in accordance with due process of law and on payment of compensation.

[6] Section B of Chapter 11 allows an investor of a NAFTA Party to initiate proceedings against another NAFTA Party on the grounds that it has breached a Section A obligation (or Articles 1503(2) or 1502(3)(a)) and the investor has incurred loss or damage by reason of, or arising out of, that breach.[5] There is a similar provision permitting an investor to bring a claim on behalf of an enterprise that the investor owns or controls. [6]

[7] Before an investor initiates a claim under Section B of Chapter 11, the investor must consent to

the arbitration in accordance with the procedures set out in the NAFTA and must waive its right to initiate or continue proceedings before any administrative tribunal or court of any NAFTA Party with respect to the measure that is alleged to be the source of the breach of Section A obligations.[7] This waiver prevents an investor from pursuing Chapter 11 damages in addition to domestic proceedings in respect of the same measure that is alleged to be a breach of the NAFTA. This waiver does not apply to proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages.[8] The investor is not obliged to rely on Section B; if it so chooses, it may pursue local remedies in a domestic court or before a tribunal. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of a loss or damage.

[8] Generally speaking, a tribunal established under Chapter 11 is composed of three arbitrators.[9] Each party to the dispute appoints one arbitrator and endeavours to agree on the appointment of the third who will be the presiding arbitrator. If the parties cannot agree, the Secretary General of the International Centre for Settlement of Investment Disputes ("ICSID") appoints the presiding arbitrator.[10] Thus, no one party can determine the membership of the tribunal. Chapter 11 also provides for a choice of applicable arbitration rules for use in the investor-state dispute: (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.[11] As Canada is not a party to the ICSID Convention, claims against Canada may only be governed by the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. A tribunal cannot invalidate the impugned government measure found to have breached a Section A obligation. It may only award damages and interest, and order the restitution of property.[12] If restitution is ordered, the award must provide that the Party may pay damages and interest in lieu of restitution. [13] Costs may also be awarded.[14] An arbitral tribunal may not order a Party to pay punitive damages.[15] Being a Party to the Agreement, it is the federal government of the host Party that is responsible for the award.

[9] Article 1131 provides that a tribunal shall decide the issues in dispute in accordance with NAFTA and applicable rules of international law. Article 1108 includes a list of reservations and exceptions to which certain Section A obligations do not apply. For example, subsidies are not subject to the national treatment obligation. There are also whole sectors to which certain Section A obligations do not apply. These include aboriginal affairs, telecommunication laws, social services and health. Pursuant to Article 2001 of Chapter 20, the NAFTA Parties established a Free Trade Commission comprising cabinet level representatives of the NAFTA Parties or their designees. Amongst other things, the Commission resolves disputes that may arise regarding the interpretation of the NAFTA. An interpretation by the Free Trade Commission of a provision under the NAFTA is binding on the arbitral tribunal.[16] As an example, in July, 2001, the Commission adopted an interpretation on access to documents. In October, 2003, the Commission provided a statement on the filing of written submissions by a non-disputing party in a Chapter 11 arbitration.

[10] The place of arbitration is determined by agreement of the parties to the dispute, or failing agreement, by the arbitral tribunal seized of the matter in accordance with the applicable arbitral rules. The arbitral tribunal must hold the arbitration in the territory of one of the NAFTA Parties unless the parties to the dispute agree otherwise.[17] Based on the materials before me, as of the beginning of 2003, Canada or the U.S had been the place of all Chapter 11 arbitrations.

An award made by a tribunal shall have no binding force except between the parties to the dispute and in respect of the particular case.[18] A non-disputing Party may present submissions on the interpretation of the NAFTA in proceedings against any other Party.[19]

[11] Each Party is to provide for the enforcement of an award in its territory.[20] Final awards

made under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules are reviewable by the domestic courts of the place of arbitration.[21] If the place of arbitration is in Canada, either disputing party may apply to any superior, county or district court to set aside or refuse to recognize or enforce an award of a Chapter 11 tribunal pursuant to the *Commercial Arbitration Act*[22] or comparable provincial legislation. The *Commercial Arbitration Act* contains as a schedule the *Commercial Arbitration Code*. The *Code* is based on the Model Law on International Commercial Arbitration adopted by UNCITRAL and governs commercial arbitration including judicial review and enforcement of an arbitration decision. Section 50 of the *NAFTA Implementation Act* amends section 5 of the *Commercial Arbitration Act* to ensure that the *Code* will apply to NAFTA arbitrations conducted in Canada.

[12] Articles 34, 35 and 36 of the *Code* specifically address the setting aside, recognition, and enforcement of an arbitral award. The award may be set aside on the grounds of, *inter alia*, incapacity, failure to receive notice of the proceedings, the decision is beyond the scope of the submission to arbitration, or the award is in conflict with the public policy of Canada.[23] Although Canada has in the past taken the position that a less deferential standard of review should be applied, courts in Canada have given a high degree of judicial deference to NAFTA tribunal decisions. See for example *Canada (Attorney General) v. S.D. Myers*[24], *United Mexican States v. Metalclad Corp.*[25] and *United Mexican States v. Karpa*.[26]

[13] Hearings conducted pursuant to the UNCITRAL Arbitration Rules and the ICSID Additional Facility Rules are conducted in camera unless both parties agree otherwise. Disputing investors and representatives of the NAFTA Parties are entitled to attend. Pursuant to the provisions of the NAFTA, Canada or a disputing investor may make the award public. To date, Canada has consistently made every final award issued by a Chapter 11 tribunal available to the public. In addition, on July 31, 2001, the Free Trade Commission issued notes of interpretation on the absence of a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration and on public access to documents. In the notes, amongst other things, the Parties agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter 11 tribunal, subject to redaction of specific categories of information.

[14] The *North American Free Trade Implementation Act*,[27] was given Royal Assent on June 23, 1993 and came into force on January 1, 1994. The Respondent's objectives in implementing the NAFTA were set out in its Statement on Implementation.[28] Three overriding considerations were noted:

(a) the importance of global trade and investment to the well-being of all Canadians;

(b) the long-standing commitment of Canada to a fair and open international trade and investment regime; and

(c) the critical role played by agreed rules and procedures in securing equal opportunities for Canadians in a world of much larger and more powerful trading entities.

[15] Using somewhat different language, the preamble to the *NAFTA Implementation Act* captures the substance of these objectives. Section 4 of the *Act* states that its purpose is to implement the NAFTA. Section 10 of the *Act* states that the NAFTA is approved. So as to ensure compliance with the obligations Canada agreed to, Part II of the *Act* contains amendments to certain legislation.

(iii) Experience with Chapter 11 Investor State Claims

[16] The evidence on the numbers of claims brought against Canada differs, the Applicants and the Respondent stating that there have been eight[29] and four[30] respectively. This difference may be attributable to the fact that certain cases settled or did not proceed or to the timing of the evidence filed. Based on the cases referred to in the materials, the higher estimate appears to be

more accurate.[31] The Respondent states that three arbitrations have been concluded and resulted in total damage awards of approximately $27,800,000. No proceeding against Canada that alleged expropriation has been successful. All of the cases against Canada involved claims brought by American investors. According to the Applicants, claims initiated by Canadian investors against the U.S. have all been unsuccessful.

a) Claims against Canada

[17] Canada's experience with Chapter 11 investor state claims provides examples of the application of the Section B provisions. It may be seen from a review of some cases that the Party measures that are being assailed in the Chapter 11 investor state proceedings span a broad spectrum of actions which is in keeping with the broad definition given in the NAFTA to "measure".

Ethyl Corporation v. Government of Canada

[18] In April, 1997, Ethyl Corporation, a manufacturer of fuel additives, brought the first Chapter 11 proceeding against Canada. It claimed that the *Manganese-Based Fuel Additives Act,*[32] federal legislation that restricted the distribution of certain fuel additives, breached Articles 1102 (National Treatment), 1106 (Performance Requirements), and 1110 (Expropriation and Compensation) and that as a result, it suffered damages of U.S. $251,000,000. The claimant was the sole shareholder of Ethyl Canada Inc., an Ontario company with facilities in that province. This company constituted the claimant's "investment". Toronto was designated as the place of arbitration.

[19] In separate proceedings, four provinces had also challenged the same legislation under the *Agreement on Internal Trade*, an agreement between the federal and provincial governments on trade liberalization in Canada. A dispute settlement panel established pursuant to that *Agreement* had concluded on June 12, 1998 that the *Manganese-Based Fuel Additives Act* was inconsistent with obligations under the *Agreement on Internal Trade* and recommended the removal of the inconsistency. The statute was amended on July 20, 1998 to delete the subject fuel additive from the list of controlled substances. Canada settled Ethyl Corporation's claim with a payment of approximately $20 million.

S.D. Myers Inc. v. Government of Canada

[20] In October, 1998, S.D. Myers, Inc., an American hazardous waste company, challenged a Canadian ban made pursuant to the *PCB Waste Export Regulations*. These regulations banned the export of hazardous wastes containing PCBs from Canada. The claimant's shareholders had incorporated a Canadian company. The Canadian company was not owned by the claimant but by its shareholders. The tribunal determined that this company was an investment of the claimant within the meaning of Chapter 11. Arrangements had been made for the transportation and disposal of Canadian-generated PCBs to the claimant's Ohio-based treatment facility when the Canadian ban effectively prohibited such activities. The importation of PCB wastes to the U.S. was prohibited under U.S. law, however, the U.S. Environmental Protection Agency had issued an enforcement discretion to S.D. Myers, Inc. to permit the import of PCBs from Canada to the U.S. for disposal. The claimant asserted that it was being treated less favourably than its Canadian counterparts. The tribunal found that there was no legitimate environmental reason for introducing the ban and that the ban was largely motivated by a desire to promote the economic interests of Canadian competitors of S.D. Myers, Inc.[33] The tribunal determined that Canada had breached Articles 1102 and 1105 of the NAFTA. The tribunal dismissed the claim that there had been an expropriation contrary to Article 1110. The tribunal awarded damages of $6,050,000 and costs of $850,000 to S.D. Myers, Inc.

[21] The Government of Canada sought judicial review and asked the Federal Court of Canada to set aside the tribunal's decision. The Council of Canadians, the Sierra Club of Canada and Greenpeace moved before the Federal Court for leave to intervene but were unsuccessful in that

Rouleau J. was not satisfied that they would bring to the court a point of view that was different from that of the parties to the dispute. Canada's application for judicial review was subsequently dismissed. In making its determination the Court observed 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.”[34]

Pope & Talbot Inc. v. Government of Canada

[22] The complainant, Pope & Talbot, Inc., is a U.S. based company that maintained an investment in British Columbia. On March 5, 1999, the claimant challenged federal regulations under the *Export and Import Permits Act*[35] that implemented the *Softwood Lumber Agreement* (“SLA”) between Canada and the United States. The arbitration was held in Montreal. The tribunal held that there was no breach of Article 1102 of the NAFTA in that the softwood lumber quota allocation system used to implement Canada's obligations under the *SLA* did not discriminate.

[23] The claimant also asserted that there had been a denial of fair treatment and hence a breach of Article 1105 of the NAFTA. Canada had conducted a verification review of the investment to determine whether its quota allocations were correct. In conducting this review, the tribunal noted that the relations between Canada's Softwood Lumber Division, a division of the Export and Import Controls Bureau within Canada's Department of Foreign Affairs and International Trade, and the complainant's investment were more like combat than cooperative regulation and found that the Softwood Lumber Division bore the overwhelming responsibility for this state of affairs.[36] The tribunal determined that in its totality, the Softwood Lumber Division's treatment constituted a denial of the fair treatment required by Article 1105 and Canada was required to pay the complainant US $461,566 in damages and interest and US $120,000 in costs.

UPS v. Government of Canada

[24] On April 19, 2000, United Parcel Service of America, Inc. (“UPS”) commenced arbitral proceedings alleging that, amongst other things, Canada had breached Article 1102 of the NAFTA by failing to provide UPS's Ontario based operation with access to Canada Post's postal distribution system for courier products. UPS also claimed that Canada had breached Article 1105 by failing to properly investigate and resolve allegations of anti-competitive behaviour by Canada Post and by failing to make Canada Post's accounting records available for review. Washington D.C. was chosen as the place of arbitration. The Canadian Union of Postal Workers applied to be added as parties or as intervenors on the basis that the decision would affect the public interest and the direct interests of Canada Post employees. The request to be added as a party was rejected on the basis that the tribunal had no authority to make such an order, a position Canada agreed with. The tribunal determined that it did have authority to grant amicus curiae intervenor status. That issue was deferred to the merits stage of the hearing. The hearings have been and will continue to be open to the public.

b) Claims by Canadian Investors

[25] As mentioned, based on the materials filed before me, the few claims brought by Canadian investors have been unsuccessful.

The Loewen Group v. United States of America

[26] The *Loewen Group v. United States of America*[37] is an example of a Canadian investor suing the American Government. Washington, D.C. was the place of arbitration. In its reasons, the tribunal outlined the background of the dispute. There had been litigation that involved a contractual dispute in Mississippi between the Loewen Group of Companies (“Loewen”) and Jeremiah O'Keefe and his related companies. The three contracts in issue were said by O'Keefe to have a value of $980,000 and involved the exchange of two O'Keefe funeral homes worth $2.5 million for a Loewen insurance company worth $4 million approximately. The trial proceeded in the

Mississippi State Court and the jury awarded O'Keefe $500 million in damages including $75 million for emotional distress and $400 million as punitive damages. The verdict was the outcome of a seven week trial in which, according to Loewen, the trial judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references: 1) to the claimant's foreign nationality (which was contrasted to O'Keefe's Mississippi roots); 2) race-based distinctions between O'Keefe and Loewen; and 3) class-based distinctions between Loewen (who was portrayed as a group of large wealthy corporations) and O'Keefe (who was portrayed as running family owned businesses). Further, according to Loewen, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial, and class-based discrimination was impermissible. Loewen sought to appeal the judgment but Mississippi law required the posting of an appeal bond valued at 125% of the judgment. Loewen sought relief from this requirement in the Mississippi courts, but both the trial and Mississippi Supreme Courts refused to reduce the quantum of the bond. Accordingly, Loewen began to prepare an application for a stay of execution before the Circuit Justice for the Fifth Circuit but ultimately settled the action by agreeing to pay $175 million to O'Keefe.

[27] Before the tribunal, Loewen sought damages arising as a result of violations of Chapter 11. Loewen alleged that by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, the Mississippi trial court violated Article 1102 of the NAFTA which bars discrimination against foreign investors and their investments. Loewen further asserted that the Mississippi courts' arbitrary application of the bonding requirement violated Article 1105 and the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of the NAFTA, the expropriation provision.

[28] The American Government objected to the jurisdiction of the tribunal on a number of grounds, one of which was that the claim was not arbitrable because the judgments of domestic courts in purely private disputes were not "measures adopted or maintained by a party" within the scope of Chapter 11. The tribunal determined that the term "measure" was broadly defined and included judicial action. The term "law" which is included in the definition of "measure" was held to include judge-made as well as statute based rules. The tribunal noted that by any standard of measurement, the trial was a disgrace and found that the Mississippi State Court's punitive damages order was "clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[38] That said, the tribunal dismissed the claim on a number of grounds one of which was that the decision had not been challenged through to appeal and the investor had failed to pursue its domestic remedies. The tribunal indicated that it could not under the guise of the NAFTA claim entertain what was in substance an appeal from a domestic judgment.

> "We find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands."[39]

Mondev International Ltd. v. U.S.A.

[29] *Mondev International Ltd. v. U.S.A.*[40] is another example of a Canadian investor suing the U.S. Government. The place of arbitration was Washington, D.C. Mondev was involved in litigation against the Boston Redevelopment Authority with respect to a commercial real estate development

project. It was ultimately unsuccessful with that litigation and then commenced arbitration proceedings claiming a breach of certain Section A obligations. Amongst other things, the tribunal considered whether the decisions of the U.S. courts constituted a breach of Article 1105(1) which provides that each Party shall accord treatment in accordance with international law including fair and equitable treatment and full protection and security to investments of investors of another Party. The tribunal reiterated the principle that it is not the function of NAFTA tribunals to act as appellate courts. The question to be addressed it said was whether at an international level a tribunal can conclude that the impugned decision was clearly improper and discreditable with the result that the investment has been subjected to unfair and inequitable treatment.[41] Responding in the negative, the tribunal dismissed the claim.

Issues

[30] In their factum, the Applicants identified four issues raised by this application. The issues to be addressed are whether the investor state procedure contained in Chapter 11 of the NAFTA:

1. is contrary to the requirements of s. 96 of the *Constitution Act, 1867* in that it transfers the work of the superior courts or improperly derogates from the superior court's core powers,

2. violates the principle of constitutionalism and the rule of law;

3. violates sections 7 and 15 of the *Charter of Rights and Freedoms*; and

4. violates section 2(e) of the *Canadian Bill of Rights*.

[31] I wish to emphasize that the focus of this application should not and does not constitute a re-examination of the merits or lack thereof of Canada's entry into the NAFTA.[42] There are persuasive arguments that can be mounted on both sides of that equation. Furthermore, arguably there are deficiencies in Chapter 11. Although improvements have been made, the procedure lacks total transparency. The principle of stare decisis is inapplicable and decisions lack predictability. There is no consistent mechanism for review of the decisions of the tribunals. Very broad definitions have been given in some cases to key terms such as “measure”, “investment” and “a measure tantamount to expropriation”. There is no necessary privity between an investor and a respondent and the only meaningful restraint on an investor is the cost of the arbitration. That said, while certain shortcomings may be identified in Section B of Chapter 11, one must recognize that a treaty is a bargain that has been negotiated among the parties and which may contain provisions with varying degrees of popularity amongst the signatories to the treaty. My role is not to remedy unpopular provisions. I must ascertain whether the NAFTA's investor state provisions are in violation of Canada's constitution.

Discussion

1. Section 96

Positions of the Parties

[32] In brief, it is the position of the Applicants that the NAFTA investor state procedure is contrary to the requirements of s. 96 of the *Constitution Act*, *1867* because it transfers the work of the superior courts to tribunals and removes or derogates core powers from the superior courts. The Respondent states that s. 96 does not apply to international treaties like the NAFTA. 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*.

Treaty Making Power and Performance

[33] A treaty is an agreement entered into between or among states that is binding in international law.[43] International coordination, cooperation and standard setting in areas as diverse as human rights, the environment, criminal law, and investment protection is undertaken through international commitments undertaken by states.[44] Most, if not all, international commitments entail some compromise of sovereignty.

> "Treaties are a restriction on sovereignty. All treaties, all international agreements, are a compromise of sovereignty. They are first an exercise of sovereignty. But they represent agreements by the state parties to do or not to do certain things. A promise not to conduct oneself in a particular way is a restriction on one's future action. So to that extent, NAFTA and every other international agreement does represent a restriction on the exercise of sovereignty."[45]

In Canada, the power to negotiate and conclude a treaty is an executive act, a principle that is reflected in Lord Atkin's commentary in the *Labour Conventions* case.

> "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 law, requires legislative action."[46]

Professor Peter Hogg also addresses this concept in his book, *Constitutional Law of Canada* :

> "The Canadian Parliament plays no necessary role in the making of treaties. The negotiation and conclusion of a treaty is part and parcel of the conduct of international relations, and the conduct of international relations has always been one of the prerogatives of the Crown; in other words, the executive branch of government has the power to make treaties without the necessity of Parliamentary authority. There is no legal requirement that the Parliament give its approval to either the signing or the ratification of a treaty."[47]

[34] Once a treaty is made, the parties are obliged in international law to implement the treaty.[48] The executive, by agreeing to the terms of a treaty, may not alter the domestic law of Canada: *Bitter v. Secretary of State of Canada*[49]; and *Re Arrow River and Tributories Slide and Boom Co.*[50] If alteration of the domestic law of Canada is required, legislation effecting such alterations must be enacted: *AG for Canada v. AG for Ontario (Labour Conventions)*.[51] As noted by Professor Hogg, many treaties do not require a change in internal law. He cites as examples treaties between Canada and other states relating to defence, foreign aid, the high seas, the air, research and diplomatic relations.[52]

[35] Canadian governments have obtained parliamentary approval of many important treaties, the NAFTA being no exception. The *NAFTA Implementation Act* sets out a preamble and its purpose. Section 10 of the Act states that the NAFTA "is hereby approved". There is, however, a distinction between Parliamentary approval of a treaty and incorporation of that treaty into Canadian law. Two cases stand for this proposition: *AG Canada v. AG Ontario (Labour Conventions)*[53] and *Pfizer Inc. v. Canada*.[54] In the former, Lord Atkin stated:

> "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, decides 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. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, 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."[55]

[36] The *Pfizer* case is a more recent decision that addresses this issue. It involved the *World Trade Organization Agreement* ("the *WTO Agreement*"), an international agreement entered into by Canada. Parliament enacted the *World Trade Organization Agreement Implementation Act*, a statute very similar to the *NAFTA Implementation Act*. Like the latter, the purpose of that Act was stated to be implementation of the *WTO Agreement* and it also expressly approved the *WTO Agreement*. The Supreme Court of Canada held that the statement of purpose and approval of the *WTO Agreement* as set out in the *WTO Agreement Implementation Act* did not incorporate the *WTO Agreement* into federal internal law.

> "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."[56]

[37] Similarly, the *NAFTA Implementation Act* did not incorporate the NAFTA into Canada's internal law nor did it have that effect. The NAFTA is therefore not part of Canada's domestic law and does not attract the application of s. 96 jurisprudence by that route.

Characterization of the investor state provisions

[38] Having determined that the NAFTA is not part of Canada's domestic law as a result of the application of the *NAFTA Implementation Act*, one must ascertain whether the s. 96 analysis is otherwise applicable to the investor state procedure in Chapter 11. In this regard, it is helpful to properly characterize the substance of these provisions. What is the nature of the dispute sought to be settled? In the case before me, the Applicants have sought to characterize the grant of jurisdiction as the authority given to NAFTA tribunals to determine whether a state Party acting through its legislative, executive or judicial powers, has interfered with the property or contractual rights of foreign corporations.[57] In contrast, the Respondent characterizes the subject matter of Chapter 11 dispute settlement as the determination of whether a governmental measure is consistent with a Party's obligations set out in Section A of Chapter 11.[58] The Chapter 11 NAFTA tribunals are entrusted with the authority to determine compliance with international obligations and, in appropriate cases, to award damages or order restitution that may be satisfied by a payment of damages.

[39] Under international law, a wronged investor could seek the intervention of its state to protect its interests. The state, if it so desired, could then espouse the investor's claim under the principle of "diplomatic protection". This principle is part of customary international law. When a national is injured by an act contrary to international law, the state itself is injured. As stated by D.M. Price in *"Private Party v. Government, Investor State Dispute Settlement: Frankenstein or Safety Valve?"* :

> "The concepts underlying an investment agreement stem from rather classical categories of public international law. They are informed by state responsibility for injury to aliens, or injury to the property of aliens. They come out of the world of diplomatic espousal, or diplomatic protection, the concept being that an investor, or the investment, carries with it a little piece of the Crown, a little piece of the sovereign. So that injury to an alien or its property, if unremedied, is an injury to the state of that investor, or the sending state of the investment, so to speak."[59]

[40] Traditionally, investment rules or agreements amongst states were enforced through diplomacy and the state would pursue the causes and cases of its nationals. Convenience and deficiencies in diplomatic procedures resulted in the evolution of commissions allowing for direct

investor participation and the system of investment arbitration is now widespread.[60] That said, while standing is provided to a state's investors, the obligations enforced continue to be those of the Parties to the international agreements entered into. In Article 1122, the Parties to the NAFTA expressly consent to the submission of claims to arbitration in accordance with the procedures set out in the NAFTA.

[41] Patrick G. Foy in his article entitled "Effectiveness of NAFTA's Chapter 11 Investor State Arbitration Procedures" [61] directly addresses the conceptual framework and appropriate characterization of the investor state provisions contained in the NAFTA:

> "Although Chapter 11 allows an investor direct access against a Party for damages 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, the investor 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."

I consider this to be an accurate characterization of the provisions in issue. NAFTA tribunals address treaty obligations and international commitments made by the three Parties to the Agreement. I fail to see how s. 96 which governs the domestic arena is applicable. International law and domestic law are distinct legal systems that operate in different spheres. This issue of the distinction between the two arenas was addressed in *The Loewen Group, Inc. and Raymond L. Loewen v. USA*.[62]

> "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 quite a 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 which 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."

[42] A detailed analysis of Chapter 11 establishes that the obligations protected are international in nature. Section A of Chapter 11 defines the reciprocal obligations the three Parties to the treaty agreed to. Section B addresses the enforcement of that bargain. Features of the international nature of Section B include the following:

> – The cause of action captured by Section B arises by virtue of the obligations set out in Section A. It is independent from any cause of action under domestic law and does not exclude such recourse. As stated by Professor Crawford, a Professor of International Law at the University of Cambridge in the UK, actions that may breach internal law may not involve any breach of substantive guarantees under Chapter 11 and vice versa. [63]
>
> – The NAFTA tribunals have no power to strike down or invalidate internal laws or

decisions. If a measure is determined to be inconsistent with Canada's obligations under the Agreement, Canada is free to determine how to bring such a measure into conformity with its obligations. The sole power of a NAFTA tribunal is to award damages, applicable interest and costs. While a tribunal may order the restitution of property, a Party may opt to pay damages instead. The compensation is payable by virtue of a failure to abide by international treaty obligations.

– NAFTA tribunals are to decide the issues in dispute in accordance with the NAFTA and applicable rules of international law. They do not apply domestic law or make determinations as to rights under domestic law.

– While "measures" has been interpreted [64] to encompass judicial determinations that may have resulted in the breach of a Section A obligation, a NAFTA tribunal is not a court of appellate jurisdiction.

– As with any other international arbitration award, Canada or an investor may seek judicial review of a tribunal's decision before the courts of the place of the arbitration.

– Parties may withdraw from the NAFTA on six month's notice.

[43] Our courts do not adjudicate on treaty rights and attendant obligations of nations. In contrast, the NAFTA tribunals compensate entities injured by the failures of Canada, the US and Mexico to abide by their treaty obligations. There has been no case in which a NAFTA tribunal has constituted itself as a court of appellate jurisdiction over determinations of any Canadian courts. Furthermore, as argued by the Respondent, if I were to accede to the Applicants' submissions, Canada would be constrained by its domestic laws from entering into an international agreement that contained a dispute resolution mechanism unless claims were resolved by Canadian courts in accordance with Canadian law. This would not only affect the NAFTA but also Canada's participation in agreements like the CUSFTA, the WTO Agreement, Canada's Foreign Investment Protection Agreements (FIPAs), the Convention on the Law of the Sea, and Canada's acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36(2) of its Statute. Although not determinative of my decision, it should be noted that in the decade following approval of the NAFTA, claims asserted against Canada totaled US $938,552,560. Total damage awards against Canada amounted to approximately $27,800,000. As Professor Crawford stated in his affidavit filed, there is no evidence that these awards are constituting "a clog on the equity of legislative action in the public interest".[65]

Although stated in a different context, Professor Hogg's following comments are apt:

> "Treaties on taxation, extradition or trade, for example, will bind each party's state to treat the nationals of the other state in particular ways. Each state undertakes its obligations in return for promises that its nationals will receive comparable treatment in the other's state. With treaties of this kind, the international character of the obligations cannot be doubted, and the inability of the federal government to ensure the fulfillment of Canada's part of the bargain would be a very serious disability."[66]

[44] In conclusion, I am of the view that the NAFTA is an international treaty that is unaffected by s. 96 of the *Constitution Act, 1867*. [67]

Section 96 Jurisprudence

[45] That said, in the event that s. 96 is engaged, I will also conduct an analysis of the application of the jurisprudence surrounding s. 96 to ascertain whether it has been violated.

[46] Section 96 states:

> The Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

This section of the *Constitution Act, 1867* is not complex, however, a significant body of law has developed on the subject. The jurisprudence surrounding s. 96 has focused on cases where the creation or enhancement of the jurisdiction of provincial courts or tribunals has interfered with the powers of superior courts. The prohibition has been held to limit the competence of both provincial legislatures and Parliament: *McEvoy v. AG (New Brunswick)*.[68] If one assumes that s. 96 is applicable to an international treaty such as the NAFTA, the question to address is whether the NAFTA investor state procedure contravenes the requirements relating to s. 96.

[47] The leading case on s. 96 jurisdiction is *Re Residential Tenancies Act, 1979*.[69] In that case, Dickson J. (as he then was) traced the evolution of s. 96 jurisprudence moving from Lord Atkin's description of s. 96 in *Toronto v. York Tp. et al*[70] as one of the "three principal pillars in the temple of justice … not to be undermined" to the articulation of a three step test:

> (i) Does the power or jurisdiction conferred upon the tribunal conform, that is to say, is it identical or analogous to, a power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation? This is an historical inquiry and if the answer is negative, that is the end of the matter. If affirmative, one proceeds to the second step.
>
> (ii) Is the function of the tribunal within its institutional setting a judicial function? Put differently, is the nature of the question within the institutional context that the tribunal is called upon to decide, a judicial function? "Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a "judicial capacity"." [71] Again, if the answer is affirmative, one moves to the third step.
>
> (iii) It is insufficient to simply examine the particular power or function of a tribunal and ask whether this power or function was once exercised by section 96 courts. One must consider the "context" in which this power is exercised. Dickson J. stated: "It may be that the impugned "judicial powers" are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*Labour Relations Board of Saskatchewan v. John East Ironworks, Limited* [1949] AC 134; *Tomko v. Labour Relations Board (Nova Scotia)* [1977] 1 S.C.R. 112) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga v. The Regional Municipality of Peel* [1979] 2 S.C.R. 244.). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Attorney General of Quebec v. Farrah* [1978] 2 S.C.R. 638) so that the tribunal can be said to be operating "like a s. 96 court"." [72]

[48] This three part *Residential Tenancies* test was expanded and further clarified by the Supreme Court of Canada in *MacMillan Bloedel v. Simpson*.[73] The *MacMillan Bloedel* test does not overrule the *Residential Tenancies* test; it adds a further analysis which must be conducted in the event that the grant of jurisdiction does not violate the three part *Residential Tenancies* test. In this additional test, the court is to consider whether the impugned grant of power violates the superior court's "core" jurisdiction. If the impugned power could be characterized as a core power, the transfer of authority to an inferior court or tribunal will prima facie be a violation of s. 96. The focus of the problem is not the conferral of the power on the tribunal but rather its removal from the s. 96 court.[74] The *MacMillan Bloedel* test only applies where a grant of power to the administrative tribunal or inferior court is exclusive. Where the court has concurrent jurisdiction, the *Residential Tenancies* test provides a complete answer to the constitutional inquiry.[75]

[49] In conducting a s. 96 analysis, firstly one must properly characterize the provision in

question. Secondly, one must apply the *Residential Tenancies* test and lastly, if the grant of jurisdiction is exclusive, one must apply the *MacMillan Bloedel* test. This is not a straightforward task. As noted by Professor Hogg in his text, *Constitutional Law of Canada* :

> "The courts have attempted to fashion a judicially enforceable rule which would separate "s. 96 functions" from other adjudicatory functions. The attempt has not been successful, and it is difficult to predict with confidence how the courts will characterize particular adjudicatory functions. The uncertainty of the law, with its risk of nullification, could be a serious deterrent to the conferral of new adjudicatory functions on inferior courts or administrative tribunals, and a consequent impediment to much new regulatory or social policy. For the most part, the courts have exercised restraint in reviewing the provincial statutes which create new adjudicatory jurisdictions, so that the difficulty has not been as difficult as it could have been. However, in the last two decades, there has been a regrettable resurgence of s. 96 litigation: six challenges to the powers of inferior courts or tribunals based on s. 96 have succeeded in the Supreme Court of Canada, and these decisions have spawned many more challenges." [76]

Characterization

[50] As mentioned, the first step in analyzing whether a grant of jurisdiction infringes s. 96 is to properly characterize the provision in question. As many present day remedies were not available in 1867, characterization should highlight the type of dispute rather than the type of remedy sought. In *Re Young Offenders Act (PEI)*,[77] the Supreme Court of Canada discussed the importance of characterizing the issue narrowly so as to avoid "large accretions of jurisdiction by inferior courts at the expense of superior courts, but not so narrow as to freeze the jurisdiction of inferior courts at what it was in 1867." I have already addressed this issue and concluded that in substance the investor is asserting the right of a Party to the treaty to obtain compliance with treaty obligations agreed to by another Party.

Historical Inquiry

[51] In conducting the historical inquiry, one again examines the dispute as opposed to the remedy. The Applicants submit that the function of determining whether government had improperly interfered with the rights of individual foreign investors or the companies they owned was reserved to s. 96 courts at the time of Confederation. They state that the disputes were analogous and in the case of expropriation, identical to those decided by superior courts in 1867. The Respondent states that superior courts never had the jurisdiction to determine the rights and obligations of another sovereign state in international law or to determine the consistency of Canada's laws with its international treaty obligations.

[52] The answer to the historical inquiry turns in large measure on the characterization of the impugned provisions. The NAFTA tribunals only determine whether a state Party has fulfilled its Chapter 11 obligations. Treaty compliance was never the subject matter of s. 96 jurisdiction. Indeed, at the time of Confederation, Canada did not even have the capacity to enter into treaties. Canadian superior courts had no jurisdiction to adjudicate treaty disputes. Furthermore, Canadian courts have the same powers with respect to review of international arbitral awards as they had prior to the adoption of the NAFTA. With respect to the issue of expropriation, certainly expropriation grounded a claim with respect to property at the time of Confederation, however, the dispute contemplated by a breach of Article 1110 relates to the expropriation of investments. This provision must be read within the context of the Agreement as a whole. Put differently, the Parties to the NAFTA agreed to refrain from nationalizing or expropriating an investment of an investor of another Party. Enforcement of that or an analogous obligation never formed part of the superior court's jurisdiction at Confederation. In sum, I am unable to conclude that the Applicants meet part one of the test. There has been no subtraction from the superior court's original jurisdiction. The

power or jurisdiction conferred upon NAFTA tribunals does not conform to a power or jurisdiction exercised by superior courts at the time of Confederation. As the answer to the historical inquiry is negative, there is no need to engage in a discussion of the remaining two elements of the *Residential Tenancies* test.

Core Jurisdiction Analysis

[53] As to the additional core jurisdiction analysis set out in *MacMillan Bloedel*, Chapter 11 does not give exclusive jurisdiction to NAFTA tribunals to hear disputes arising from the actions of government. While a claim for damages arising from a breach of Section A obligations should be brought before a NAFTA tribunal, an aggrieved investor has the right to bring claims before domestic courts for the breach of any law arising out of the same government action. Article 1121 requires that a claimant must forego any proceedings with respect to the measure that is alleged to be a breach of the NAFTA but not proceedings for injunctive, declaratory or extraordinary relief not involving the payment of money. Article 1121 essentially precludes a claimant from bringing a NAFTA claim unless it first agrees to not proceed with any proceeding before any administrative tribunal or court under the law of any Party. While a NAFTA claimant must not initiate or continue proceedings for damages before any of those bodies once it decides to pursue a Chapter 11 claim, one cannot conclude that NAFTA tribunals have exclusive jurisdiction to hear disputes arising out of the governmental actions of which the investor complains. As such, the core jurisdiction analysis is not required.

[54] In conclusion, assuming that s. 96 is applicable to the NAFTA, I do not accept that it is violated by the investor state procedure found in Chapter 11.

2. Does the investor state procedure violate constitutionalism and the rule of law?

Positions of the Parties

[55] The Applicants submit that even if the NAFTA investor state procedure is consistent with section 96 of the *Constitution Act, 1867*, it remains unconstitutional because it is contrary to "constitutionalism and the rule of law". They submit that the adjudication of legal disputes between individual investors and the state, impacting upon a wide range of legislation and public policy and engaging fundamental rights and values, cannot be placed beyond the reach of Canadian constitutional principles. They state that NAFTA tribunals are neither competent nor authorized to consider and apply distinctive Canadian constitutional principles or the *Charter of Rights and Freedoms* and it is therefore unconstitutional to grant adjudicative authority to them.[78] The Respondent submits that if the arbitral jurisdiction conferred on Chapter 11 tribunals does not infringe the *Residential Tenancies* and core jurisdiction tests with respect to s. 96, that is the end of the matter. In addition, the principles of constitutionalism and the rule of law must be balanced against the principle of Parliamentary sovereignty which found expression in the *North American Free Trade Implementation Act*. The Respondent goes on to argue that 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. Lastly, the Respondent submits 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 a party by reference to Canadian constitutional values and principles. This approach, argues the Respondent, is at odds with the long-standing body of international law regarding treaty interpretation, and if accepted, would effectively prevent Canada from entering into treaties with dispute settlement mechanisms.

Discussion

[56] Huge changes have occurred in Canada since Confederation. Different approaches have been applied by the courts to respond to changing times and an unchanging written constitution. One approach the courts have taken to a static constitution is the development of unwritten constitutional principles.

> "There are, however, a number of cases where the Supreme Court of Canada has found an "unwritten constitutional principle" in the Constitution, and has treated the principle as an implied term of the Constitution that is enforceable in precisely the same way as if it were an express term."[79]

An example of this approach was found in *Reference Re Secession of Quebec*[80] where the Supreme Court held that any secession by Quebec must respect four unwritten principles of the Constitution namely democracy, federalism, constitutionalism and the protection of minorities.

[57] While unwritten constitutional principles have been found to be part of the Constitution, there is an obvious danger that legislation deemed legitimate by government may be considered illegitimate by the courts based on uncertain and ill-defined principles. In *Lalonde v. Ontario (Commission de restructuration des services de santé)*[81], the Ontario Court of Appeal set aside certain directions issued by a governmental commission but noted that unwritten principles "do not confer on the judiciary a mandate to rewrite the Constitution's text".[82] In addition, in *Babcock v. Canada (Attorney General)*,[83] McLachlin C.J. observed that unwritten constitutional principles must be balanced against the principle of Parliamentary sovereignty.

[58] I am not persuaded that the NAFTA investor state procedure violates constitutionalism and the rule of law. Firstly, I have already determined that it does not infringe s. 96, an express provision of the Constitution. Secondly, although the NAFTA is not incorporated into Canada's domestic law, Parliament has approved the treaty in the *North American Free Trade Agreement Implementation Act*. Thirdly, the NAFTA tribunals have no jurisdiction to invalidate domestic laws or government practices. Lastly, 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* and are to apply rules of international law. I agree with the Respondent's position that the Applicants are seeking to require international tribunals to interpret international treaties to which Canada is a party by reference to Canadian constitutional values and principles, a position at odds with international law regarding treaty interpretation. I am unable to conclude that the investor state procedure is unconstitutional based on any principles of constitutionalism and the rule of law.

3. Does the investor state procedure in Chapter 11 violate sections 7 and 15 of the Charter of Rights and Freedoms?

Positions of the Parties

[59] The Applicants state that the investor state procedure violates sections 7 and 15 of the *Charter of Rights and Freedoms*. These sections state:

> **7.**
>
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **15.**
>
> **(1)** Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or

mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[60] The Applicants state that Chapter 11 adjudication may involve laws, regulations and public policy in critical areas affecting individual and community health, security and well being, including the protection of essential public services and health, education, communications and social services, environmental protection, and special employment measures for local communities and vulnerable workers. In these areas, they state that individual and *Charter* interests relating to equality and to life, liberty and security of the person are engaged. They also argue that monetary awards ordered by NAFTA tribunals against Canadian governments may have significant fiscal consequences affecting government's ability to fund other programs. NAFTA tribunals are neither authorized nor competent to consider or apply the *Charter* in interpreting NAFTA provisions and the Applicants submit that delegating the adjudication of Chapter 11 disputes to NAFTA tribunals operating beyond the reach of the *Charter* violates substantive and procedural rights to equality, life, liberty and security of the person guaranteed under sections 7 and 15. The Respondent states that any *Charter* argument is premature and conjectural and that the Applicants' case rests on allegations of future harm in that it is based on speculation that government might take action in response to a NAFTA tribunal decision that could have an impact on Canadians' rights. Furthermore, the Applicants' submissions should fail in substance as no section 7 or 15 interest is engaged. Lastly, the Respondent submits that any infringement is justifiable under section 1 of the *Charter*.

Discussion

[61] As a preliminary matter, I must determine whether the *Charter* argument is premature. If so, there is no need to address the remaining arguments relating to the *Charter*.

[62] As mentioned, the Respondent states that the Applicants' case rests on allegations of future harm and as such are premature. Cory J. in *Phillips v. Nova Scotia (Westray Mine Inquiry)*[84] provides a succinct description of the issue of prematurity:

> "The onus of proving a *Charter* breach lies upon the individual who claims it. It is true that relief may be granted for a prospective *Charter* violation (see *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (S.C.C.), [1985] 1 S.C.R. 441). However, relief will only be granted in circumstances where the claimant is able to prove that there is a sufficiently serious risk that the alleged violation will in fact occur. In *Operation Dismantle Inc.*, where the anticipated violation was of s. 7, Dickson C.J. adopted (at p.458) the requirement that the individual seeking to restrain government action must demonstrate a "high degree of probability" that the *Charter* infringement will occur before the court will grant relief … Frankly, I cannot see much difference between the test of "high degree of probability" and that of "a real and substantial risk". The essence of both tests is that before a court will restrain government action, it must be satisfied that there is a very real likelihood that in the absence of that relief an individual's *Charter* rights will be prejudiced. This determination cannot be made in the abstract. Rather, the proper approach should be a contextual one, which takes into account all the surrounding circumstances, including, for example, the nature of the right said to be threatened and the extent to which the anticipated harm is susceptible of proof."[85]

Similarly in *MacKay v. Manitoba*,[86] Cory J. observed that *Charter* decisions should not and must not be made in a factual vacuum. The reason for this is that *Charter* analysis is contextual and is dependent on the establishment of particular facts. "The presentation of facts is not, as stated by

the Respondent, a mere technicality; rather it is essential to a proper consideration of *Charter* issues."[87] Arbour J. made similar comments in *USA v. Kwok*[88]:

> "As discussed earlier, remedial action may be sought under the *Charter* for a future harm that, though likely to occur, actually has yet to materialize. Nevertheless, as a basic premise, remedies must generally await infringement." [89]

The same sentiment was expressed by the Supreme Court most recently in *Reference re Same-Sex Marriage*.[90]

[63] The Applicants' response is that they recognized the issue of prematurity and as a reflection of same, amended their notice of application. Their claim insofar as the *Charter* is concerned is for a declaration that Section B of Chapter 11 of NAFTA as implemented and made part of Canadian law by the *NAFTA Implementation Act*, and the *Commercial Arbitration Act* insofar as it applies to NAFTA claims, infringe sections 7 and 15 as they preclude and fail to ensure that NAFTA tribunals consider, weigh and apply fundamental *Charter* values in adjudicating claims under NAFTA. They state that the very conferral of authority on NAFTA tribunals without considering the *Charter* constitutes the breach.

[64] I consider that the record before me is inadequate to render the determination requested by the Applicants and would result in conjecture of the nature described in the aforesaid Supreme Court of Canada decisions. It seems to me that the *Charter* argument could proceed down two avenues. It could be argued that a NAFTA tribunal should consider the *Charter* in a particular case. In addition, it might be argued that government legislative or administrative action in response to a NAFTA tribunal decision might be subject to the *Charter*. The Applicants have not sought status before a tribunal alleging breach of the *Charter* [91] and there is no evidentiary framework to support an argument that the Government of Canada amended legislation as a result of the NAFTA. Indeed, there is no particular government action that is directly impugned by the Applicants. There is no suggestion by the Applicants that section 7 or 15 *Charter* rights were infringed in any of the tribunal decisions that have been rendered to date, nor are they able to demonstrate that any of the tribunal decisions actually have affected any section 7 or 15 rights. It seems to me that it would be inappropriate to embark on a *Charter* analysis in the factual vacuum and framework presented.

[65] As to the argument that the conferral of authority on NAFTA tribunals constitutes a breach of the *Charter*, I fail to see the merits of this argument. As already discussed in some detail, the tribunals have no authority to change Canada's domestic law or practices. Their jurisdiction is limited to the international law issues before them and the remedies available are also circumscribed. Nothing in the NAFTA compels the Canadian government to amend its laws and practices. The arbitration of claims that Canada has failed to honour its treaty obligations does not affect or determine the rights of Canadians. As such, there can be no breach of the *Charter* that arises simply as a result of the establishment of these tribunals. In conclusion, I agree with the Respondent's position that the *Charter* argument asserted by the Applicants is premature. As such, there is no need to consider the remaining *Charter* issues any further.

4. Does the investor state procedure in Chapter 11 violate section 2(e) of the Canadian Bill of Rights?

[66] Section 2(e) of the *Canadian Bill of Rights* states:

> **2.**
>
> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein

recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for determination of his rights and obligations.

[67] Neither party spent any time in argument on the *Canadian Bill of Rights*. Both counsel simply referred me to their facta. In their factum, the Applicants correctly note that the *Canadian Bill of Rights* has not been diminished by the enactment of the *Charter*. They complain that the *Bill of Rights*, and particularly section 2(e), has been infringed in that rights and obligations of third parties have not been accorded the right to a fair hearing. In addition, NAFTA tribunals lack the quality of judicial independence that is essential under section 2(e). The Respondent's arguments with respect to the *Bill of Rights* are similar to those with respect to the *Charter*, namely, the Applicants' case rests on allegations of future harm. With respect to the Applicants' fair hearing argument, the Respondent states that Article 1136 of the NAFTA provides that an award made by a tribunal shall have no binding affect except between the disputing parties and in respect of a particular case. As such, the absence of third parties is irrelevant in that none of their rights and obligations are being determined.

[68] As a matter of principle, the arguments relating to prematurity and the *Charter* are equally applicable to the *Bill of Rights*. Accordingly, the Applicants' Bill of Rights argument similarly must fail.

Conclusion

[69] In closing, I am persuaded that the Application should be dismissed. The Respondent indicated that, if successful, it would not be seeking any costs. Accordingly, there is no order as to costs.

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Pepall, J.

Released: July 8, 2005

Footnotes:

[1] Affidavit of Stephen Clarkson sworn May 26, 2003, para 18.

[2] Affidavit of Denyse Vigors MacKenzie sworn December 18, 2003, para 38.

[3] North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA] at Article 1101.

[4] Article 201.

[5] Article 1116. The treaty also contains other dispute resolution provisions in Chapters 19 and 20. Chapter 20 also may be used by a Party for breach of Chapter 11 obligations.

[6] Article 1117.

[7] Article 1121.

[8] Article 1121(1)(b).

[9] Article 1123.

[10] Article 1124.

[11] Article 1120.

[12] Article 1135.

[13] Article 1135(1)(b).

[14] Article 1135(1).

[15] Article 1135(3).

[16] Article 1131(2).

[17] Article 1130.

[18] Article 1136.

[19] Article 1128.

[20] Article 1136(4).

[21] With the exception of ICSID Convention arbitrations, all other international commercial arbitration is subject to review by the national courts of the place of arbitration. See P.G. Foy, “Effectiveness of NAFTA's Chapter 11 Investor State Arbitration Procedures” Proceedings of the 31st Annual Conference of the Canadian Council on International Law, October 2002, p. 44 .

[22] R.S.C., 1985 c. 17. In 2002, this Act was amended to delete the Federal Court from the list of alternatives.

[23] “Public policy” refers to “fundamental notions and principles of justice”. See *AG Canada v. S.D. Myers, Inc.*, [2004] 3 FCR 368 at para. 55 and *United Mexican States v. Karpa* 2005 CanLII 249 (ON C.A.), (2005), 74 O.R. (3d) 180 at 196.

[24] *SD Myers , ibid.*

[25] [2001] B.C.J. No. 950.

[26] Supra, note 23.

[27] S.C. 1993, c.44.

[28] NAFTA, C. Gas 1994.I.147 at p.69.

[29] Affidavit of M. Sornarajah sworn April 23, 2003 at para 45.

[30] Affidavits of James Crawford sworn July 15, 2004 para. 34 and of Denyse MacKenzie sworn December 18, 2003 at paras. 123–160.

[31] Apart from the four cases described herein, other cases against Canada include: *Crompton Corp v. Canada* (September 19, 2002); *Sun Belt Water Inc. v. Canada* (November 27, 1998); *Trammel Crow Company v. Canada* (December 7, 2001); and *Ketchum Investments Inc. & Tysa Investments Inc. v. Canada* (December 22, 2001).

[32] S.C. 1997, c. 11.

[33] *S.D. Myers, Inc. v. the Government of Canada*, November 12, 2000 at paras. 162 and 194.

[34] *SD Myers, supra,* note 23 at para. 73.

[35] R.S.C. 1985, c. E-19.

[36] *Pope & Talbot, Inc. v. Canada*, April 10, 2001, para 181.

[37] *The Loewen Group, Inc. and Raymond L. Loewen v. USA* , (ICSID Case No. ARB (AF)98/3 ("*Loewen*")

[38] *Ibid*, at para. 137.

[39] *Ibid,* at para. 242.

[40] ICSID Case No. ARB(AF)/99/2, *American Journal of* ***International*** *Law* 155 (2004) .

[41] *Ibid.* at para. 127.

[42] Consideration of certain elements of that debate may be necessary in the event a section 1 *Charter* analysis is required.

[43] P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Carswell, 1997) at 11–1 ("Hogg").

[44] Affidavit of Professor Crawford, sworn July 15, 2004 at para. 51.

[45] D.M. Price, "Chapter 11- Private Party v. Government, Investor State Dispute Settlement: Frankenstein or Safety Valve ?" 26 Canada-United States Law Journal 107 at 113 ("Price").

[46] *AG for Canada vs. AG for Ontario* [1937] A.C. 326 (P.C.) ("*AG for Canada*"). See also R. St. J. MacDonald, "International Treaty Law and the Domestic Law of Canada," 1975 Dalhousie Law Journal 307 ("Macdonald").

[47] Hogg, supra, at 11-4.

[48] *Ibid*, at 11-4.

[49] [1944] 3 D.L.R. 482 (S.C.C.).

[50] [1931] 2 D.L.R. 216. See also MacDonald, *supra* note 46.

[51] *AG for Canada*, *supra*, and Hogg, *supra*, at 11-4.

[52] Hogg, *supra*, at 11-4.

[53] *AG for Canada*, *supra*.

[54] 1999 CanLII 8291 (C.F.), [1999] 4 C.F. 441 ("*Pfizer*").

[55] *AG Canada, supra*, at 678–679.

[56] *Pfizer, supra*, at 460.

[57] Applicants' factum at para. 99.

[58] Respondent's factum at para 69.

[59] Price, supra at note 45 at 108. Regardless of whether the NAFTA was in fact informed by this concept, it nonetheless is applicable.

[60] Affidavit of Professor Crawford, p. 20 at paras, 44 and 45.

[61] Foy, supra, note 21 at 51.

[62] *Loewen, supra*, at para 233.

[63] Affidavit of James Crawford, sworn July 15, 2004 at para 5.

[64] See *Loewen, supra*.

[65] Crawford, supra, p. 15.

[66] Hogg, supra, at 11–15.

[67] This does not preclude the possibility that treaties may be subject to other elements of Canada's Constitution.

[68] [1983] 1 S.C.R. 704.

[69] 1981 CanLII 24 (S.C.C.), [1981] 1 S.C.R. 714, (1981), 123 D.L.R. (3d) 554 ("*Residential Tenancies*").

[70] [1938] A.C. 415.

[71] *Residential Tenancies*, supra at 735.

[72] *Ibid*, at 736.

[73] 1995 CanLII 57 (S.C.C.), [1995] 4 S.C.R. 725 ("*Macmillan Bloedel*").

[74] *Ibid.* at para 27.

[75] *Ibid.* at para 26.

[76] Hogg, supra, at 7–26.

[77] 1990 CanLII 19 (S.C.C.), [1991] 1 S.C.R. 252 at para. 28.

[78] Applicants' factum para. 118–119.

[79] Hogg, *supra* at p. 15, 46–47.

[80] 1998 CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217.

[81] 2001 CanLII 21164 (ON C.A.), (2001), 56 O.R. (3d) 505 (C.A.) ("*Lalonde*").

[82] *Ibid.* at para. 121.

[83] 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3.

[84] 1995 CanLII 86 (S.C.C.), [1995] 2 S.C.R. 97.

[85] *Ibid.* at 158.

[86] 1989 CanLII 26 (S.C.C.), [1989] 2 S.C.R. 357.

[87] *Ibid.* at 361.

[88] 2001 SCC 18 (CanLII), [2001] 1 S.C.R. 532 ("*Kwok*").

[89] *Ibid*, at 576.

[90] 2004 SCC 79 (CanLII), [2004] 3 S.C.R. 698 at para. 51.

[91] No reference was made to the *Charter* in CUPW's petition for standing in *UPS v. Canada*.