

# HOUSING AND ESC RIGHTS LAW CANADIAN CONSTITUTIONAL CHALLENGE TO NAFTA RAISES CRITICAL ISSUES OF HUMAN RIGHTS IN TRADE AND INVESTMENT TREATIES

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## Introduction

The adverse effect of international trade and investment agreements on the protection and enjoyment of human rights has been a growing concern among human rights NGOs and UN human rights bodies in recent years. For instance, the UN Sub-Commission on the Promotion and Protection of Human Rights has affirmed that human rights must receive adequate protection and consideration in trade and investment regimes.<sup>2</sup> In addition, the UN Committee on Economic, Social and Cultural Rights has asserted that governments must ensure that “international human rights obligations are considered as a matter of priority” in trade negotiations.<sup>3</sup> Recently, the Director General of the World Trade Organisation (WTO) cautioned that for institutions such as the WTO to continue to ignore the obvious link between human rights and trade would be a “recipe for trouble.”<sup>4</sup> Surprisingly, the consensus among international human rights institutions, NGOs, and other actors that human rights must be more adequately protected within trade and investment regimes has not been translated into legal challenges to trade and investment agreements that are at odds with domestic human rights protections. However, a constitutional challenge to the investor-state dispute procedures under the North American Free Trade Agreement (NAFTA), which has been launched jointly by three Canadian NGOs, may break new ground in this respect.<sup>5</sup>

It is not unprecedented for domestic courts to review international adjudicative regimes against domestic human rights standards. In the 1970s, the German and Italian Constitutional Courts insisted that domestic courts must “measure [European] community law against the norms on fundamental rights in the [German] Constitution”<sup>6</sup> and against “the fundamental principles of our [Italy's] constitutional order or the inalienable rights of the human person.”<sup>7</sup> These early

domestic court decisions played an important part in motivating the European Community to improve fundamental human rights protections within European treaty law.<sup>8</sup>

In recent years, however, despite the development of increasingly powerful adjudicative regimes for investors' rights that impact upon constitutionally protected human rights in many countries, the responsibility of national courts to ensure that constitutional rights are adequately protected seems to have been largely ignored.

### **The human rights implications of NAFTA investor-state dispute procedures**

Investor-state dispute procedures under NAFTA have been a particular focus of concern for human rights experts, NGOs, and UN bodies.<sup>9</sup> Under the dispute procedures set out in Chapter 11 of NAFTA, foreign investors enjoy unprecedented powers to demand compensatory damages for government measures found to infringe NAFTA – even where such measures may be designed to protect the rights of citizens to equality, health or personal security.

NAFTA's Chapter 11 accords individual investors the right to invoke international arbitration to claim damages arising from a broad range of administrative or regulatory measures taken by governments. Such 'measures' include regulatory actions that are alleged to have indirectly expropriated an investor's property. As a result, in one case, the Canadian Government was required to pay over \$8 million<sup>10</sup> to a US investor who successfully challenged a ban on exports of PCB waste that was necessary to ensure Canadian compliance with an environmental treaty.<sup>11</sup> In another instance, Canada agreed to pay more than \$20 million to a US firm and to remove a ban on a gasoline additive considered hazardous to health.<sup>12</sup> The mere threat of such challenges has had a profound effect on public policy related to the protection of fundamental human rights. For example, when

legislation requiring plain packaging for cigarettes was considered by the Parliament of Canada, cigarette companies threatened a NAFTA Chapter 11 challenge to recover hundreds of millions of dollars in compensation. The proposed legislation was never enacted.<sup>13</sup>

NAFTA has created a new form of legal accountability to corporate economic rights that is at odds with the Canadian Charter of Rights and Freedoms ('Canadian Charter'). When the Charter was adopted in 1982, corporate economic 'property' rights were deliberately denied constitutional protection – in part to avoid sanctioning US-style corporate challenges to regulatory measures as 'takings'. In effect, NAFTA Chapter 11 has constitutionalised these corporate economic rights through the 'back door'.<sup>14</sup>

The rights protected by the Canadian Charter are subject to reasonable limitations and balances, with particular weight given to the rights of marginalised or vulnerable groups and the values of social justice and equality. In contrast, however, the corporate economic rights established by NAFTA are adjudicated without any reference to, or limitation by, the rights of citizens or disadvantaged groups.<sup>15</sup> Unlike remedies granted for Charter violations, massive compensatory awards ordered by NAFTA Tribunals are enforced without any consideration of their implications for the funding of those social programs or health services upon which the rights of Canadians rely.<sup>16</sup> The adjudication and enforcement of investor rights under NAFTA's Chapter 11 thus represents a fundamental departure from Canadian constitutional norms.

NAFTA also breaks with the norms of dispute resolution under international law. Rather than relying on state-to-state dispute resolution, NAFTA Chapter 11 allows private parties to unilaterally initiate challenges to public policy that would otherwise be adjudicated by domestic courts under the rubric of domestic constitutional law. NAFTA tribunals review measures that may be necessary to

ensure state compliance with public international human rights law under rules of private commercial arbitration. The tribunals have no competence to consider broader human rights issues that may be at stake.

### **The constitutional challenge**

The constitutional challenge to NAFTA Chapter 11 investor-state dispute procedures has two components.<sup>17</sup> First, the applicants allege that the legal disputes between individual investors and government measures which are adjudicated by NAFTA tribunals are matters that are exclusively reserved to federally appointed courts by Sect. 96 of Canada's Constitution Act 1867. Sect. 96 has been interpreted as preventing Parliament and provincial legislatures either from transferring the work of superior courts to tribunals or other bodies, or from removing or derogating from the core or inherent powers of the superior courts.

Second, it is alleged that the investor-state dispute procedures violate the principle of constitutional supremacy under the Canadian Charter, as well as specific Charter rights. This component of the challenge is the focus of the Charter Committee on Poverty Issues' involvement in the case. The issue here is not whether it is unconstitutional for a tribunal – as opposed to a superior court – to adjudicate investor-state disputes. Rather, the question is whether it is unconstitutional to permit the adjudication of these types of claims beyond the protective reach of the Canadian Charter and in the absence of protection of fundamental human rights by any other means. It is this second line of argument that puts into Canadian domestic constitutional terms the widespread concern that adjudication under trade and investment regimes does not respect the primacy of fundamental human rights.

In Canada, decision-making bodies, whether tribunals or courts, are obliged to interpret and apply law and to exercise discretion consistently with the Canadian

Charter and with the values of international human rights law.<sup>18</sup> NAFTA tribunals, however, are under no such obligation and do not do so. We allege that it is unconstitutional to confer the adjudication of individual legal challenges against government measures under NAFTA on a tribunal that is unable to ensure that its decision-making is informed by, or consistent with, fundamental human rights.

We argue in particular that the broadly framed rights to “life, liberty and security of the person” and to equality under Sections 7 and 15 of the Canadian Charter are violated by the Canadian Government's decision to confer authority over the adjudication of investor-state disputes to NAFTA tribunals. The issues placed before NAFTA tribunals clearly engage these rights, yet the tribunals have no competence or authority to consider or protect them. As a result, policies and measures that are critical to ensuring equality and the enjoyment of security of the person are subject to review and compensatory orders without any consideration of, or balancing against, these core Charter rights.

### **The decision of the Ontario Superior Court**

In a decision handed down on 8 July 2005, Justice Peppal of the Ontario Superior Court dismissed both aspects of the constitutional challenge. Her decision has been appealed to the Court of Appeal for Ontario.<sup>19</sup>

Justice Peppal declined to make a finding on the human rights issues raised, on the basis that the Charter allegations were “premature”. She accepted the applicants' standing to advance the Charter arguments but found that, in order to avoid prematurity, the applicants must establish that a particular NAFTA Tribunal order, or government action emanating from a Tribunal order, violates the Charter.

The issue raised in this case, however, is not whether particular tribunal orders have resulted, or will result, in Charter violations. Rather, the issue is whether the adjudicative regime is itself unconstitutional. Justice Peppal's decision on prematurity effectively immunises from constitutional review an adjudicative mechanism for the protection of individual investor rights that has dramatically altered governmental accountability to law in Canada and has undermined the protection of fundamental rights. If accepted on appeal, the judgment would leave vulnerable groups with the bleak prospect of having to challenge, as a direct violation of a Charter right, every compensatory order and reduced or rolled-back protective measure resulting from actual or possible investor challenges. The investor-state procedures themselves would remain intact and immune from Charter scrutiny.

### **The guarantee of decision-making informed by human rights**

The Supreme Court of Canada has made it clear that the Canadian Charter guarantees that all decision-making and adjudication of legal disputes by courts or any other decision-making body must itself be informed by, and consistent with, the paramount value placed on fundamental human rights.<sup>20</sup> This crucial dimension of the protection of human rights under both the Canadian Charter and international human rights law is particularly important to disadvantaged, marginalised and vulnerable groups in instances where advantaged interests challenge protective or regulatory measures. Yet this aspect of fundamental rights protection is entirely absent in NAFTA adjudication. In light of the nature of the interests that are adjudicated in Chapter 11 investor-state procedures, the loss of this component of Charter and international human rights protection constitutes a serious violation of the rights to equality and to life, liberty and security of the person enshrined in the Canadian Charter.

## **The mandate and responsibility of domestic courts to review international adjudicative regimes**

A central question that is likely to arise in cases such as this is whether it is appropriate for courts to apply domestic constitutional requirements to an adjudicative regime created in part by international treaty. Relying on an affidavit from James Crawford of Cambridge University, the Government of Canada argued at trial that dispute resolution procedures under NAFTA (or any other treaty) constitute a distinct sphere of law to which domestic constitutional requirements should not be applied. It was argued that this should be so even when, as is the case with NAFTA Chapter 11, remedies are enforced by domestic courts. Justice Peppal agreed with these submissions.

In our view, such an argument is without foundation in either domestic or international law. Ensuring that governments do not contract out of constitutional rights by way of treaties is a core responsibility of domestic courts, and the constitutional accountability of governments in treaty negotiation has been clearly affirmed by the Supreme Court of Canada.<sup>21</sup> The Court has also held that Parliament or provincial legislatures may not circumvent the Charter by conferring decision-making functions on private entities beyond the reach of the Charter, without ensuring that Charter rights will be protected.<sup>22</sup>

Domestic courts will show some deference to the political branches of government with respect to the negotiation of treaties. However, judicial deference should never justify a failure to fulfil the courts' responsibility for ensuring the protection of constitutionally guaranteed human rights in the adjudication of issues that directly affect the enjoyment of those rights. As noted by the UN Committee on Economic, Social and Cultural Rights, safeguarding fundamental human rights in the interpretation and application of law is a pre-eminent responsibility of domestic courts under international as well as domestic

law: “[n]eglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.”<sup>23</sup>

The Supreme Court of Canada has found that its role in safeguarding rights under the Canadian Charter and its function in promoting international human rights values in all decision-making are compatible and complementary. The Court has thereby upheld the supremacy of fundamental human rights in both international and domestic law.<sup>24</sup> This understanding of domestic and international human rights protections as constituting an interwoven fabric of rights and values (rather than two distinct or competing spheres of law) is fundamental to our claim. It remains to be seen whether, when the appeal of the NAFTA challenge is heard, the Court of Appeal for Ontario will be prepared to assume the critical responsibility of domestic courts to ensure that human rights are protected in the adjudication of trade and investment disputes. The UN High Commissioner for Human Rights and former Supreme Court of Canada Justice Louise Arbour has commented on the “timidity” of Canadian courts and litigants with respect to applying the Canadian Charter to assaults on the economic and social rights of poor people and other vulnerable groups.<sup>25</sup> This case, however, calls on the court to assume its constitutional mandate and responsibility with some courage. We can only hope that the increasing recognition of the link between trade and investment regimes and human rights at the international level will help to convince the Canadian courts and those in other jurisdictions to fulfil their responsibility with respect to one of the most critical human rights issues of our time.

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<sup>2</sup> Sub-Commission on the Promotion and Protection of Human Rights, 'Human Rights as the Primary Objective of Trade, Investment and Financial Policy,' ESC Res. 1998/12, UN ESCOR, 50th Sess., UN Doc.E/CN.4/Sub.2/RES/1998/12 (1998); Sub-Commission on the Promotion and Protection of Human Rights, 'Trade Liberalization and Human Rights,' ESC Res. 1999/30, UN ESCOR, 51st Sess., UN Doc.E/CN.4/Sub.2/RES/1999/30 (1999).

<sup>3</sup> Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization 26/11/99. E/C.12/1999/9.

<sup>4</sup> Quoted in NGO Human Rights Caucus 'Human Rights Caucus Response to Lamy: Human Rights Cannot be Traded' (15 Dec. 2005): [http://www.dd-rd.ca/english/commdoc/prelease1/human\\_rights\\_caucus\\_Lamy.htm](http://www.dd-rd.ca/english/commdoc/prelease1/human_rights_caucus_Lamy.htm) CENTRE ON HOUSING RIGHTS AND EVICTIONS • Canadian constitutional challenge to NAFTA raises critical issues of human rights in trade and investment treaties

<sup>5</sup> The action has been brought by the members of the Canadian Union of Postal Workers, the members of the Charter Committee on Poverty Issues (CCPI) and the Council of Canadians. CCPI joined the action to advance arguments based on the Canadian Charter of Rights and Freedoms and international human rights law. These are the focus of the present article.

<sup>6</sup> German Constitutional Court, Solange I, BVerfGE 37, 271 (1974) 170, 174 at para. 37; German Constitutional Court, Solange II, BVerfGE 73, 378 (1986).

<sup>7</sup> Italian Constitutional Court, Frontini [1974] 2 CMLR 372 [Frontini].

<sup>8</sup> Ari Afilalo, 'Constitutionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter' 34 NYUJ Intl. L. & Pol. 1 (2001).

<sup>9</sup> The Committee on Economic, Social and Cultural Rights recently asked Canada to provide information on how it has guaranteed that Covenant rights will be given "primary consideration in the adjudication of North American Free Trade Agreement (NAFTA) disputes." (List of issues to be taken up in connection with the consideration of the fourth periodic report of CANADA, UN ESCOR, 2005, UN Doc E/C.12/Q/CAN/2 (2005) at para. 19).

<sup>10</sup> All awards cited are in Canadian dollars.

<sup>11</sup> S.D. Myers, Inc. v. The Government of Canada, 12 Nov. 2000. Documents available online at: <http://www.dfait-maeci.gc.ca/tna-nac/SDM-en.asp>

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<sup>12</sup> Ethyl Corporation v. The Government of Canada. Documents available online at: <http://www.dfait-maeci.gc.ca/tna-nac/ethyl-en.asp>.

<sup>13</sup> Samrat Ganguly, 'The Investor-State Dispute Mechanism and a Sovereign's Power to Protect Public Health' 38 Colum. J. Transnat'l L. 113 (1999).

<sup>14</sup> Afilalo (n. 8 above); David Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada' (1996) 46 U.T.L.J. 499.

<sup>15</sup> For information on the Supreme Court's approach to limiting corporate rights so as to protect the rights of vulnerable groups, see *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 986-1000.

<sup>16</sup> The Supreme Court of Canada has found that even pay equity awards required to guarantee women's equal pay for equal work are subject to limitations in light of competing claims on scarce resources. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras. 75, 93.

<sup>18</sup> *Baker v. Canada (Minister of Citizenship and Immigration)* (1997), 174 D.L.R. (4th) 193 at paras. 53-54, 74-75. [Baker]; *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.) [Slaight].

<sup>19</sup> *R. v. Council of Canadians et al* 2005 CanLii 28426 (On S.C.). Available at [www.canlii.org](http://www.canlii.org).

<sup>20</sup> *Baker* (n. 18 above), at paras. 53-54, 74-75; *Slaight* (n. 18 above).

<sup>21</sup> *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.), per Dickson CJ, at 491 and Wilson J., at 497-98; *Canada v. Schmidt* [1987] 1. S.C.R. 500, at 524 (para. 52).

<sup>22</sup> *Eldridge v. British Columbia (A.G.)* (1997), 151 D.L.R. (4th) 577 (S.C.C.), at para. 40; *Lavigne v. Ontario Public Service Employees Union* (1991), 81 D.L.R. (4th) 545 (S.C.C.) at 559-565.

<sup>23</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 9 on the Domestic Application of the Covenant, UN ESCOR, 1998, UN Doc. E/C.12/1998/24 (1998) para. 14.

<sup>24</sup> *Baker* (n. 18 above), *Slaight* (n. 18 above).

<sup>25</sup> Louise Arbour, 'Freedom from want' -from charity to entitlement', Lafontaine-Baldwin Lecture, 3 March 2005: <http://www.unhchr.ch/hurricane/hurricane.nsf/view0158E08B5CD49476BEC1256FBD006EC8B1?opendocument>