

Court upholds corporate rights under NAFTA

An analysis of the November 30, 2006 decision by the Ontario Court of Appeal by the Council of Canadians

On November 30, 2006, the Ontario Court of Appeal dismissed an appeal by the Council of Canadians, the Canadian Union of Postal Workers (CUPW) and the Charter Committee on Poverty Issues (CCPI) concerning NAFTA investment rules.

At issue are NAFTA rules that allow countless foreign investors to sue the federal government for damages when public policy, law or even the delivery of public services interferes with their present or future profits. Foreign corporations have taken advantage of these rules to challenge environmental laws, water export controls, the delivery of postal services and even the decisions of domestic courts. The threat of foreign investor claims was cited by the Romanow Commission as a serious impediment to government initiatives like the establishment of new social programs, such as the expansion of medicare to cover prescription drugs.

Because of these developments, CUPW, CCPI and the Council asked the Court to find that the NAFTA rules are unconstitutional, because they undermine the independence of Canadian courts and important constitutional values, including the Charter of Rights and Freedoms.

Under Canada's Constitution, when corporations have a legal claim against the government, the place for that dispute to be decided is in the courts. Yet under NAFTA such claims are decided by private and secretive international tribunals, which operate entirely outside the framework of Canadian constitutional norms, including those of judicial independence and the Charter.

When their case was argued by the Ontario Superior Court in 2005, Justice Peppal acknowledged that NAFTA creates foreign-investor rights that infringe on sovereignty, and that are enforced in a way that is neither transparent nor subject to proper review. However, the judge rejected the argument that the private enforcement of NAFTA rights was unconstitutional.

Unfortunately, the Court of Appeal has now confirmed Justice Peppal's decision. In doing so, the Court accepted the federal government's argument that because investor-state litigation is a part of an international trade agreement, it doesn't infringe on the jurisdiction of domestic courts.

The problem with this conclusion is that it ignores both the legal and practical effects of investor-state claims. Legally, multi-million dollar NAFTA awards can be registered with and enforced as judgements of Canadian superior courts. In addition, NAFTA tribunals have the power to review the decisions of Canadian courts, including those of the Supreme Court of Canada. To reason that this dispute mechanism exists independently of Canadian law, simply doesn't reflect reality.

Just as important, at a practical level the threat of NAFTA investor claims is often sufficient to persuade governments to abandon important initiatives, from environmental regulation to public auto insurance. According to the evidence of constitutional and international law experts introduced in support of the challenge, NAFTA effectively operates as a new constitution because of its broad and restrictive impact on government authority. Unfortunately the Court chose simply to ignore evidence about the broader impacts of this free trade agreement.

The Court also rejected the Charter argument as premature; because the groups were not complaining about a specific instance where someone's Charter rights had been violated by a NAFTA tribunal. But this ignores the larger concern that was raised, namely that the private character of investor-state claims violates the Charter by allowing broad questions of policy and law to be decided by tribunals that have no competence to deal with, let alone apply, the Charter or other domestic constitutional values to the disputes before them.

By allowing countless foreign investors to use international tribunals to enforce their investment rights, NAFTA represents a radical expansion of corporate rights under international law. In many instances this has also occurred at the cost of international human rights and other non-commercial interests.

The groups argued that by creating such a system of private international justice, the federal government has seriously undermined Canadian sovereignty and failed to respect fundamental constitutional safeguards, including that of judicial independence and the Charter. Unfortunately, the Ontario Court of Appeal opted for a narrow approach to these issues, essentially ignoring the larger legal, political and practical consequences of NAFTA investment rules.

The groups now have the right to take steps toward an appeal to the Supreme Court of Canada.

– Prepared by Steven Shrybman, international trade lawyer with Sack Goldblatt Mitchell, and member of the Council of Canadians' Board of Directors.