

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE COUNCIL OF CANADIANS, and DALE CLARK, DEBORAH BOURQUE, and
GEORGE KUEHNBAUM on their own behalf and on behalf of all members of the
CANADIAN UNION OF POSTAL WORKERS, and
BRUCE PORTER and SARAH SHARPE, on their own behalf and on behalf of all
members of the CHARTER COMMITTEE ON POVERTY ISSUES**

Applicants

- and -

**HER MAJESTY IN RIGHT OF CANADA, AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA**

Respondents

AFFIDAVIT OF DAVID SCHNEIDERMAN

I, DAVID SCHNEIDERMAN, of the City of Toronto, in the Province of Ontario, **HEREBY AFFIRM THAT:**

1. I have been since 1999, and continue to be, an Associate Professor at the Faculty of Law, University of Toronto.
2. Prior to that, I was Executive Director of the Centre for Constitutional Studies at the University of Alberta from 1989 to 1999. This is an interdisciplinary research institute housed in the Faculty of Law concerned with constitutional developments in Canada and elsewhere in the world.
3. I have attached As Exhibit " A to this Affidavit a copy of my curriculum vitae. My research and teaching subjects concern constitutional law in Canada, both as regards the division of legislative authority between the federal government and the provinces and the Canadian Charter of Rights and Freedoms. A body of research undertaken over the last ten years concerns the implications of

investment treaties, such as the North American Free Trade Agreement (NAFTA), on Canada's constitutional order.

4. The purpose of this Affidavit is to join issue with several points made by Professor James Crawford in his Affidavit dated July 15, 2004.
5. Professor Crawford opines that "NAFTA does not impede the Parties' Ability to Act in the Public Interest." In paragraph 30 of his affidavit he notes that parties can take exceptions in investment treaties. The examples he cites are not in fact exceptions from the obligations contained in Chapter Eleven, rather, they are only reservations and exceptions from certain of the Chapter's provisions. As such, they are bounded by limits set out in Article 1108, which does not allow for either reservations or exceptions to be taken from several of the key provisions of the Chapter, including those set out in Article 1110 which deals with the matter of expropriation. The only exclusion from the dispute procedures of Chapter Eleven taken by Canada concern certain decisions made pursuant to the *Investment Canada Act* (Annex 1138.2).
6. As for the specific matter of expropriation, aside from the standard form of exception that requires, *inter alia*, the payment of compensation in the event of an expropriation, Professor Crawford makes no mention that no exceptions were taken by any of the Party States for measures that expropriate or nationalize or that are "tantamount to" expropriation and nationalization (Article 1110). Nor would such an "exception" be permitted under Article 1108. I note, as well, that most investment treaties around the world do not allow for any exceptions in such matters other than those mandating the prerequisites to and the procedure by which payment will be made.
7. Specifically, as regards the *Metalclad* case, Professor Crawford claims, in paragraph 32, that Mexico was "satisfied" that the investor's project was

“consistent environmental concerns”. Professor Crawford fails to mention that the relevant municipal government, and later the state government, was not so satisfied.

8. Further, Professor Crawford notes, in paragraph 32, that the Panel in *Metalclad* concluded that the “landfill project conformed to Mexico’s environmental requirements.” The panel could come to this conclusion only because the panel chose to ignore the express allocation of constitutional authority to the municipal government to make precisely these kinds of determinations. The Constitution of the United Mexican States authorizes municipalities to “administer zoning and urban municipal development plans,” “to control and supervise the use of land in its territorial jurisdiction,” and “to grant licenses and building permits” (Art. 115, sec. V). The panel instead preferred an interpretation of the Mexican Constitution inconsistent with the State Party’s interpretation of its own Constitution. This is a stunning arrogation of authority, the panel sitting as if it were a constitutional court with the authority to determine questions of national constitutional law.

9. Professor Crawford states that Justice Tysoe of the B.C. Supreme Court found the *Metalclad* panel’s definition of expropriation not “patently unreasonable.” Justice Tysoe did not do so. He held, instead, that the panel’s definition of expropriation is a question of law, under the applicable provincial statute governing review of the panel’s award, “with which this Court is not entitled to interfere” (para. 99). Professor Crawford mistakenly is referring to Justice Tysoe’s finding that the tribunal did not commit a patently unreasonable error by not having referred to NAFTA Article 1114(1) in connection with the issuance of the State Governor’s ecological decree (para. 104). It should be emphasized that Justice Tysoe expressed serious concern about the “extremely broad definition of expropriation” adopted by the Panel. It “is sufficiently broad,” he wrote, “to include legitimate rezoning of property by a municipality or other rezoning authority” (para. 100).

10. Professor Crawford states, at paragraph 33, that, "Overall, it cannot be said that the pattern of decisions deprives NAFTA States of their regulatory powers over the economy or the environment." Though there only are a handful of panel rulings to date, one can fairly conclude that exercises of State regulatory authority, even when non-discriminatory or merely an exercise of what in the U.S. is called 'police power' authority - - regulations concerning health, welfare, public morals or the environment which, by definition, do not require the payment of compensation - - may, under NAFTA, give rise to the requirement to pay compensation to investors. More significantly, Professor Crawford declines to mention that no similar obligation to pay compensation in such cases will arise under Canadian law, where such matters are reserved to parliaments and legislatures (*Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999) 68 LCR 1 [NSCA]).

11. Professor Crawford states, in paragraph 34, that there is "no evidence that Chapter Eleven awards are constituting, so to speak, a clog on the equity of legislative action in the public interest." I believe Professor Crawford is speaking here of NAFTA's "chilling effects." I and others have made arguments about the potential of NAFTA's Chapter Eleven to chill regulatory innovation in regard to important public policy initiatives. For instance, I have written about the Canadian federal government's proposal to mandate the "plain packaging" of all tobacco products sold in Canada. This proposal precipitated an appearance before the House of Commons Standing Committee on Health in 1994 by representatives of two large U.S. tobacco companies (R.J.R. Reynolds Tobacco Company and Philip Morris International). These companies indicated, through their representatives, they would be prepared to sue the Government of Canada for "hundreds of millions" of dollars were the government to proceed with this initiative. In support of their claim, the tobacco companies filed an Affidavit sworn by Carla Hills, former U.S. Trade Representative who helped to negotiate the text of NAFTA. The Government of Canada chose to abandon this initiative. We also

likely have seen evidence of NAFTA's chilling effect in recent debates about adopting public auto insurance in the province of New Brunswick. Rates paid to private auto insurers were a principal election issue in 2003 and so Premier Bernard Lord struck an all party-committee to consider appropriate legislative responses. In its final report, the Committee recommended that the province adopt a public auto insurance plan, and this was despite evidence from the Insurance Bureau of Canada and a commissioned legal opinion from McCarthy Tetrault that U.S.-based private auto insurers could seek compensation for the taking of their investment interests under NAFTA's Chapter 11. The Government decided to pursue an alternative course of action, though without specific reference to NAFTA's potential chilling effects. Without being privy to the confidential deliberations of Ministers of the Crown and their delegates, it is impossible to know with certainty how the risks of such claims are being taken into account by governments when weighing the relative pros and cons of proceeding with a particular initiative. What can be seen, however, is an increasing reference to the threat of such litigation by foreign investors who may unilaterally invoke the dispute procedures of Chapter Eleven. It would be unreasonable to conclude that Ministers and other government officials are indifferent to such risks.

12. Professor Crawford writes, at paragraph 36, that Panels have "failed to identify a legitimate measure adopted to defend the public interest which was at the same time contrary" to Chapter Eleven. Three observations can be made about this point. First, his assertion fails to acknowledge that the legitimacy of the measure is irrelevant where a measure is found to have expropriated an investment under Article 1110. Second, Professor Crawford's argument is tautological in that it simply relies upon the tribunal's characterizations of the government actions in question as proof of their true character. Nevertheless, the legitimacy of these measures was vigorously defended by the governments involved in the cases he cites, both before the tribunals and in subsequent proceedings for judicial review.

Third, his conclusion is entirely dependant upon the competence of tribunals to identify when “legitimate measures” are at issue. As mentioned above, in *Metalclad* the panel made the spurious finding that the municipality did not have the constitutional capacity to assess the environmental impact of a hazardous waste facility project. Professor Crawford accepts the finding of the panel in this regard and so concludes that the municipality’s refusal to issue a construction permit was not a “legitimate measure.” Similarly, in the *S.D. Myers* case, the panel concluded that Canadian government policy was contrary to NAFTA’s national treatment obligation and, perhaps, even rose to the level of an expropriation. The government decision to prefer a Canadian hazardous waste facility site to dispose of made-in-Canada waste, as mandated by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, was not considered to have a sound basis in environmental law and policy. Yet Canada legitimately could, and in fact did, justify its actions as satisfying international commitments as required by the Basel Convention, by sustaining domestic capacity to dispose of hazardous PCB waste within Canada. The panel, rather than concluding the measure was an illegitimate one, could have deferred to the State party’s own assessment of the environmental soundness of the decision. Having acknowledged the legitimacy of the measure in question, the panel might, nevertheless, have gone on to conclude that compensation was payable under Article 1110, in any event.

13. In paragraphs 9 through 16, Professor Crawford takes the position that “Chapter Eleven tribunals are not Courts of Appellate Jurisdiction.” While this view is put forward in response to the issues raised by Professor Sornarajah, including those outlined in paragraph 49 of his affidavit, in fact Professor Sornarajah does not suggest that “investors could ... use NAFTA to appeal against decisions of domestic courts” as Professor Crawford suggests in paragraph 9 but, rather, that investor state procedures can be invoked “to challenge judicial determinations

made by the courts of a NAFTA Party”, a point that Professor Crawford concedes is correct.

14. Professor Crawford’s continues to recite various portions of tribunal awards, including two he authored, to make the point “that tribunals do not have any appellate jurisdiction over the decisions of a State’s domestic courts.” But this is to conceive of appellate review very narrowly, for by his own account, tribunals, including the one he presided over, have engaged in the probing review of judicial decisions to determine whether those decisions represented a denial of justice. According to a passage he recites from the *Azinian* case in paragraph 11, a denial of justice may occur where the “domestic courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way” or, the tribunal adds, if there is a “malicious misapplication of the law.” Tribunals, therefore, are empowered and ready to examine the judicial determinations of domestic courts, including those of the highest levels.

15. Professor Crawford describes, in paragraph 40, as “overstated if not greatly misconceived” claims that Chapter 11 is part of “new international constitutional order.” It is not misconceived to characterize a new set of rules and institutions as “constitutional” when, together, they exhibit characteristics similar to national constitutional charters. As Professor Crawford admits, at paragraph 48 of his Affidavit, NAFTA delimits the scope of “State sovereignty” and these are in ways that suggest the transfer of authority to new transnational institutions exercising constitution-like authority. Professor Bryan Schwartz, in a separate opinion in the *S.D. Myers* case, confirms that trade agreements like NAFTA “have an enormous impact on public affairs in many countries” and likens these agreements to “a country’s constitution.” “They restrict the ways in which governments can act,” he writes, “and they are very hard to change.”

16. Professor Crawford claims, at paragraph 44, footnote 46, that “NAFTA panels have resisted the application of U.S. constitutional principles in favour of a formulations [sic] based on customary international law.” Precisely what is the scope of customary international law in this field remains an issue of some controversy. Also, it is not unusual to claim that municipal legal practice occupies the “place of a source of law’ for international practice.’ Consider also that the Interim Panel decision in the *Pope & Talbot* case found support for its interpretation of NAFTA’s expropriations rule in the American Law Institute’s *Third Restatement of the Foreign Relations Law of the United States* (para. 99). The Restatement calls for state responsibility in the event that “alien property” is subject to “taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment” of property. The authors of the comment go on to admit that this often will be difficult to ascertain for, “As under United States constitutional law, the line between ‘taking’ and regulation is sometimes uncertain.” The *Pope & Talbot* panel acknowledged this same difficulty when it adopted the Third Restatement definition in its decision.

17. That the U.S. constitutional law experience informs Chapter Eleven’s interpretation is supported by Congress’ modification of trade and investment treaty practice in the *Trade Promotion Authority Act of 2002*. The Act mandates that foreign investors receive no greater rights than those that are available to U.S. investors under the U.S. Constitution.² The debates within Congress reveal that the standard of investment protection is drawn directly from the U.S. constitutional experience. The U.S. Trade Representative’s Office has modified

¹ H. Lauterpacht, ‘Decisions of Municipal Courts as a Source of International Law’ (1929) 10 *British Yearbook of International Law* 65 at 89.

² The Act recognizes that US law “on the whole provides a high level of protection for investment” and that among the “principal negotiating objectives” of the US is to ensure that foreign investors in the US “are not accorded greater substantive rights with respect to investment protections that US investors in the US and to secure for investors rights comparable to those that would be available under US legal principles and practice” (s. 2102(b)(3)).

investment treaty language in recent treaties with Singapore, Morocco, and Chile (in letters of exchange, for instance) to reflect more accurately U.S. Supreme Court jurisprudence, particularly, the criteria outlined in the *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977). As Marc Poirier writes, the U.S. Congress “took steps to require the inclusion of the substantive U.S. domestic regulatory takings standards in all future investment treaties.”³ The Canadian government recently issued an Annex to its model treaty that is similar to the new U.S. treaty language (Annex B.13[1]). The text, therefore, is not drawn, as such, from “customary international law.”

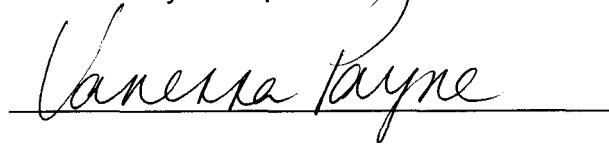
18. This standard of protection for investors under NAFTA is highly discordant with Canada’s own constitutional commitments. Such property rights protections as are found in the Fifth and Fourteenth Amendments to the U.S. Constitution are not included within Canada’s Constitution Acts. More particularly, property rights deliberately were left out of the Canadian Charter of Rights and Freedoms. As Chief Justice Dickson observed in *Irwin Toy Ltd. v. Quebec (Attorney General)*⁴, this omission in section 7 of the Charter “leads to the general inference that economic rights as generally encompassed by the term ‘property’ are not within the perimeters of the s. 7 guarantee.” In which case, he concluded, “a corporation’s economic rights find no constitutional protection in that section.”
19. Professor Crawford writes, at paragraph 50, that “NAFTA is consensual in nature; State parties can withdraw on six months’ notice.” This may legally be accurate, but practically impossible to do. As Professor Bryan Schwartz acknowledges in his separate opinion in the *S.D. Myers* case, trade agreements like NAFTA “are very hard to change.” While governments usually have the right to withdraw with notice, Professor Schwartz admits that this “is often practically

³ Marc R. Poirier, “The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property theorist” (2003) 33 *Environmental Law* 851 at 898.

⁴ [1989] 1 SCR 927.

impossible to do . . . Pulling out of a trade agreement may create too much risk of reverting to trade wars, and may upset the settled expectations of many participants in the economy.” The amendment of NAFTA is not made much easier, he writes, “just as it is usually very hard to change a provision of a domestic constitution.”

AFFIRMED before me at the City of
Toronto, in the Province of Ontario,
this 17th day of September, 2004



A Commissioner etc.

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DAVID SCHNEIDERMAN

Curriculum vitae

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This is Exhibit "A" referred to in the
affidavit of David Schneiderman
sworn before me, this 17th
day of September, 2004.
Janeesa Payne
A COMMISSIONER, ETC.

Part I

Academic History

- 2001 (Spring) Fulbright Visiting Scholar, New School for Social Research and School of Law, Columbia University
- 1997 (Oct.) Visiting researcher, Institute for Law and Society, New York University
- 1992- 1993 LL.M., Queen's University, Kingston, Ontario
Thesis: "Constitutional Limits and Economic Interests: A Search for the Purposes of Canadian Constitutionalism."
- 1980 - 1983 LL.B., University of Windsor, Windsor, Ontario
- 1977 - 1980 B.A. (Honours in Political Science), McGill University, Montreal, Quebec
- 1975 - 1977 CEGEP Diploma, Dawson College, Montreal, Quebec

Employment History

- 1999 - Associate Professor, Faculty of Law, University of Toronto.
- 1989 - 1999 Executive Director, Centre for Constitutional Studies, University of Alberta, Edmonton, Alberta.
- 1986 - 1989 Research Director, Canadian Civil Liberties Association, Toronto, Ontario.
- 1984 - 1986 Associate in the practice of law, Davis & Co., Barristers and Solicitors, Vancouver, British Columbia
- 1983 - 1984 Articled Student, Davis & Co., Vancouver, British Columbia
- 1982 (Summer) Director, Community Legal Aid, Windsor, Ontario
- 1980, 1981 Canadian Executive Service Overseas Youth Program,
(summers) Elizabeth Metis Settlement, Cold Lake, Alberta

Academic Awards

- \$ Canada-U.S. Fulbright Program, Fulbright Visiting Scholar Award (2001)
- \$ Canada-U.S. Fulbright Scholarship (1999) (declined)
- \$ Social Science and Humanities Research Council Doctoral Fellowship (1999) (declined)
- \$ Wilfred R. May Scholarship for Career Development, Alberta Heritage Scholarship Fund (1992) (\$10,000).
- \$ Special Faculty of Law Award (for academic excellence), University of Windsor (1982)
- \$ United Auto Workers - Local 195, Labour Law Book Prize, University of Windsor (1982)

Part II

Periodicals (Editor)

- \$ *Constitutional Forum Constitutionnel*, a quarterly publication of the Centre for Constitutional Studies (1989-1999)
- \$ *Review of Constitutional Studies/ Revue d'études constitutionnelles*, a semi-annual journal published by the Centre for Constitutional Studies in association with the Alberta Law Review (Editor-in-Chief since 1993, co-editor since 1999)

Books (Edited)

- \$ *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Lorimer, 1999).
- \$ *Charting the Consequences: The Impact of the Charter of Rights on Canadian Law and Politics* (University of Toronto Press, 1997) with Kate Sutherland
- \$ *Police Powers in Canada: The Police Power in History, Law, and Politics* (Toronto: University of Toronto Press, 1993) with R.C. MacLeod
- \$ *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) with Joel Bakan
- \$ *Conversations: Women and Constitutional Reform* (Edmonton: Centre for Constitutional Studies, 1992)
- \$ *Freedom of Expression and the Charter* (Toronto: Carswell, 1991)
- \$ *Language and the State: The Law and Politics of Identity* (Montréal: Les Editions Yvon Blais, 1991)

Books (unpublished)

- \$ *Investing Authority: The Constitutional Order of Economic Globalization* (under contract with University of Chicago Press).
- \$ *Laying Down the Law: The Media and the Supreme Court of Canada* (with Florian Sauvageau, David Taras, and Pierre Trudel) under contract with University of British Columbia Press.

Articles (Published)

- \$ "Aboriginal Rights and Economic Globalization: Canadian Constitutional Law Meets the Global Rule of Law" in M. Abe, M. Sasaki, and S. Taira, eds., *Law and Legal profession in the Age of Globalization* [trans. By M. Sasaki into Japanese].
- \$ AExchanging Constitutions: Constitutional Bricolage in Canada@(2002) 40 OSGOODE HALL LAW JOURNAL 401-424.
- \$ AInvestment Rules and the Rule of Law@(2001) 8 (4) CONSTELLATIONS 521-37.
- \$ AComparative Constitutional Law in an Age of Globalization@in V. Jackson and M. Tushnet, eds, *Comparative Constitutional Law: Defining the Field* (Greenwood Press, 2003).
- \$ AEconomic and Social Citizenship in the Era of the Charter@forthcoming in I. Cotler and A. Maoz, eds., *Litigating the Values of a Nation* (Dordrecht:Kluwer).
- \$ AThe Constitutional Disorder of the Safe Streets Act: A Federalism Analysis@in J. Hermer and J. Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Press, 2002).
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- \$ AHarold Laski, Viscount Haldane and the Law of the Canadian Constitution in the Early Twentieth Century@(1998) UNIVERSITY OF TORONTO LAW JOURNAL
- \$ "A.V. Dicey, Lord Watson and the Law of the Canadian Constitution in the Late Nineteenth Century" (1998) 16 LAW AND HISTORY REVIEW 495
- \$ AConstitutionalizing the Culture-Ideology of Consumerism@ (1998) 7 SOCIAL & LEGAL STUDIES 213.
- \$ "Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights" (1997) 14 INTERNATIONAL JOURNAL OF CANADIAN STUDIES 35
- \$ "Moments of Silence: The Constitutional Context of Religious Instruction and the Lord's Prayer in Saskatchewan Public Schools" with Richard W. Bauman (1996) 60 SASKATCHEWAN LAW REVIEW 265
- \$ "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 UNIVERSITY OF TORONTO LAW JOURNAL 499

- \$ "Constitutional Interpretation in An Age of Anxiety: A Reconsideration of the Local Prohibition Case" (1996) 41 MCGILL LAW JOURNAL 411
- \$ "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 SUPREME COURT LAW REVIEW (2d) 81 (with H. Lessard, B. Ryder, and M. Young)
- \$ "Economic Citizenship and Deliberative Democracy: An Inquiry Into Constitutional Limitations on Economic Regulation" (1995) 21 QUEEN'S LAW JOURNAL 125
- \$ "Developments in Constitutional Law: The 1993-94 Term" (1995) 6 SUPREME COURT LAW REVIEW (2d) 64 (with J. Bakan, B. Ryder and M. Young)
- \$ "Dual(ling) Charters: The Harmonics of Rights in Canada and Quebec" (1992) 24 OTTAWA LAW REVIEW 235
- \$ "An Appeal to Justice: Publicly Funded Appeals and R v. Robinson; R v. Dolejs" (1990) 28 ALBERTA LAW REVIEW 873 (with Charalee Graydon)
- \$ "The Access to Information Act: A Practical Review" (1987) 7 Advocates Quarterly 474 reprinted in G. Stuart Adam and R. Martin, eds., *A Sourcebook of Canadian Media Law* (Ottawa: Carleton University Press, 1994)

Book Chapters

- \$ "Taking Investments Too Far: Expropriations in the Semi-Periphery" in M. Griffin and S. Clarkson, eds., *Governance On the Edge: Semi-Peripheral States and the Challenge of Globalization* (Zed Books, forthcoming).
- \$ "Global Governance and the New Constitutionalism" in J.N. Clarke and G. Edwards, eds., *Global Governance in the Twenty-First Century: Dynamics and Contexts of Change* (Palgrave, forthcoming).
- \$ "The Old and New Constitutionalism" in J. Brodie and L. Trimble, eds., *Re-Inventing Canada: Politics for the 21st Century* (Toronto: Pearson Education Canada, 2003).
- \$ "The Difficulties of Local Citizenship in an Era of Economic Globalization" in M. Hanen, A. Barber, and D. Cassels, eds., *Community Values in an Age of Globalization* (Alberta: The Sheldon M. Chumit Foundation, 2002).
- \$ "Terrorism and the Risk Society" in R.J. Daniels, P. Macklem, and K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).
- \$ "Political Association and the Anti-Terrorism Bill" (with B. Cossman) in R.J. Daniels, P. Macklem, and K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).
- \$ "The Judiciary" in Janine Brodie, ed., *Critical Concepts: An Introduction to Politics*, 2nd ed. (Toronto: Prentice-Hall, 2002).
- \$ "Human Rights, Fundamental Differences? Multiple Charters in a Partnership Frame" in Roger

Gibbins and Guy LaForest, eds., *Beyond the Impasse* (Montreal: Institute for Research and Public Policy, 1998)

- \$ "The Constitutional Politics of Poverty" in J. Bakan and D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992)
- \$ "The Market and the Constitution" in D. Cameron and M. Smith, eds, *Constitutional Politics* (Toronto: James Lorimer & Co., 1992)
- \$ A Freedom of Expression and the Charter: Being Large and Liberal @ in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Carswell, 1991)

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- \$ A The Constitutional Strictures of the Multilateral Agreement on Investment @ (1999) 9(2) THE GOOD SOCIETY 90-96 reprinted in J. Kesley, ed., *International Economic Regulation [Library of Essays in International Law]* (Aldershot: Ashgate Publishing, forthcoming).
- \$ A Reconstructing Rights in the Spirit of a New Partnership @ POLICY OPTIONS (March 1998)
- \$ "Consumer Interests and Commercial Speech: A Comment on *RJR-McDonald v. Canada (A.G.)*" (1996) 30 U.B.C. LAW REVIEW 165
- \$ "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies" (1995) 7 CONSTITUTIONAL FORUM 16 (with Allan C. Hutchinson)
- \$ "Toward the Referendum: Campaign Contradictions" (1995) 6 CONSTITUTIONAL FORUM 126 (with Claude Denis)
- \$ "Canadian Constitutionalism and Sovereignty After NAFTA" (1994) 5 CONSTITUTIONAL FORUM 93
- \$ "The Charter and Canadian Political Life: Has Canada Been Captured by a 'Court Party'?" (1994) 178 INTER PARES 11
- \$ "The Delegation Power Past and Present" (1992) 3 CONSTITUTIONAL FORUM 82
- \$ A On Stacking the Senate @ 12:9 POLICY OPTIONS (November 1991) 34
- \$ A *Taylor v. Canada* (Human Rights Commission): Using Human Rights Legislation to Curb Racist Speech @ (1991) 2 CONSTITUTIONAL FORUM 90
- \$ A Supreme Court Reverses Itself on *Bhinder* @ (1990) 2 CONSTITUTIONAL FORUM 20
- \$ A *The Prostitution Reference: Sexual Communication and the Street* @ (1990) 2 CONSTITUTIONAL FORUM 14
- \$ A Auditor General Loses Battle Against Federal Cabinet: *Auditor General v. Minister of Energy, Mines & Resources* @ (1989) 1:1 CONSTITUTIONAL FORUM 1

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- \$ A Review of Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* forthcoming in UNIVERSITY OF TORONTO QUARTERLY
- \$ A Review of Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty ~~Visions~~ of Law and Peace* (1997) 36 ALBERTA LAW REVIEW 301.
- \$ A The Past We Allegedly Have Lost: A Review of A. Peacock, *Rethinking the Constitution* (1997) 22 QUEEN'S LAW JOURNAL 531
- \$ A Review of S. La Selva, *The Moral Foundations of Canadian Federalism* (1997) XXX CANADIAN JOURNAL OF POLITICAL SCIENCE 360
- \$ A Taking Documents Seriously (A Review Essay) (1991) 2 SUPREME COURT LAW REVIEW (2d) 555
- \$ A Review of Michael Mandel, *The Charter of Rights and the Legalization of Politics*, (1990) 28 ALBERTA LAW REVIEW 570

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- \$ "Canadian Constitutional Culture Post 9-11" for the volume *Justice, Culture and Terror*, L. Findlay, ed.
- \$ "Canadian Constitutionalism, the Rule of Law and Economic Globalization" for the volume *Participatory Justice in a Global Economy: The New rule of Law?* P. Hughes, ed.
- \$ "Revisability, Investor Rights and Discourse Theory: Rolling Back Economic Globalization?" submitted to CITIZENSHIP STUDIES special issue editor J. Brodie.
- \$ "Social Rights and Common Sense: *Gosselin* Through a Media Lens" for the volume *Social and Economic Insecurity: Rights, Social Citizenship and Governance*, G. Brodsky, S. Day, and M. Young eds. (forthcoming UBC Press).
- \$ Case Comment: "Equality Rights in Education - - Sexual Orientation -- Religion in public school board administration -- *Chamberlain v. Surrey School District No. 36*" to the International Journal of Constitutional Law (I-CON).
- \$ "Associational Rights, Religion and the Charter: Notes Toward a Pluralist Theory of the Charter"
- \$ A Implementing International Human Rights Commitments: The Difficulties of Divided Jurisdiction (prepared for the National Consultation on Human Rights: Human Rights Linkages Initiative, Senate of Canada, Ottawa, November 26-27, 1999).
- \$ A Criminal Libel and Political Dissent: The Case of *J.J. Harpell v. Sun Life Assurance*

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- \$ "Referendum Reckoning" NATIONAL POST (30 November 1999) A18.
- \$ AMMT Promises: How the Ethyl Corporation Beat the Federal Ban@The Parkland Post (Winter 1999), reprinted in ENCOMPASS MAGAZINE, Vol.3, No. 3 (February 1999) .
- \$ AReading the Quebec Secession Reference@UNIVERSITY OF ALBERTA FOLIO (4 September 1998)
- \$ A@Notwithstanding Clause: Lessons Learned From Invoking >Atom Bomb= of Charter@ EDMONTON JOURNAL (8 April 1998) A15
- \$ AWatching the Quebec Secession Reference@UNIVERSITY OF ALBERTA FOLIO (6 March 1998) 4
- \$ AInvestment Rules!The MAI and the Future of Canadian Democracy@THE PARKLAND POST (Winter 1998)
- \$ AThere's No Need for an 'Equal Access' Qualifier@THE GLOBE AND MAIL (10 May 1996)A1
- \$ AThe Pearson Bill Would Pass Legal Muster@THE GLOBE AND MAIL (2 January 1995) A12 (with Joel C. Bakan)
- \$ ACanada=s Social and Economic Union@ THE [KINGSTON] WHIG-STANDARD (9 October 1992) 9 reprinted in THE OTTAWA CITIZEN (17 October 1992)B4
- \$ AGetty's Rigid Senate Stand Not Shared by Most Albertans@ THE EDMONTON JOURNAL (5 April 1992) A7

Submissions to Government

- \$ Special Joint Committee on the Amendment to Term 17 of the Terms of Union of Newfoundland (20 November 1997)
- \$ Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-22, An Act Respecting Certain Agreements Concerning the Redevelopment and Operation of Terminals 1 and 2 at Lester B. Pearson Airport (April 1994) (with Joel Bakan)
- \$ Alberta Human Rights Commission Public Review (2 March 1994) (on behalf of the Edmonton Social Planning Council)
- \$ Alberta Special Select Committee on Constitutional Reform (31 May 1991)

Conference Presentations

- \$ "On the Absence (and Presence) of Constitutional Property Rights in Canada" presented to the Property Section, American Association of Law Schools Annual Meeting (Atlanta 2-6 January 2004).
- "Canadian Constitutionalism, the Rule of Law and Economic Globalization" to the conference

- “Participatory Justice in a Global Economy: The New Rule of Law?,” Canadian Institute for the Administration of Justice (Banff 17-19 October 2003).
- “Constitutional Culture Post 9-11” to the “Justice Culture and Terror” Conference, University of Saskatchewan (Saskatoon 11-13 September 2003).
 - “Investor Rights, Communicative Power and Constitutional Authorship” to the American Political Science Association Annual Meeting (Philadelphia 28-31 August 2003).
 - “Aboriginal Rights and Economic Globalization: Canadian Constitutional Law Meets the Global Rule of Law” to the international symposium “Social Responsibility of the Legal Profession in the Age of Globalization,” Faculty of Law, Osaka City University (4-6 July 2003) [paper delivered *in absentia*].
 - “Social Rights and Common Sense: *Gosselin* Through a Media Lens” to the Poverty and Human Rights Project Colloquium, Institute for Feminist legal Studies UBC (Vancouver 16-17 May 2003) [paper delivered *in absentia*].
- § AThe Vriend Case@to the Media/Supreme Court Round Table, Ottawa, Canada (8 November 2002).
- § AAssociational Politics and Charter Rights@at the Pluralism, Religion and Public Policy, McGill University, Montreal, Quebec (9-11 October 2002).
- § ATerrorism and the Risk Society@at the National Policy Research Conference - - Future Trends: Risk, Ottawa (23-25 October 2002).
- § AExchanging Constitutions: Constitutional Bricolage in Canada@at the Law and Society Association and Canadian Law and Society Association 2002 Joint Meetings, Vancouver, B.C. (May-June 1, 2002).
- § ATaking Investments Too Far: Expropriations in the Semi-Periphery@at the Law and Society Association and Canadian Law and Society Association 2002 Joint Meetings, Vancouver, B.C. (May 30-June 1, 2002).
- § AExchanging Constitutions: Constitutional Bricolage in Canada@at the Canadian Association of Law Teachers Meeting, Toronto, Ontario (May 2002).
- § AThe Difficulties of Local Citizenship in an Era of Economic Globalization@ to the conference on ACommunity Values in an Age of Globalization, @Sheldon Chumir Foundation for Ethics in Leadership (April 25, 2002).
- § ANAFTA, Constitutionalism and Recent Arbitral Jurisprudence@ to the conference on AGlobalism and its Challengers, @Mexico City (February 21, 2002)
- § ATerrorism and the Risk Society@to the conference on AThe Security of Freedom@(University of Toronto November 10, 2001).
- § APolitical Association and the Anti-Terrorism Bill@ (with B. Cossman) to the conference on AThe Security of Freedom@(University of Toronto November 10, 2001)

- \$ AAAlternative Pasts, Alternative Futures: Investment Rules and Economic Globalization@ to the Alternative Approaches to Legal Scholarship Graduate Seminar, Faculty of Law, University of Toronto (November 14,2001)
- \$ ANAFTA, Constitutionalism and Recent ArbitralJurisprudence@to the Association of the Bar of the City of New York, Committee on Foreign and Comparative Law (May 14,2001)
- \$ AThe Possibilities for Citizenship in an Era of Economic Globalization@The New School for Social Research (April 3,2001)
- \$ ANAFTA, Constitutionalism and Recent ArbitralJurisprudence@to the Tenth Regional Meeting of the American Society of International Law and Eleventh Annual Fulbright Symposium on International Legal Problems, Golden Gate University (30 March 2001)
- \$ ASpeech and Public Policy@for AGetting Beyond Soundbites: Censorship and Public Policy@at the Wolfson Centre for National Affairs, New School University (12 March 2001)
- \$ ASex Speech: Remarks on R v. *Sharpe* and *Little Sisters*@ to the Panel on Sexuality and the Supreme Court, Faculty of Law, University of Toronto (February 2001)
- \$ AInvestment Rules and the Rule of Law@to the >AlternativeApproaches to Legal Scholarship= Graduate Seminar, Faculty of Law, University of Toronto (November 2000)
- \$ AInvestment Rules and the Rule of Law@ to the INTELL (International Labour Law Group) Meeting, Faculty of Law, University of Toronto (September 2000)
- \$ AInvestment Rules and the Rule of Law@to the AGlobalism and its Challengers@SSHRC Project Meeting, August 2000, Simon Fraser University (August 2000)
- \$ AInvestment Rules and the Rule of Law@to the Labour Law Casebook Group, June 2000, Faculty of Law, University of Toronto (June2000)
- \$ "Federalism, Identities, and Nationalism", University of Alberta (10-12 December 1999, Edmonton).
- National Consultation on Human Rights: Human Rights Linkages Initiative (November 26-27,1999) Senate of Canada, Ottawa
- \$ AComparative Constitutional Law: Defining the Field@,Georgetown University Law Center (September 17, 1999 Washington D.C.)
- \$ "Public Aspects of Privatization" Geneva (July 1999) sponsored by Duke University, University of Geneva, and the University of Alberta
- \$ Law and Society Seminar Series, Green College, U.B.C. (29 October 1998, Vancouver)
- \$ International Canada-Israel Conference ALitigating the Values of a Nation@(10-12 May 1998 Tel Aviv)

- \$ Exploring Canada's Legal Past@ (7-9 May 1998, Toronto)
- \$ Parkland Institute First Annual Conference (7 November 1997, Edmonton)
- \$ Canadian Association of Law and Society (12 June 1997, St. John's)
- \$ Consortium on Globalization, Law and Social Sciences (4-6 April 1997, New York)
- \$ International Law and Society Association, (10-14 July 1996, Glasgow)
- \$ Consortium on Globalization, Law and Social Sciences (7-8 July 1996, Glasgow)
- \$ Canadian Association of Law Teachers, Constitutional Law Section (July 1995, Montreal)
- \$ Critical Legal Network conference on "The Politics of Class and the Construction of Identity" (10 March 1995, Washington, D.C.)
- \$ School of International Affairs, Carleton University, conference on "Toward the Third Millennium: The Role of the U.S. in the New North America" (3-5 November 1994, Ottawa)
- \$ Canadian Studies Program, Brock University, conference entitled "Re/Viewing Canada" (9-10 November 1994, St. Catharines)
- \$ Canadian Political Science Association and Canadian Law and Society Association joint session (commentator) (2 June 1992, P.E.I.)

Part III

Courses Taught

- \$ Constitutional Law of the United States (Fall 2000, Spring 2001)
- \$ Homelessness Bridge (Fall 2000)
- \$ Advanced Constitutional Law: Social and Economic Rights (Faculty of Law, University of Toronto, Spring Term, 2000).
- \$ Constitutional Law (Section and Small Group) (Faculty of Law, University of Toronto, Winter/Spring Term, 1999; Fall 2000; Winter/Spring Terms 2001-02)
- \$ Comparative Constitutional Law (Faculty of Law, University of Alberta, Winter Term, 1998)
- \$ The Law, Theory, and Politics of the Charter (Faculty of Law, University of Alberta, Winter Term, 1996)
- \$ Constitutional Law and History (Faculty of Law, University of Alberta, 1990-95)

Course Materials

- \$ Homelessness Bridge Materials (Fall 2000)
- \$ Advanced Constitutional Law: Social and Economic Rights (Spring 2000)

- \$ Comparative Constitutional Law (with Bruce P. Elman) (1998,1999) (major responsibility)
- \$ Law, Theory and Politics of the Charter (1996)
- \$ Constitutional Law and History, Law 435 Casebook 1991-92 (major responsibility)