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**The Council of Canadians and the Canadian Union of Postal Workers
Launch a Constitutional Challenge to NAFTA Investment Rules**

The Council of Canadians (the Council), the Canadian Union of Postal Workers (CUPW), and the Charter Committee on Poverty Issues (CCPI) have joined forces to challenge the constitutional validity of NAFTA investment rules.

The case is the first to question the lawfulness of NAFTA and takes aim at the trade deal's investment rules that empower foreign corporations to sue governments for taking actions which interfere with the profitability of their investments, even where such government measures are non-discriminatory and taken entirely in the public interest.

These extraordinary investor rights have now been invoked by foreign investors and corporations to challenge environmental laws, municipal land-use controls, water protection measures, the activities of Canada Post, and even the decisions of juries and appellate courts. Once initiated, NAFTA investor-State claims are decided by private international tribunals which operate entirely outside the framework of Canadian law and constitutional safeguards, including those of the Charter of Rights and Freedoms. Yet the multi-million damage awards against governments made by such tribunals are binding and may be enforced as judgments of domestic Courts.

The groups are seeking declarations by the Ontario Superior Court of Justice that NAFTA investor-State procedures, and the Canadian laws that implement them, are void and of no force and effect. They will argue that the federal government acted beyond its lawful authority by establishing NAFTA investor-State procedures which:

- (i) deprive Canadian courts of the authority to adjudicate matters reserved to them by the Constitution, including claims against the State by private and corporate entities arising from alleged government wrongdoing;

- (ii) infringe and deny the rights and freedoms guaranteed by the Charter of Rights and Freedoms and the Canadian Bill of Rights, including those concerning fundamental justice, fairness and equality;
- (iii) exceed the treaty making powers of government by negotiating a treaty that is incompatible with Canada's most basic norms and values, including those of democracy, constitutionalism and the rule of law.

The Applicants' written argument is available at www.canadians.org. Among the key points it makes are the following.

A Radical Expansion of Investor Rights

By allowing countless foreign investors to invoke international binding arbitration to enforce expansive investment rights, NAFTA and other investment treaties represent a dramatic departure from the norms of international law in two important ways. First, corporations are given the right to directly enforce an international treaty to which they are neither party nor under which they have any obligations. Previously, the powerful enforcement machinery of international trade agreements was only available to the nations that were parties to such treaties. Second, foreign investors may invoke international commercial arbitration processes to determine claims that involve important issues of public policy and law - ie. to use private procedures to resolve public disputes.

The result has placed a coercive international enforcement regime at the disposal of a legion of foreign investors who may use it freely to challenge public policies and laws they oppose. Not surprisingly, a growing number of foreign investors and corporations are taking advantage of this opportunity to claim substantial damages from governments that have allegedly failed to respect the constraints imposed on their authority by NAFTA rules. The targets of these claims have included water export controls, fuel additive and pesticide regulations, hazardous waste export controls, and most recently public services. Often, just the threat of litigation is sufficient to warn governments off regulatory initiatives such as requiring cigarettes to be sold in plain packaging, banning the use of a neurotoxic fuel additive, or establishing a public automobile insurance system.

Challenging the Integrity and Independence of the Courts

The independent role of Canadian courts is preserved by certain provisions of the Constitution. Of these, the most important is Section 96, which provides for the appointment by the Governor General of judges to the superior courts. Section 96 has been read broadly by the courts to engender the principle of judicial independence, and the courts have relied upon the section to strike down both federal and provincial initiatives that would delegate superior court authority to inferior courts or administrative tribunals.

Canada and United States now concede that investor-State claims routinely concern broad issues of public policy and law. Yet these disputes are resolved by private arbitrators, not judges; under international, not domestic law; and pursuant to procedures that ignore domestic

constitutional guarantees. In fact, NAFTA tribunals have arrogated to themselves the power to review judicial determinations made by domestic courts, in essence assuming the mantle of courts of appeal residing entirely outside of the Canadian judicial structure. At the same time, where the place of arbitration is outside Canada, Canadian courts have no jurisdiction to review a damage award made against the federal government, no matter how egregious, or contrary to Canadian law or the Constitution, it may be.

The investor-State dispute procedures of NAFTA establish a system of international commercial arbitration with sweeping powers that arguably supplants the core functions of superior courts. The breadth of the jurisdiction conferred on these tribunals, the secrecy that envelops their proceedings, and the very limited scope for judicial supervision of the arbitral process can be seen as representing a direct assault on the bedrock principles upon which the administration of justice under the Constitution depends.

The Charter of Rights and Freedoms and the Rule of Law

Investor-State claims under NAFTA impact broadly on the relationship between Canadian governments and citizens, which must be governed by the principle of the rule of law and constitutionalism. Applying a private commercial arbitration model, that operates entirely outside of Canada's constitutional framework, to the resolution of investor-State disputes under NAFTA is contrary to the principle of constitutionalism and the rule of law on which Canada's democratic system and the protection of fundamental human rights is based.

It will be argued that that investor-State arbitral proceedings offend both the principles of constitutionalism and the rule of law by submitting the exercise of legislative and governmental action, as well as the exercise of supervisory authority, to arbitral review by tribunals which are unbound by legal precedent, subject to no right of appeal, and which operate entirely outside the framework of the constitution. Moreover, under this regime, executive accountability is not to legal authority, but to semi-private arbitral tribunals which are themselves subject to no supervision by Canadian courts, particularly where the place of arbitration is outside Canada. Thus, quite apart from displacing the authority of section 96 courts, the Chapter Eleven procedures represent a fundamental assault on the very foundations of our structure of government, including a judicial system which makes superior courts the ultimate arbiter of the legality of government action.

Thus, the adjudication of legal disputes between individual investors and the State, impacting upon a wide range of legislation and public policy and engaging fundamental rights and values, cannot be placed beyond the reach of Canadian constitutional principles. NAFTA tribunals are neither competent nor authorized to consider and apply distinctive Canadian constitutional principles or the Charter. It is therefore unconstitutional to grant adjudicative authority to them.

The **Canadian Union of Postal Workers (CUPW – STTP)** represents approximately 46,000 operational employees of Canada Post who provide postal services to Canadians throughout the country. CUPW is firmly committed to working within the broader labour movement, and with groups in civil society, to preserve the integrity of Canadian public services across the full spectrum of these social services from health care and education to municipal services.

The **Council of Canadians** is a non-governmental organization with more than a 100,000 members, many of whom participate in the activities of more than 60 chapters across the country. Strictly non-partisan, the Council is committed to raising public awareness, and to fostering democratic debate about some of Canada's most important issues, including the future of Canada's social programs; the need to renew its democratic institutions, and the protection of public health and the environment.

The **Charter Committee on Poverty Issues** is a national committee whose purpose is to bring together low-income individuals, anti-poverty organizations, researchers, lawyers and advocates for the purpose of assisting poor people in Canada to secure and assert their rights under international law, the *Canadian Charter of Rights and Freedoms*, human rights legislation and other law in Canada.

The Applicants are represented by Steven Shrybman and Steven Barrett, partners in the law firm Sack Goldblatt Mitchell. Mr. Shrybman can be reached at the Ottawa Office of the firm at (613)233-4897 or at stevenshrybman@sgmlaw.com.