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COURT OF APPEAL FOR ONTARIO

GOUDGE, FELDMAN AND MACFARLAND JJ.A.

B E T W E E N :	)	
	)	
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 on his own behalf and on behalf of all members of the CHARTER COMMITTEE ON POVERTY ISSUES	)	**Steven Shrybman Steven Barrett and Martha Jackman for the appellants**
	)	
	)	**Donald J. Rennie for the respondent Attorney General of Canada**
Applicants (Appellants)	)	
- and -	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA	)	
Respondent	)	
	)	**Heard: June 19, 20 and 21, 2006**

On appeal from the judgment of Justice Sarah E. Pepall of the Superior Court of Justice dated July 8, 2005.

GOUDGE J.A.:

[1] The *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992,

Can. T.S. 1994 No. 2, ("NAFTA") was signed by Canada, the United States and Mexico in December 1992, and came into force on January 1, 1994. This Treaty provides that an investor from one of these three NAFTA Parties may initiate a claim to determine, through international arbitration, whether another NAFTA Party has violated its treaty obligations to treat foreign investors fairly.

[2] The issue in this case is whether, by agreeing in NAFTA to such tribunals to resolve these disputes, the Government of Canada has deprived Canadian superior courts of their authority to adjudicate upon matters reserved to them by s. 96 of the *Constitution Act 1867*, or has violated principles of judicial independence and the rule of law, or has infringed the *Charter of Rights and Freedoms.*

[3] At first instance, Pepall J. answered these questions in the negative. For the reasons that follow, I reach the same conclusion. I would therefore dismiss the appeal.

BACKGROUND

[4] The parties to NAFTA are the governments of Canada, the United States and Mexico. A principal objective of the Treaty is to secure and maintain access for exporters, service providers and investors from each of these countries to the markets of the other two.

[5] This appeal focuses on the investment provisions set out in Chapter 11 of NAFTA. Article 1101 provides that this Chapter applies to government "measures" maintained by a NAFTA Party relating to investors of another Party and to their "investments" in the territory of the first Party.

[6] "Measures" are defined in article 201 to include any law, regulation, procedure, requirement or practice. In article 1139, "investments" are equally broadly defined and include an enterprise, equity securities, debt securities and loans to an enterprise.

[7] The critical obligations of each NAFTA Party concerning investors of another NAFTA Party are found in Chapter 11, Section A, in articles 1102, 1103, 1104, 1105 and 1110. They provide that each NAFTA Party must treat those investors no less favourably than it treats its own investors or than it treats investors from any other nation, whichever is better; that each NAFTA Party must accord their investments fair and equitable treatment; and that each NAFTA Party is prohibited from expropriating these investments except for a public purpose, on a non-discriminatory basis, and after according due process and paying due compensation. These provisions read as follows:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1103: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accord, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1104: Standard of Treatment

1. Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"). except:

(a) for a public purse;

> (b) on a nondiscriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

[8] Section B of Chapter 11 establishes a mechanism for the settlement of investment disputes before an impartial tribunal. Article 1116 provides that an investor of a NAFTA Party may submit to arbitration a claim that another NAFTA Party has breached one of the obligations set out above and that the investor has incurred loss or damage as a result.

[9] As a condition precedent to submitting a claim, article 1121 provides that the investor must consent to arbitration in accordance with the procedure set out in NAFTA and must waive its right to take proceedings (except for injunctive or other relief not involving payment of damages) before any administrative tribunal or domestic court of any NAFTA Party with respect to the measure alleged to constitute the breach of obligation. This prevents the investor from seeking damages in respect of the same government measure both at arbitration under NAFTA and pursuant to the domestic law of any NAFTA Party.

[10] By Article 1122, each NAFTA Party has obliged itself to consent to the submission by an investor of a claim to arbitration in accordance with the NAFTA procedures.

[11] Article 1123 of Section B of Chapter 11 provides that the arbitration tribunal will consist of a nominee of the investor, a nominee of the NAFTA Party and an agreed presiding arbitrator. In other words, the tribunal is not established by the NAFTA Party alone.

[12] Article 1130 provides that the arbitration must be held in the territory of one of the NAFTA Parties, unless the disputants agree otherwise, and that the precise selection is to be made in accordance with the applicable arbitration rules.

[13] NAFTA spells out the law by which the arbitration tribunal is to adjudicate the dispute. Article 1131(1) reads:

> A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[14] NAFTA also clearly sets out the extent of the remedial authority of the arbitration tribunal. Article 1135 provides that it may award only monetary damages together with interest, and/or restitution of property. It may also award costs in accordance with the applicable arbitration rules. Article 1136 provides that the award has no binding effect except between the investor and the NAFTA Party, and only in respect of the particular case. In other words, the tribunal award cannot invalidate the impugned government measure or have any other effect on domestic law beyond the disputants and the particular case.

[15] Finally, Article 1136 requires that each NAFTA Party must provide for the enforcement of the award in its territory.

[16] Canada did this by enacting the *North American Free Trade Implementation Act*, S.C. 1993, c. 44 ("the Act"), which came into force on January 1, 1994. Section 4 of that Act sets out its purpose in clear language, namely to implement NAFTA. Section 10 says simply "[t]he Agreement is hereby approved". Section 50 amends the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) to ensure that its enforcement provisions apply to NAFTA arbitration awards. Thus, investors can enforce them against Canada in the domestic courts of this country.

[17] The arbitration rules under which a tribunal award is issued provide that the award is reviewable in the domestic courts of the place of arbitration. The Act makes the necessary changes to the federal commercial arbitration legislation to provide for this for awards from NAFTA arbitrations conducted in Canada. The grounds on which a domestic court can set aside such an award include incapacity, failure to receive notice of the proceedings, where the award is beyond the scope of the submission to arbitration, or is in conflict with the public policy of Canada.

THE PROCEEDINGS BELOW

[18] The appellants are the Council of Canadians, members of the Canadian Union of Postal Workers and members of the Charter Committee on Poverty Issues. They brought this application to challenge the constitutionality of Canada agreeing in NAFTA to set up arbitration tribunals to resolve claims by foreign investors that they had suffered damage due to government measures undertaken by Canada.

[19] The standing of the appellants to bring the application was not questioned at first instance and is not an issue in this court.

[20] In thorough and careful reasons, Pepall J. dismissed the application. She first addressed whether s. 96 of the *Constitution Act, 1867* applies at all to the investor–state arbitration mechanism in Chapter 11 of NAFTA. She found that it does not, for two

reasons. First, she found that NAFTA has not been made part of Canada's domestic law. Second, she held that, while standing is provided to the foreign investor, the obligations enforced by NAFTA tribunals are international commitments made in that Treaty by the three NAFTA Parties. She concluded that, as an international treaty, NAFTA is unaffected by s. 96 of the *Constitution Act, 1867*.

[21] The application judge went on to apply the tests set out in the s. 96 jurisprudence, in the event that that section should be found to reach these NAFTA tribunals. She concluded that there was no violation. The tribunals decide only whether a NAFTA Party has breached its Treaty obligations, a jurisdiction never exercised by superior courts. Moreover, since an aggrieved investor can complain about a government measure either to a domestic court or a NAFTA tribunal, she found that the latter did not have exclusive jurisdiction to hear disputes about contested government measures and hence could not be said to have usurped a core function of superior courts.

[22] Finally, the application judge found that the NAFTA provisions setting up these tribunals were not shown to violate any principles of constitutionalism, the rule of law, or the *Charter*, because they (1) do not infringe s. 96, (2) cannot invalidate domestic laws or government practices and (3) must operate in accordance with the rules of international law. She held that the mere establishment through NAFTA of the system of arbitration tribunals violates no *Charter* rights and any question of a *Charter* violation arising from a particular tribunal decision is premature.

[23] As a result, the application judge dismissed the application but ordered no costs since none were sought.

ANALYSIS

First Issue: Does S. 96 Apply To NAFTA Tribunals At All?

[24] The appellants first attack the finding of the application judge that s. 96 simply does not reach the tribunals set up under Chapter 11 of NAFTA. They argue that the Government of Canada cannot exempt these tribunals from being tested against the requirements of s. 96 merely by conferring jurisdiction on them through an international treaty. They say that the nature of investor–state adjudication conducted by these tribunals is sufficiently integrated with the domestic law of Canada through the *NAFTA Implementation Act* that they should attract the application of s. 96.

[25] In my view, the application judge correctly determined that the tribunals set up under Chapter 11 have not been incorporated into the domestic law of Canada which negates one possible basis for applying s. 96 to them. There is a clear and well-known distinction between parliamentary approval of a treaty on the one hand, and incorporation

of that treaty into Canadian domestic law on the other. See *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 (P.C.) (*Labour Conventions*). The *NAFTA Implementation Act* clearly does the former, and just as clearly does not purport to do the latter. The provision in the *Commercial Arbitration Act* that makes decisions, once rendered by NAFTA tribunals, enforceable in Canadian courts, goes no further than just that. That legislation cannot be seen as a determination by Parliament to incorporate into Canadian domestic law the entire investor–state adjudication process, including the tribunal's makeup, its procedures, its governing law and the defined limits within which it can act. Only the decision it has made is incorporated into domestic law. The *Commercial Arbitration Act* says no more than this, and it is not necessary to read any broader meaning into that legislation to make the resulting decisions enforceable in Canadian courts.

[26] Beyond whether NAFTA tribunals have been incorporated into domestic law, the broader question is whether tribunals set up by an international treaty signed by Canada, but not incorporated into domestic law, are *per se* immunized from scrutiny under s. 96, or whether these tribunals otherwise have sufficient links with the domestic law of Canada to warrant the application of s. 96 to them.

[27] The appellants argue that the government cannot immunize a tribunal from s. 96 merely by setting it up by treaty. This position has some attraction. It recognizes that s. 96 is a functional test that can be comfortably applied to tribunals whether set up by the executive act of treaty making or by domestic legislation, with a resulting benefit to the coherence of the law. However, for two reasons I do not propose to attempt a final answer to that question in this case.

[28] First, the appellants and the respondents seem to agree that the inquiry required by such an approach would focus on a determination of the nature of the disputes adjudicated by NAFTA tribunals. In essence, this is the same inquiry required by the first step of the three-part test established by *Reference re Residential Tenancies Act (1979) Ontario*, [1981] 1 S.C.R. 714 that would be used if s. 96 were applied to them. Since at least in the context of these tribunals, the same question must be asked whether one is asking whether s. 96 applies at all or is applying s. 96, it is probably better addressed in the more familiar context of the application of the s. 96 test, rather than as a separate threshold question of whether s. 96 applies at all.

[29] Second, it is unnecessary to address the threshold question in this case because, assuming that s. 96 does apply to them, NAFTA tribunals do not violate it. The wisdom of judicial minimalism suggests that the determination of whether a tribunal set up by international treaty is *per se* exempt from s. 96 is best left to a case where it must be decided.

The Second Issue: Do NAFTA Tribunals Violate Section 96?

[30] Section 96 of the *Constitution Act, 1867* reads as follows:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[31] Although framed as an appointing power accorded to the federal government, it is now well established that s. 96 was designed to ensure the independence of the judiciary and to provide some uniformity to the judicial system throughout the country. See, for example, *Reference re Amendments to the Residential Tenancies Act, (N.S.),* [1996] 1 S.C.R. 186 as para. 26 per Lamer C.J.C. Moreover, the application of s. 96 must be addressed in functional terms if it is to properly serve these purposes. See *McEvoy v. New Brunswick (A.G.),* [1983] 1 S.C.R. 704 at 718.

[32] The well-known test for determining whether a conferral of power on an inferior tribunal violates s. 96 was set out in *Reference re Residential Tenancies Act (Ontario), supra* become known simply as the *Residential Tenancies* test. It was reiterated in *Reference re Residential Tenancies Act (N.S.), supra*, by McLachlin J. (as she then was) at para. 74:

> It consists of three steps, represented by the following questions: (1) does the power conferred "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation? (2) if so, is it a judicial power? (3) if so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function? The first two steps may be seen as identifying potential violations of s. 96; the last step as setting out the circumstances in which the transfer of a s. 96 power to an inferior tribunal is "transformed" and hence constitutionalized by the administrative context in which it is exercised.

[33] Even if the conferral of the power in question does not transgress the *Residential Tenancies* test, if it constitutes the complete removal from the superior courts of a power that is integral to the core or inherent jurisdiction of those courts, it will nonetheless violate s. 96. This principle was laid out in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, particularly at para. 18.

[34] In applying the *Residential Tenancies* test, the application judge focused on the first of these three steps. In my view, the same focus is warranted in this court.

[35] As McLachlin J. said in *Reference Re Residential Tenancies Act (N.S.)*, *supra*, at paras. 75 and 76, this step is designed to determine whether the power conferred on the inferior tribunal is analogous to or in broad conformity with one exercised by the courts that became s. 96 courts at the time of Confederation. She said that this requires that the power be characterized by focusing on the type of dispute involved, rather than on a technical analysis of the remedies used by the tribunal. She also directed that in applying step one of the test the reviewing court look at the subject matter of the disputes being resolved and not the apparatus of adjudication used to resolve them.

[36] Keeping these considerations in mind, I have no doubt that the application judge was correct in concluding that the power conferred on NAFTA tribunals is not analogous to one exercised by superior courts at the time of Confederation.

[37] The type of dispute to be resolved by those tribunals is clearly revealed by Chapter 11 of NAFTA, their only source of power. The state obligations they enforce are set out in article 11. Article 1102 is the national treatment obligation, namely the obligation of each Party to accord investors of another Party treatment no less favourable than it accords to its own investors. Article 1103 is the most-favoured-nation treatment obligation, namely the obligation of each Party to accord investors of another Party treatment no less favourable than that accorded to investors of any other state. Article 1105 is the minimum standard of treatment obligation, that is, the obligation of each Party to accord investors of another Party fair and equitable treatment. Finally, article 1110 contains the obligation of each Party not to expropriate investments from investors of another Party except for a public purpose, on a non-discriminatory basis and in accordance with due process and with compensation.

[38] These are all state obligations mutually undertaken in NAFTA by the three Parties signing the Treaty. They derive only from the Treaty. They bind the three Parties only because they signed the Treaty. And they regulate only the conduct of each Party in adopting measures relating to investors from another Party. The NAFTA tribunals only have power to adjudicate upon the consistency of governmental measures with these state obligations. Alleged inconsistency with these state obligations are the causes of action that NAFTA tribunals have authority to determine.

[39] We have been shown nothing that suggests that there were any domestic causes of action known to the superior courts at the time of Confederation that could be said to be broadly analogous to these international obligations to accord national treatment, most-favoured-nation treatment, and fair and reasonable treatment to the foreign investors.

[40] The only arguable exception is the expropriation obligation contained in article 1110. However, this is but one particular obligation among those that are part of the scheme of powers given to NAFTA tribunals. That scheme is animated by the principle of protecting and promoting international investment throughout North America by giving investors of any Party the capacity to bring claims under NAFTA against another NAFTA Party. This is a quite different principle from the traditional domestic law of expropriation which is designed to regulate the government taking of domestic private property, not to facilitate the flow of international investment in North America. This difference is enough to constitute even the expropriation component of the powers of NAFTA tribunals a novel jurisdiction different from the expropriation jurisdiction of superior courts at the time of Confederation. This basis for finding compliance with s. 96 was set out in *Reference Re Residential Tenancies (N.S.)*, *supra*, at para. 94.

[41] In addition to the obligations enforced by these tribunals, the law they must apply and the limits on the effect of their decisions are also relevant at step one of the *Residential Tenancies* test. Article 1131 of NAFTA obliges the tribunals to decide the disputes before them in accordance with NAFTA, and the applicable rules of international law. Article 1136(1) ensures that the tribunals have no power to alter or affect domestic laws through their awards by providing that these awards have no binding effect except between the disputing parties and in respect of the particular case. By contrast, the process of superior courts are shaped by domestic law and clearly carry effects beyond the immediate litigants and the particular case.

[42] In summary then, these tribunals have been given the power to adjudicate only upon alleged breaches of the international obligations mutually undertaken by treaty by the NAFTA Parties, obligations which have no counterpart in pre-1867 domestic law in Canada. They are to do so using international law principles not domestic law, and they are to issue awards which have no effect beyond the disputing parties and the particular case. In all these respects there is no broad conformity with a s. 96 court power.

[43] However, the appellants argue that several other aspects of the arbitration system set up by Chapter 11 compel the opposite conclusion.

[44] First, they say that it is individual foreign investors who have the sole right to pursue claims against Canada under Chapter 11 and that this is broadly analogous to the historic right of individual foreign investors to sue the government in superior court for interference with property or contractual rights. In each case, the claimant is an individual who seeks a remedy against government.

[45] I do not find this analogy apt. It is true that under Chapter 11 individual investors can seek to enforce state obligations to treat foreign investors in certain ways that the NAFTA Parties have undertaken to each other through the Treaty. It seems to me that these obligations are not just state-to-investor, but have a state-to-state dimension as well.

They reflect the commitments of NAFTA Parties to each other as well as to individual foreign investors. Even if it could be said that the result is in part "rights" held by individual investors, they are not rights sourced in contract, legislation or domestic common law. They exist only so long as the NAFTA parties agree they should. There is no analogy here to investor rights of property or contract historically enforceable in the superior courts.

[46] Second, the appellants argue because article 1121(1)(b) requires a foreign investor who seeks to utilize the Chapter 11 procedures to waive the right to seek damages before a domestic court with respect to the government measure in question, the subject matter of the dispute before the tribunal must be the same as that before the domestic court because if not, a waiver would not be required.

[47] Again, I do not agree. The only common factor is the government measure. However, the subject matter of the dispute before the NAFTA tribunal is not the government measure itself, but whether that measure is consistent with the international obligations in Chapter 11, something which historically was not within the purview of the superior courts.

[48] Third, the appellants say that the enforceability of NAFTA tribunal awards in domestic courts shows a broad conformity with s. 96 courts. However, in my view, the enforceability of an award resolving such a dispute is not helpful in characterizing the dispute itself. Rather, enforcement is a consequential matter following the resolution of that dispute by the NAFTA tribunal, and not a basis for describing the nature of that dispute.

[49] Finally, the appellants argue that NAFTA tribunals have several times reviewed the decisions of domestic courts of other NAFTA Parties and that this is analogous to the appellate powers of s. 96 courts.

[50] Here too I do not agree. As the application judge found, there have been no cases in which a NAFTA tribunal has constituted itself as a court of appellate jurisdiction over determinations of any Canadian court. Moreover, in the instances cited by the appellants, the tribunals appear to assess the decisions of domestic courts against the state obligations found in Chapter 11 rather than against the standards applied by domestic appellate courts. They were not purporting to act as appellate courts.

[51] In the end, I am confirmed in my view that the application judge correctly answered in the negative the historical inquiry mandated by the first step of the *Residential Tenancies* test. Like her, I therefore see no need to examine steps two and three of that test.

[52] The appellants go on to argue that even if NAFTA tribunals do not violate the *Residential Tenancies* test, nonetheless, they offend s. 96 because they remove a core jurisdiction from the superior courts, as discussed in *MacMillan Bloedel*, *supra*.

[53] They say that individual investors can use NAFTA tribunals to review governmental action, thereby eliminating a core function of superior courts, namely the judicial review of government action. The easy answer to this is that article 1121 expressly contemplates that such investors can elect to proceed in the domestic courts rather than complain to a NAFTA tribunal. Thus, it cannot be said that there is any removal of jurisdiction from those courts.

[54] The appellants also say that NAFTA tribunals constituted outside Canada cannot be judicially reviewed by s. 96 courts, thus removing that core function from those courts.

[55] Again the answer is straightforward. The judicial review jurisdiction of s. 96 courts is with respect to tribunals constituted under domestic law for alleged violations of domestic law. It has never been a part of the core jurisdiction of superior courts to review international tribunals conducted offshore and acting under international law.

[56] Thus I conclude that NAFTA tribunals do not violate either the *Residential Tenancies* test or the *MacMillan Bloedel* test, and hence do not offend s. 96.

The Third Issue: Do NAFTA Tribunals Violate The Principles Of Judicial Independence And The Rule Of Law?

[57] This argument turns on the allegation that NAFTA tribunals have a supervisory role over domestic courts resulting in a loss of public confidence in those courts. I have already dealt with this argument in the context of the *Residential Tenancies* case, *supra*, and the answer in this context is the same. No NAFTA tribunal has purported to exercise an appellate jurisdiction over a domestic court. The appellants acknowledge that NAFTA tribunals have no *de jure* authority to overrule superior court decisions. Even if those tribunals were to assess the work of superior courts against the obligations contained in Chapter 11 and did so critically, I have no doubt that domestic courts would nonetheless retain full public confidence, just as they do in the face of academic or media criticism.

Fourth Issue: Do NAFTA Tribunals Violate Constitutional Values Such As Those Reflected In ss. 7 And 15 Of The *Charter Of Rights And Freedoms*?

[58] The appellants do not argue that any particular decision of a NAFTA Tribunal has had this effect, but rather that the mere setting up of this decision-making scheme does so.

[59] I see no basis for this argument. The appellants can point to no tribunal decision that impairs the constitutional or *Charter* rights of any individual Canadian. Indeed they do not allege that setting up the scheme has caused harm to anyone. They simply worry that it will. However mere speculation of possible harm is not enough. I therefore agree completely with the application judge that since any harm to anyone's *Charter* values said to be caused by the creation of this scheme is merely speculative, the appellants' complaint is premature.

[60] In the result, I would dismiss the appeal. No party sought costs and none are ordered.

RELEASED: November 30, 2006 "STG"

"S.T. Goudge J.A."
"I agree K. Feldman J.A."
"I agree J. MacFarland J.A."