

Court File No. C43995

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

**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
(Appellants)

- and -

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

Respondents
(Respondents in Appeal)

APPLICATION UNDER Rule 14 of the Ontario Rules of Civil Procedure

NOTICE OF APPEAL

THE APPLICANTS APPEAL to the Court of Appeal from the judgment of Madame Justice Pepall dated July 8, 2005 made at Toronto.

THE APPELLANTS ASK that the judgment be set aside and judgment be granted in the form of the declarations requested in the Applicants' (Appellants') Amended Notice of Application, issued October 30, 2003, and that this Court fix costs for this appeal and for the proceedings below.

THE GROUNDS OF APPEAL are as follows:

1. The learned judge below erred in holding that the North American Free Trade Agreement ("NAFTA"), was not implemented and incorporated into Canadian domestic law;

2. The learned judge below erred in failing to hold that the federal government and its executive are bound to comply with the requirements of the Constitution, including those set out by s. 96 through 101 of the *Constitution Act*, and by the *Canadian Charter of Rights and Freedoms*, in the exercise of its authority to negotiate international treaties and, in particular, that the executive had failed to act in manner consistent with these constitutional requirements when it negotiated and implemented the investor-state dispute resolution mechanism contained in Section B of Chapter Eleven of NAFTA.
3. The learned judge below erred in her formulation and application of the relevant tests for ascertaining whether the judicial powers and functions reserved to Canadian superior courts under s. 96 of the *Constitution Act* have been improperly delegated or assigned to an inferior tribunal and, in particular, erred in holding that the investor-state dispute resolution mechanism contained in Section B of Chapter Eleven of NAFTA, insofar as it is implemented and made part of Canadian law, is not contrary to the requirements of and limitations contained in s. 96 of the *Constitution Act*;
4. The learned judge below erred in holding that the investor-state dispute resolution mechanism contained in Section B of Chapter Eleven of NAFTA, insofar as it is implemented and made part of Canadian law, is not in breach of fundamental constitutional principles including the rule of law, democracy, constitutionalism and federalism, and is therefore *ultra vires*, void and of no force and effect;
5. The learned judge below erred in holding that NAFTA tribunals do not have exclusive jurisdiction to deal with complaints brought pursuant to the investor-state dispute resolution mechanism contained in Section B of Chapter Eleven of NAFTA;

6. The learned judge below erred in holding that the questions relating to the infringement of the Charter were premature. In particular, the learned judge below erred in holding that that these questions were premature, in part, because no Charter argument had been raised by the applicants before a NAFTA tribunal;
7. The learned judge below erred in restricting the possibility of Charter review to government action arising from a tribunal decision, and in excluding from Charter review infringements resulting from the impugned government action of creating and giving binding legal force to the investor-state dispute resolution mechanism contained in Section B of Chapter Eleven of NAFTA;
8. The learned judge below erred in holding that the evidence required to substantiate an alleged violation of the Charter would consist either of evidence of a violation of rights directly resulting from a specific NAFTA tribunal ruling or of a violation of rights directly resulting from legislative change required by NAFTA, and in failing to consider evidence that Charter rights and values are routinely engaged in Chapter 11 adjudication and that NAFTA tribunals completely fail to consider Charter rights and values in the adjudication process itself;
9. The learned judge below erred in failing to properly assess the implications of a finding in favour of the Applicants (Appellants) on other international adjudicative regimes and, in particular, in failing to consider the fact that Charter rights could be minimally impaired in the creation of international adjudicative mechanisms by ensuring that fundamental human rights recognized under international human rights law have primacy;
10. The learned judge below erred in holding that the investor-state dispute resolution mechanism contained in Section B of Chapter Eleven of NAFTA, insofar as it is implemented and made part of Canadian law, does not infringe and deny rights and freedoms guaranteed by s. 2(e) of the Canadian Bill of Rights.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- (i) Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, Chap. C-43;
- (ii) The order appealed from is final; and
- (iii) Leave to appeal is not required, as this is a final order of a judge of the Superior Court of Justice: see *Courts of Justice Act*, section 6(1)(b).

August 5, 2005

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REPRESENTED BY THE ATTORNEY GENERAL OF
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Proceeding commenced at TORONTO

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