

# CITIZENS' RIGHTS OR INVESTORS' RIGHTS?

## COUNCIL APPEALS COURT DECISION, ARGUING THAT NAFTA IS UNCONSTITUTIONAL

On July 8, 2005, Justice Sarah Peppal of the Superior Court of Ontario dismissed a constitutional challenge asking the Court to find that Chapter 11 of the North American Free Trade Agreement (NAFTA) is unconstitutional. The challenge was launched by the Council of Canadians and the Canadian Union of Postal Workers (CUPW). That same day, the Council and CUPW announced that they would appeal the ruling, arguing that NAFTA undermines the role of Canadian courts and offends both the Charter of Rights and Freedoms and the Bill of Rights.



Photo: Tony Fontaine

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Chapter 11 of NAFTA has achieved dubious fame. It allows foreign corporations to sue the federal government for compensation when legislation, policy or the delivery of public services interferes with present or future profits. This includes public interest legislation

aimed at protecting the environment and citizens' health and safety.

While Justice Peppal disagreed with the Council's position, she did acknowledge that NAFTA is full of "deficiencies." She said that the agreement gives rights to foreign corporations that infringe on Canadian sovereignty. She also acknowledged that NAFTA tribunal decisions lack transparency and provide no mechanism for review.

But Justice Peppal still concluded that the private enforcement of NAFTA rights is constitutional, ruling that NAFTA investor-state arbitration is entirely a creature of international, not domestic law.

### HARDLY IMPARTIAL

We disagree with this assessment. NAFTA tribunal decisions are made by trade lawyers, not judges. The same lawyer may arbitrate in one case, and represent a corporate client in another – hardly a model of impartiality.

The provisions in Chapter 11 have allowed foreign investors and corporations to challenge environmental laws, municipal land-use controls, water protection measures and even the decisions of juries and appellate courts. NAFTA tribunal decisions have an impact on a wide range of legislation and public

policy that simply should not be placed beyond the reach of the Constitution and Charter.

CUPW and the Council of Canadians launched the court case against NAFTA in 2001, in response to the lawsuit by United Parcel Service (UPS) against Canada. UPS is suing Canada under NAFTA for US\$160 million. The company asserts that Canada's publicly funded postal system gives Canada Post an unfair advantage when delivering courier services in competition with private providers.

A win for UPS would cost taxpayers millions and undermine our public postal service. It is disturbing to realize that a similar lawsuit could just as easily have been launched over public education or health care.

Meanwhile, the Canadian government continues to push for more "investors' rights" in international trade agreements. If our government has its way, corporations from the European Union, China, India and South Korea could soon also have the right to sue for compensation if they dislike our laws.

Reproducing this model is not only unwise; it has proven to be financially, legally and democratically costly. For large corporations, trade tribunals represent a legal nirvana of sorts – a place where they can challenge the laws of sovereign nations in complete secrecy before a panel of friendly arbiters. It confirms their belief that public interest should be subjugated to private profit. For the citizens of this country, it's a constitutional kangaroo court.

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