

NAFTA Tribunals are Constitutional

On July 26, 2007 the Supreme Court of Canada refused to hear an appeal of [Council of Canadians v. Canada \(Attorney General\)](#), a 2006 decision of the Ontario Court of Appeal that upheld the constitutionality of international tribunals set up under the North American Free Trade Agreement (NAFTA).

Under Chapter 11 of NAFTA, an individual investor can initiate a claim at a tribunal against Canada, the United States or Mexico (the treaty's signatories) for violating obligations under the treaty. These obligations include: treating all investors favourably; giving all investments fair and equitable treatment; and prohibiting the expropriation of investments except for a public purpose, on a non-discriminatory basis, and after according due process and paying due compensation.

At the Court of Appeal, the petitioners (which included Council of Canadians, members of the Canadian Union of Postal Workers and the Charter Committee on Poverty Issues), argued that the tribunals deprived Canadian superior courts of their authority under [section 96](#) of The Constitution Act, 1867 [2]. Section 96 of the Constitution "ensure[s] the independence of the judiciary and...provide[s] some uniformity to the judicial system throughout the country" [3]. The legal test for determining the application of s. 96 involves an historical inquiry into the powers granted to superior courts at the time of Confederation. It consists of three parts:

1. Does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district, or county court at the time of Confederation?
2. If so, is it a judicial power?
3. If so, is the power either subsidiary or ancillary to a predominately administrative function or necessarily incidental to such a function?

The Court of Appeal held that the NAFTA tribunals did not usurp the power granted to Canadian superior courts by s. 96. The historical inquiry revealed that the "power conferred on [NAFTA] tribunal[s] [is] not analogous to one exercised by superior courts at the time of Confederation" [4]. The subject matter of the disputes before the tribunals - the alleged violation of state obligations under Chapter 11 - had "no counter-part to pre-1867 domestic law in Canada" [5]. The Court also considered the fact that the tribunals cannot alter Canadian laws; the tribunal's decision is incorporated into domestic law insofar as it is binding on the parties [6].

The Court dismissed two other constitutional issues brought forward by the petitioners: "Do NAFTA tribunals violate the principles of judicial independence and the rule of law?" and

“Do NAFTA tribunals violate constitutional values such as those reflected in sections 7 and 15 of the Charter of Rights and Freedoms?” [7]. The Court also declined to comment on the broader issue underlying the case, namely the extent to which tribunals created by international treaties are exempt from constitutional scrutiny [8]. The lower court had held that since the tribunals were created by an international treaty, they were unaffected by s. 96 of The Constitution Act, 1867 [9].

According to the petitioners, the case has important ramifications for the scope of the NAFTA regime, and more specifically, the ability of “foreign investors to sue the Canadian government for damages when public policy, law or even the delivery of public services interferes with their present or future profits” [10]. They argue that the secret tribunals undermine Canadian sovereignty and expand corporate rights.

NAFTA came into force in 1994 as an initiative between the governments of Canada, the United States, and Mexico to promote and facilitate trade in North America. Since its inception, the treaty has been hotly debated. Proponents of NAFTA generally argue that the globalization of markets creates more jobs and a stronger economy by encouraging trade and ensuring secure investment opportunities, while opponents claim that free trade has resulted in the exploitation of cheap labour forces and widened the gap between the rich and the poor [11].

Cases

- Council of Canadians v. Canada (Attorney General), 2006 CanLII 40222 (ON C.A.).
- R. v. Council of Canadians, 2005 CanLII 28426 (ON S.C.).

Sources

- Supreme Court of Canada, “Information on cases” (18 June 2007), online: <http://cases-dossiers.scc-csc.gc.ca/information/cms/docket_e.asp?31842>.
- Steven Shrybman, “Court upholds corporate rights under NAFTA” (30 November 2006) Council of Canadians, online: <http://www.canadians.org/trade/issues/NAFTA/analysis_Nov30_2006.html>.
- Jean-Yves LeFort, “Free Trade’s Big Lie: NAFTA has failed to create quality jobs or close the equality gap” (Spring 2007) Canadian Perspectives online: <<http://www.canadians.org/publications/CP/2007/spring/trade.html>>.

[1] Council of Canadians v. Canada (Attorney General), 2006 CanLII 40222 (ON C.A.).

[2] 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.”

[3] *Supra* note 1 at para. 31.

[4] *Ibid.* at para. 36.

[5] *Ibid.* at para. 42.

[6] *Ibid.* at para. 25.

[7] *Ibid.* at paras 57 & 58.

[8] *Ibid.* at para. 26.

[9] *Ibid.* at para. 20.