

## NAFTA illegal?

### **CUPW, Council of Canadians, launch constitutional challenge against NAFTA in Ontario Superior Court.**

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*by Steven Shrybman*

On January 24, the Council of Canadians and the Canadian Union of Postal Workers (CUPW) launched a constitutional challenge against NAFTA's Chapter 11 rules before the Ontario Superior Court of Justice. This is the first time that a court will consider the constitutionality of international trade rules.

Chapter 11 of NAFTA, which allows foreign corporations to sue governments, if they feel that they are being discriminated against by that government's policies, is by far the most shocking and dangerous element of NAFTA, and a profound threat to Canada's sovereignty and the safety of its citizens.

Over the ten years of NAFTA, ten investor-state disputes have been launched against Canada. All of these were brought against Canada by US corporations, which claimed that Canada's laws to protect the public (for example, environmental regulations banning MMT, laws preventing the export of toxic waste, and laws protecting Canada's water) were discriminatory. Two of these have already been settled, at a tremendous cost to Canada.

**UPS claims that simply by having a public postal system, Canada is allowing unfair competition.**

This newest case was launched in response to the UPS claim that Canada Post violates Chapter 11 of NAFTA. This claim by UPS is one of the most egregious examples of how NAFTA puts corporate interests before the interests of Canadian citizens.

UPS claims that simply by having a public postal system, Canada is allowing unfair competition. This has enormous implications not just for Canada Post but for all public services, as by this logic, every public service from health care to education to the CBC could face similar lawsuits.

In court, the Council of Canadians and CUPW will argue that it is unconstitutional for the rules of NAFTA (created to advance corporate interests and profits) to supersede the laws of NAFTA member nations (made in the interest of the public good).

## **Background material:**

Because they share a conviction that NAFTA investor-State procedures represent a profound assault on the most basic building blocks of a sovereign and democratic society, 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 that 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 that NAFTA investor-State procedures, and the Canadian laws that implement them, are void and of no force and effect.**

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 [Canadians.org](http://Canadians.org) (url link below).

## **How NAFTA Rules are Being Used**

Several investor-State claims have been made against Canada. Two have settled in favour of the foreign investors; two have been decided, also in favour of the foreign investors; others are still outstanding. Often, simply the threat of an investor-State claim is sufficient to discourage government action, as was most recently the case when New Brunswick backed down from plans to establish a public auto insurance system.

In the SD Myers case, Canada was found to have been in breach of its obligations under NAFTA by refusing to allow PCB exports to the US for a brief period in the mid-1990s, even though it was obliged under an international environmental treaty, the Basel Convention, to minimize the export of such wastes. More astonishing is the fact that Canada was held liable for interfering with PCB exports, when importing such hazardous wastes was actually illegal under US environmental law. Nevertheless, and on these grounds, the Tribunal awarded this US- based hazardous waste company \$10 million in damages, even though it had never operated in Canada.

**If UPS wins, the result would likely create serious pressure to privatize postal and other public services.**

In the UPS v. Canada case, a claim for \$250 million against Canada by United Parcel Service of America Inc. (UPS) has far-reaching and potentially disastrous implications. UPS argues that Canada Post has somehow taken advantage of its letter-mail monopoly to support its parcel and courier delivery services. But in an era when many Crown Corporations and public agencies deliver at least some services in competition with the private sector, that argument could apply to virtually all public sector services – from water supply to health care. If UPS wins, the result would likely create serious pressure to privatize postal and other public services.

UPS also complains about the Canada Post Pension Plan, and an important cultural program that subsidizes the delivery of Canadian publications by Canada Post. UPS says both are unfair and demands damages on these grounds as well.

Because the case not only affects a vital public service, but also the direct interests of postal workers, both the Council and CUPW petitioned the arbitrating Tribunal that will determine the UPS claim for standing as a party to the dispute. Their petition was rejected by the Tribunal on the grounds that it had no authority to admit third parties to NAFTA investor-State disputes. While the Tribunal left the door open to receiving a brief written submission by the Council and CUPW, it offered no assurance that either would see all, or even any, of the evidence upon which its decision will be based.

The Council, CUPW and CCPI are firmly committed to ensuring that if large foreign corporations want to challenge Canadian public policy and law, they must do so in our courts, before our judges, and in accordance with Canadian law, including the Constitution.

For more information, please contact: Laura Sewell, Media Officer, Council of Canadians, Tel: 613.233.4487 ext.234 Cell: 613.795.8685 Fax: 613.233.6776 or on the web at [Canadians.org](http://Canadians.org) (link below).

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*Mr. Shrybman has served as a member of an expert advisory committee on the resolution of foreign investment disputes to the Federal Minister of International Trade, and as a member of Canada's Sectoral Advisory Group on International Trade – Environment.*

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