SCC FILE NO.:

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Ontario)

BETWEEN:

BRUCE PORTER ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE CHARTER COMMITTEE ON POVERTY ISSUES

APPLICANTS
(APPELLANTS)

- AND -

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

RESPONDENT
(RESPONDENT)

APPLICATION FOR LEAVE TO APPEAL
(Bruce Porter et al., Applicants)
(Pursuant to Section 40 of the *Supreme Court Act,* R.S.C. 1985 c. S.-26, as amended)

Martha Jackman
University of Ottawa (Common Law Section)
Faculty of Law, 57 Louis Pasteur St.
PO Box 450, Stn. A
Ottawa, On, K1N 6N5
Tel: (613) 562-5800
Fax: (613) 562-5124
Email: mjackman@uottawa.ca
mmajor@langmichener.ca

Counsel for Bruce Porter on his own behalf and on for behalf of all the members of the Charter Committee on Poverty Issues

Marie-France Major
Lang Michener LLP
Suite 300
50 O'Connor Street
Ottawa On, K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191
Email:

Ottawa agent to counsel the Applicant

Donald J. Rennie
Department of Justice Canada
Civil Litigation Section
Room 1112
234 Wellington Street, East Tower
Ottawa, On, K1A 0H8

Tel: (613) 957-4863
Fax: (613) 954-1920

Counsel for the Respondent Her Majesty the Queen

AND TO:

Steven Shrybman
Steven Barrett
Sack Goldblatt Mitchell LLP
20 Dundas Street West, Suite 1100
Toronto, On. M5G 2G8
Tel: 416-979-6422
Fax: 416-591-7333
email: stevenshrybman@sgmlaw.com
fionacampbell@sgmlaw.com

Fiona Campbell
Sack Goldblatt Mitchell LL
30 Metcalfe St.
Suite 500
Ottawa, On. K 1P 5L4
Tel: 613-482-2451
Fax: 613-235-3041
email:

Counsel for 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

Ottawa agent to Counsel for 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.

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MEMORANDUM OF ARGUMENT

PART I: STATEMENT OF FACTS

A. The *Charter* Claim in this Case Raises a Novel Issue of Critical Public Importance Warranting Consideration by This Court

1. This case provides the Court with its first opportunity to consider whether the investor-state adjudicative regime established by Chapter 11 of the *North American Free Trade Agreement* ("NAFTA") respects the requirements of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and the principle of constitutionalism.[1] It raises the critical and unresolved question of whether the *Charter* requires the Government of Canada to ensure that *Charter* rights are protected when it negotiates and implements new adjudication regimes under international trade and investment agreements which impact on *Charter* rights.

2. Beginning with its landmark decision in *Operation Dismantle,* this Court made it clear that treaties negotiated by the Executive must conform with the *Charter*.[2] The Court has not, however, considered or determined what this requirement means in the context of international trade agreements, in this case, the investor state adjudication regime under NAFTA Chapter 11. At the urging of the Respondent, the courts below held that, in attempting to superimpose principles of constitutionalism and compliance with *Charter* rights and values on the NAFTA investor-state regime, the Applicants were seeking to apply domestic constitutional norms to international treaty law. The Respondent argued, and the Courts below agreed, that NAFTA Chapter 11 occupied a separate sphere of law that is properly subject to international, rather than domestic law.[3]

3. Protecting *Charter* rights in the adjudication of treaty law does not require that international bodies apply the *Charter*, and this is not what the Applicants have demanded in this

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[1] The Charter Committee on Poverty Issues (CCPI) is seeking leave to appeal with respect to the decision of the Court of Appeal with respect to the principle of constitutionalism and the alleged infringement of sections 7 and 15 of the *Charter* only. A separate application is being submitted by CUPW and the Council of Canadians with respect to section 96 of the *Constitution Act, 1982*.

[2] *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at paras. 28, 50 **[Tab 7V]**; *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at para. 42 **[Tab 7D]**.

[3] Decision of the Ontario Superior Court, *Application Record*, at paras. 58, 65 **[Tab 4A]**; Decision of the Court of Appeal for Ontario, *Application Record*, at paras 22, 42, 58-59 **[Tab 4C]**.

case. The Applicants submit that *Charter* compliance can be assured by requiring that claims against government 'measures' relating to the enjoyment of *Charter* rights be addressed and resolved within domestic courts, subject to the *Charter*.[4] Alternatively, *Charter* compliance can be secured by ensuring that *Charter* rights are protected through explicit incorporation of international human rights norms that offer comparable protection, in international adjudication, to that guaranteed by the *Charter* in the domestic sphere.[5] Various combinations of these approaches have been proposed for NAFTA Chapter 11 and developed in other jurisdictions.[6] In the Applicants' submission, the NAFTA investor state adjudication regime is unconstitutional because it places claims that engage *Charter* rights before a decision-making body that lacks the competence or authority to protect *Charter* rights and values and/or comparable international human rights norms.

4. Alex Neve, Secretary General of Amnesty International Canada, states in his affidavit in support of this application, that the appeal raises "one of the most critical contemporary issues of human rights and constitutional protections in Canada and internationally."[7] He notes that concerns about the need to protect fundamental human rights in trade and investment regimes have been expressed by United Nations bodies dealing with human rights, including the U.N. General Assembly, the U.N. High Commissioner for Human Rights, the U.N. Human Rights Commission and the U.N. Sub-Commission for the Promotion and Protection of Human Rights.[8] Particular concerns have been raised specifically with respect to the need for Canada to ensure the primacy of fundamental human rights in NAFTA Chapter 11 adjudication.[9] |

5. The effect of the Court of Appeal decision in this case is to restrict the scope of *Charter* review to particular Chapter 11 tribunal awards only. The critical issue of widespread concern – the failure of the investor-state regime more generally to reflect, respect or protect fundamental human rights that are part of the Canadian Constitution – was found to be inherently 'premature' and speculative. The implications of such a restriction of *Charter* review of the investor-state

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[4] Para. 28 below.
[5] Para. 29 below.
[6] Para. 30 below; Porter, B. ""Canadian Constitutional Challenge to NAFTA Raises Critical Issues of Human Rights in Trade and Investment Regimes" (2005) 2(4) *ESC Rights Law Quarterly* 1. **[Tab 7W]**
[7] Affidavit of Alex Neve, *Application Record*, at para. 8. **[Tab 2]**
[8] Ibid, para. 6.
[9] Ibid, para. 7.

regime are immense, depriving those who rely on the protection of the *Charter* of any effective remedy when their rights are undermined by new forms of treaty adjudication. As such, this case urgently warrants review by this Court.

B. The NAFTA Chapter 11 Investor-State Dispute Adjudication Regime

6. Unlike previous international trade agreements entered into by Canada, which relied on state-to-state dispute resolution procedures and 'directions' to rescind or repeal impugned measures, NAFTA Chapter 11 allows individual foreign investors to "enforce or determine any right or obligation" by way of individual-to-state claims and judicially enforceable damage awards.[10] Investors from the U.S. or Mexico are able to challenge any government 'measure' in Canada that is alleged to interfere with any investor right under Chapter 11, including the right not to be subject to any measure that "directly or indirectly" expropriates an investment or is "tantamount to … expropriation."[11]

7. Claims by individual investors under NAFTA Chapter 11 are adjudicated by *ad hoc* international tribunals ("NAFTA tribunals") authorized to determine whether an impugned 'measure' is contrary to the provisions of NAFTA and, if so, the appropriate award of compensatory damages to be paid by the Government of Canada to the aggrieved investor. The term "measure" is defined broadly to include "any law, regulation, procedure, requirement or practice" and any measure may be challenged under NAFTA as long as it is "related to an investment"[12] "Investment" is also defined broadly, to include an "enterprise, equity securities, debt securities, and loans to an enterprise." The breadth of these definitions is such that "investors quite easily may structure their business operations in a manner that ensures that those operations will qualify as an investment and will be entitled to protection under Chapter 11."[13] Any public policy measure that has financial implications for investors in Canada is therefore vulnerable to challenge under the investor-state procedures.

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[10] 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, 32 I.L.M. 289 (entered into force 1 January 1994), Article 6 [NAFTA].
[11] NAFTA, Articles 1102 - 1110.
[12] Decision of the Ontario Superior Court, *Application Record*, at para. 4 **[Tab 4A]**
[13] Afilalo, "Constitutionalism Through the Back Door" at 21. **[Tab 7A]**

8. Monetary damages awarded for government measures found to contravene NAFTA's provisions are often in the range of millions of dollars. This, too, contrasts with domestic constitutional norms in Canada, where monetary damages for the effects of legislation or policy found to contravene the *Charter* are rarely awarded, on the grounds that such awards may "interfere with the effective operation of government."[14] The U.S. scholar Ari Afilalo accurately describes the impact of the new framework for the adjudication and enforcement of trade law introduced in NAFTA Chapter 11 as "constitutionalization through the back door":

> Chapter 11 fundamentally transforms the context of litigation in international trade law by placing its enforcement in the hands of individuals, presumably motivated only by their economic interests, with a ready supply of legal counsel. Successful plaintiffs are entitled to damages for their lost profits or other impairment of value to their "investment[s]". Instead of facing compliance with an order directing the suspension of a national law, the defendant government must pay compensation for the harm it has caused by failing to obey international law … the magnitude of such exposure has the potential to be staggering.[15]

Expert evidence provided in this case by pre-eminent scholars in the field, Professors Schneiderman, Clarkson and Sornarajah, all agree with this characterization of the transformative nature of NAFTA investor-state adjudication, and its "constitutional" or "supra-constitutional" effect on the accountability of Canadian governments to legal and constitutional norms.[16]

C. Interpretations of NAFTA Provisions by NAFTA Tribunals

9. The interpretation and application of Chapter 11 by NAFTA tribunals has increased concerns about its potential scope and effects on constitutional rights. As noted by Peppal J. at

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[14] *Guimond v. Quebec (Attorney General),* [1996] 3 S.C.R. 347 at para. 15. **[Tab 7M]**

[15] Afilalo, "Constitutionalism Through the Back Door"at p. 4 **[Tab 7A]**; Affidavit of Professor M. Sornarajah ["Sornarajah Affidavit"], *Application Record*, at para. 71. **[Tab 6D]**

[16] Sornarajah Affidavit, *Application Record*, at paras 64-69 **[Tab 6D]**. Affidavit of Professor Stephen Clarkson {"Clarkson affidavit"] *Application Record,* at paras 17-42 **[Tab 6E]**; Affidavit of Professor David Schneiderman ["Schneiderman Affidavit"] *Application Record,* at paras 15-19. **[Tab 6B]**

trial: "Very broad definitions have been given in some cases to key terms such as "measure", "investment" and "a measure tantamount to expropriation."[17]

10. For example, in a challenge by a U.S. investor to municipal zoning in Mexico that prohibited the development of a landfill site for hazardous waste, a NAFTA tribunal held that "expropriation" within the meaning of NAFTA includes: "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[18] In reviewing this decision, Justice Tysoe of the B.C. Supreme Court expressed concern about the "extremely broad definition of expropriation" adopted by the tribunal, but held that this issue of interpretation was a matter for the NAFTA tribunal to decide.[19] As documented by Professor Schneiderman and others, the interpretation and application of NAFTA's provisions by tribunals has been largely informed by U.S. constitutional jurisprudence and the "takings" rule, and is fundamentally at odds with the architecture of Canada's *Charter* and this Court's jurisprudence.[20]

D. No Protection for Fundamental Human Rights in NAFTA Chapter 11

11. Despite its broad application to virtually any form of regulation affecting investments, NAFTA Chapter 11 does not provide Canadian governments protection from investor challenges to governmental measures on the grounds that the challenged measures may be necessary or beneficial to the enjoyment of *Charter* protected rights or comparable rights protected under international human rights law. There is no provision directing a NAFTA tribunal to consider whether a measure ought to be exempt from challenge on the basis that it is integral to the protection of fundamental human rights.[21]

12. There is no provision in Chapter 11 that safeguards equality promoting programs for women or other disadvantaged groups, including employment equity programs, from challenge

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[17] Decision of the Ontario Superior Court *Application Record*, at para. 31. **[Tab 4A]**
[18] *Metalclad v United Mexican States*, ICSID Case No. ARB 97/1 at para. 103. **[Tab 7S]**
[19] *Mexico v. Metalclad Corp.*, [2001] B.C.J. No. 950 (B.C.S.C.) at para. 99 **[Tab 7T]**; Schneiderman Affidavit, *Application Record*, at para. 9. **[Tab 6B]**
[20] Schneiderman Affidavit, *Application Record*, at paras. 16-18 **[Tab 6B]**; David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 U.T.L.J. 499 at 500-501; 513-515; 535-537 [Schneiderman, "NAFTA's Takings Rule"]. **[Tab 7AA]**
[21] Schneiderman Affidavit, *Application Record*, at para. 5. **[Tab 6B]**

under various provisions of NAFTA, such as the prohibitions on performance requirements and indirect expropriation.[22] While protection is extended to foreign investors against discriminatory treatment, there is no provision to shield governments in Canada from challenges by investors to government measures that promote equality and non-discrimination in relation to disadvantaged groups.

E. Measures Subject to Challenge Under NAFTA's Investor-State Regime

13. Measures that can be challenged as contrary to NAFTA Chapter 11 include measures for the protection of human life or health; safeguards from hazardous chemicals and air pollution; measures to protect universal public services; health promotion and protection measures; restrictions on advertising designed to protect life or the interests of vulnerable groups; employment equity requirements; or provisions to provide work for locally disadvantaged workers.[23]

14. With only three Chapter 11 claims against Canada decided to date, there remains some uncertainty as to how NAFTA tribunals will interpret and apply NAFTA's provisions in these diverse areas. However, based on a review of the three claims against Canada that have been arbitrated and other claims launched against Canada and other NAFTA parties, Peppal J. was able to observe that: "the Party measures that are being assailed in the Chapter 11 investor state proceedings span a broad spectrum of actions which is in keeping with the broad definition given in the NAFTA to "measure." [24]

15. The claims against Canada that have been adjudicated so far also demonstrate the extent to which investor claims under Chapter 11 may challenge measures that are linked to the enjoyment of *Charter* rights and highlight the inability of the Canadian government to successfully argue that such measures should be considered as valid public policy measures rather than as measures "related to investment." In the *Ethyl Corporation* case (challenging legislation prohibiting the import and distribution of a toxic manganese based fuel additive), Canada described the contested measure in pleadings before the NAFTA tribunal as being

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[22] Lucie Lamarche, *Retaining Employment Equity Measures in Trade Agreements* (Ottawa: Status of Women Canada, 2005) [Lamarche] at pp. 57-62. **[Tab 7Q]**
[23] Sornarajah Affidavit, *Application Record*, at paras 45 – 54 **[Tab 6D]**; Lamarche, pp. 57-62. **[Tab 7Q]**
[24] Decision of the Ontario Superior Court, *Application Record*, at para. 17. **[Tab 4A]**

integral to combating the detrimental effects of air pollution which "reduce quality of life, increase hospital admissions, treatment and cause premature death."[25] Canada's motion to dismiss the *Ethyl Corporation* claim on the grounds that the impugned regulation was an environmental and public health measure, and not one "relating to investment" failed, however, and Canada settled the case, revoking the ban and paying Ethyl Corporation approximately $20 million.[26]

16. In the *S.D. Myers* case, an American hazardous waste company challenged a Canadian ban on the export of hazardous wastes containing PCB's. Again, Canada argued that the impugned regulation was not a measure "relating to investment" but a legitimate measure to control hazardous waste, submitting that "PCB's are subject to stringent Government regulation and control in the public interest due to their extremely hazardous nature."[27] Canada also argued that the export ban was necessary for compliance with the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*. [28] Again, Canada's argument that the measure ought to be exempt from challenge under NAFTA Chapter 11 failed and the tribunal awarded damages of $6,050,000 against Canada and costs of $850,000 to S.D. Myers.[29]

F: The Chilling Effect of Potential NAFTA Challenges

17. In addition to the record of decided cases against Canada, there is compelling evidence on the record that threatened and potential NAFTA investor challenges under Chapter 11 are having a profound impact on Canadian public policy directly affecting the welfare of disadvantaged groups, as well as interests related to the protection of life and security of the person generally in Canada.

18. The expert witnesses in this case have documented, for example, how the Government of Canada abandoned proposed plain packaging legislation, designed to reduce tobacco

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[25] *Ethyl Corp v. Canada* Statement of Defence (November 27. 1997) online at <http://www.dfait-maeci.gc.ca/tna-nac/disp/ethyl_archive-en.asp> at para. 41. **[Tab 7G]**
[26] Sornarajah Affidavit, *Application Record*, at para. 73 **[Tab 6D]**; Decision of the Ontario Superior Court *Application Record*, at para. 19. **[Tab 4A]**
[27] *S.D. Myers v. Canada*, Statement of Defence (June 18, 1999) online at <http://www.dfait-maeci.gc.ca/tna-nac/disp/SDM_archive-en.asp> at para. 58. **[Tab 7Y]**
[28] Schneiderman Affidavit, *Application Record*,at para.12. **[Tab 6B]**
[29] Schneiderman Affidavit, *Application Record*, at para. 12 **[Tab 6B];** Decision of the Ontario Superior Court *Application Record*, at para. 20. **[Tab 4A]**

consumption and smoking-related illnesses and deaths, after cigarette companies threatened to launch a Chapter 11 challenge to recover "claims for compensation of hundreds of millions of dollars" in the event such a law was enacted.[30]

19. Steps to privatize health care funding or delivery that may subsequently be found to have discriminatory consequences for disadvantaged groups, cannot be reversed without risking Chapter 11 challenges by investors who may be adversely affected. Recommendations by the Romanow Commission on the Future of Health Care in Canada, to expand the public system in areas such as home care or prescription drugs in which foreign investment already exists, in order to better meet the needs of disadvantaged groups, are difficult to implement because of the threat of costly Chapter 11 awards. The prospect of Chapter 11 challenges by drug insurance companies has been identified as a significant deterrent factor in relation to the introduction of a national pharmacare plan, despite the critical need for such a program among people with disabilities and other economically disadvantaged groups.[31] While the Respondent and the courts below characterized this evidence as "speculative", Professor Schneiderman correctly points out that "it would be unreasonable to conclude that Ministers and other government officials are indifferent to such risks."[32]

G: Decisions of the Courts Below

20. At trial CCPI alleged that NAFTA's investor-state procedures violate the principle of constitutionalism and infringe rights under sections 7 and 15 of the *Charter*. CCPI alleged that, while investor-state procedures authorize challenges to government regulatory and protective

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[30] Clarkson Affidavit, *Application Record,* at para. 47 **[Tab6E]**; Schneiderman Affidavit, *Application Record,* para. 11 **[Tab 6B]**; Schneiderman, "NAFTA's Takings Rule" at 523-526; Samrat Ganguly, "The Investor-State Dispute Mechanism and a Sovereign's Power to Protect Public Health" (1999) 38 Colum. J. Transnat'l L. 113 [Ganguly, "Investor-State Dispute Mechanism"]. **[Tab 7AA]**

[31] Tracey Epps & David Schneiderman, "Opening Medicare to our Neighbours or Closing the Door on a Public System? International Trade Law Implications of Chaoulli v. Quebec" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Care in Canada* (Toronto: University of Toronto Press, 2005) 369 at 377-78 [Epps & Schneiderman, "Opening Medicare"] **[Tab 7I]**; Jon R. Johnson, *How Will International Trade Agreements Affect Canadain Health Care?* Discussion Paper No. 22 (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at 16, 30-31 [Johnson, "International Trade Agreements"] **[Tab 7O]**; Tracey Epps & Colleen M. Flood, "Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of NAFTA for Medicare" (2002) 47 McGill L.J. 747 at paras. 64-67 **[Tab 7H]**; Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Commission on the Future of Health Care in Canada, 2002) at 171, 189. **[Tab 7C]**

[32] Schneiderman Affidavit, *Application Record,* at para. 12. **[Tab 6B]**

measures that directly impact on the enjoyment of section 7 and 15 *Charter* rights, NAFTA tribunals have no competence or authority to ensure that these *Charter* rights are considered or protected. CCPI alleged that the denial of the protection of these *Charter* rights in the investor-state regime itself constituted an infringement of the *Charter* and of the principle of constitutionalism, which guarantees the supremacy of constitutional rights in all areas of law.

21. Peppal, J. dismissed these allegations. With respect to the principle of constitutionalism, she agreed with the Respondent's position: "that the Applicants are seeking to require international tribunals to interpret international treaties to which Canada is a party by reference to Canadian constitutional values and principles, a position at odds with international law regarding treaty interpretation." [33]

22. Peppal, J. also dismissed CCPI's *Charter* allegations on the basis that they were "premature". She held that, to avoid prematurity: "the *Charter* argument could proceed down two avenues. It could be argued that a NAFTA tribunal should consider the *Charter* in a particular case. In addition, it might be argued that government legislative or administrative action in response to a NAFTA tribunal decision might be subject to the *Charter*."

23. The Court of Appeal upheld the decision of the Superior Court of Justice that the *Charter* arguments were premature, on the basis that it had not been shown that any individual tribunal decision had infringed any individual's *Charter* rights, and that alleged harm emanating from the creation of the investor-state regime itself was "merely speculative."[34]

PART II: QUESTIONS IN ISSUE

24. The present case raises issues that are of profound national significance and thereby warrant consideration by this Court:

a. Did the courts below err in finding that CCPI's argument that NAFTA's investor-state dispute procedures infringe section 7 and 15 of the *Charter* is premature?

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[33] Decision of the Ontario Superior Court *Application Record*, at paras 58, 64-65, 68. **[Tab 4A]**
[34] Decision of the Ontario Court of Appeal, *Application Record*, at paras 58-59. **[Tab 4C]**

b. Does the failure to ensure adequate protection, in NAFTA Chapter 11 investor-state adjudication, of rights to "life, liberty and security of the person", and of equality rights, infringe sections 7 and 15 of the *Charter*?

c. If sections 7 and 15 of the *Charter* are infringed, is this rights violation justified under section 1 of the *Charter*?

d. If the investor-state regime violates either sections 7 or 15 of the *Charter* and is not justified under section 1, what is the appropriate remedy?

The evidence on the record shows that these questions are of profound public importance, relating to the preservation of government policy and programs which protect life and health and the well-being of vulnerable groups.[35] Further, these questions are fundamental to the integrity and effectiveness of the protections of the *Charter* in an era of increased globalization of law. As such, they warrant consideration by this Court.

PART III: ARGUMENT

A. The Nature of Charter Review Sought by CCPI

25. The nature and implications of CCPI's *Charter* and constitutionalism claims have been mischaracterized by the Respondent and misunderstood by the courts below. CCPI does not propose that international adjudicative bodies in general, or NAFTA tribunals in particular, must apply domestic constitutional provisions in order to comply with the principle of constitutionalism or the *Charter*. The Applicants have emphasized, in pleadings before both courts below, that NAFTA tribunals have no authority or competence to apply the *Charter*, and have not suggested that tribunals should have such powers. CCPI would not, therefore, argue "that a NAFTA tribunal should consider the *Charter* in a particular case."[36]

[35] Paras 13-19 above.
[36] Decision of the Ontario Superior Court, *Application Record*, at para. 64. **[Tab 4A]**

26. The fact that the *Charter* cannot be expected to be applied by NAFTA tribunals does not, however, mean that courts cannot review the terms, operation and effects of NAFTA investor-state dispute adjudication against the requirements of the *Charter*. This Court has made it clear that the Executive action of negotiating the terms of treaties and international agreements is subject to *Charter* review, and that treaties "must conform with the requirements of the *Charter*, including the principles of fundamental justice."[37]

27. There are a number of different ways in which the Government of Canada could, and should, have ensured that the unprecedented adjudication procedure put into place by NAFTA Chapter 11 adequately protected *Charter* rights and values, and thereby respected the requirements of the *Charter*, without requiring that NAFTA tribunals themselves apply the *Charter*.

28. One possible approach would be to ensure that constitutional issues arising in NAFTA disputes are adjudicated by domestic courts rather than before NAFTA tribunals. In addition to the section 96 concerns raised by CUPW and the Council of Canadians in this case, the evidence outlined above as to the types of matters that are subject to investor-state adjudication raises additional *Charter* concerns about the delegation of the adjudication of these kinds of claims outside of domestic courts, where decision-making is informed by and consistent with *Charter* rights and values. Altering the investor-state procedures so that domestic courts are charged with determining the appropriate scope and application of NAFTA provisions has been advocated by Professor Ari Afilalo. He suggests that when Canada argues that a measure linked to the protection of life and health is a valid public policy measure rather than one "related to investment" (as in the *Ethyl Corporation* or *S.D. Myers* cases), this question should be resolved before a domestic court, which could consider and address the constitutional and public policy dimensions of the question.[38]

29. Alternatively, *Charter* rights might have been protected by way of an explicit guarantee that the primacy of fundamental human rights under international law must be respected in the adjudication of NAFTA Chapter 11 claims. The rights to "life, liberty and

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[37] *Canada v. Schmidt*, [1987] 1 S.C.R. 500 [*Schmidt*] at para.42 **[Tab 7D]**; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 [*Operation Dismantle*] at paras 28, 50. **[Tab 7V]**

[38] Afilalo, "Constitutionalism Through the Back Door" at pp. 41, 51-55. **[Tab 7A]**

security of the person" and the right to equality and non-discrimination are fundamental human rights under international human rights law, and are guaranteed under various international human rights instruments binding on all three parties to NAFTA.[39] Requiring that the adjudication of NAFTA Chapter 11 disputes incorporate protection and consideration of the primacy of these and other international human rights would be consistent with a number of recommendations from UN human rights bodies, including the recent recommendations from the UN Committee on Economic, Social and Cultural Rights that Canada: "consider ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-state disputes under Chapter XI of NAFTA."[40]

30. Judicial review of new international adjudicative regimes for conformity with domestic constitutional norms is neither unprecedented nor inappropriate, as claimed by the Respondents. In particular, it has played an important role in ensuring adequate protection of fundamental rights in European law. In the famous "*Solange*" cases, the German Constitutional Court initially refused to cede authority over the interpretation and application of European law to the European Court "so long as" [*solange*] fundamental human rights were not protected in European law to the extent that that they were protected under the German Constitution.[41] In the second "*Solange*" decision, however, the Court found that the protection of fundamental human rights in European law had advanced so as to satisfy domestic constitutional requirements.[42] In CCPI's submission, given their core function of safeguarding principles of constitutional supremacy and constitutional rights, this constructive role for domestic courts in the development of human-rights compliant norms of international adjudication, is both appropriate and necessary.

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[39] International human rights instruments applying in all three NAFTA parties which protect the right to life, liberty and security of the person and the right to equality and non-discrimination include the *Universal Declaration of Human Rights*, G.A. Res. 217(III) UN GAOR, 3d Sess., Supp. No. 13, A/810(1948) 71, articles 2 and 3, *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No.47 articles 2, 6, 9 and 26 and the *American Declaration on the Rights and Duties of Man*, Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948, articles 1, 2.

[40] UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada (2006) E/C.12/CAN/CO/5 at para. 68 **[7CC]**

[41] German Constitutional Court, BVerfGE 37, 271 (1974) 170, 174 at para. 37 [*Solange I*] **[Tab 7K]**; Walter Kälen "The EEA Agreement and the European Convention for the Protection of Human Rights" (1992) 3 E.J.I.L. 341 **[Tab 7P]**; Afilalo, "Constitutionalism Through the Back Door" 41-42 **[7A]**

[42] German Constitutional Court, BVerfGE 73, 378 (1986) [*Solange II*] **[Tab 7L]**.

B. CCPI'S *Charter* Arguments are not Premature

31. The Court of Appeal found CCPI's *Charter* arguments to be premature because the Applicants did not allege or seek to show that a particular Chapter 11 tribunal decision "impairs the constitutional or *Charter* rights of any individual Canadian."[43] The question raised in the present *Charter* claim is, however, of a different order than a claim that a particular tribunal award to an individual investor violates the *Charter*. The *Charter* violation that is challenged by CCPI in the present case is that the Chapter 11 adjudicative regime *itself* fails to respect the requirements of sections 7 and 15, by failing to ensure that *Charter* rights and values are adequately considered and protected.

32. In *Slaight Communications* and in *Baker,* this Court made it clear that all decision-making authority conferred by government must be exercised consistently with *Charter* and international human rights and values.[44] The *Charter* requirement that decision-making must be consistent with the *Charter* or with international human rights values is distinct from the requirement that a particular decision not violate a *Charter* right. In the *Baker* case, this Court did not suggest that Ms. Baker had to establish that a deportation order violated her *Charter* right in order to claim a right to decision-making informed by the *Charter* and international human rights values. In the *Slaight Communications* case, the worker who was unfairly dismissed did not need to prove that he had a *Charter* right to a letter of recommendation from his employer in order to benefit from a decision-making process that was consistent with the *Charter* and informed by international human rights and *Charter* values.

33. Similarly, in the present case, it is not necessary for the Court to decide whether revoking a ban on MMT or on trans-border shipping of PCB's violates an individual Canadian's *Charter* rights, in order to find that the decision-making in these cases was not adequately informed by the consideration of *Charter* and international human rights values, As in *Slaight Communications* and *Baker*, the evidence is clear in this case that *Charter* rights and values, linked to fundamental rights protected under international human rights law, are at issue in the decision-making process that has been established for investor-state challenges. There is an

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[43] Decision of the Court of Appeal for Ontario, *Application Record*, at para. 59. **[Tab 4C]**
[44] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 **[Tab 7B]** at paras 53-54, 74-75; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057, 1078-1081. **[Tab 7BB]**

abundance of evidence that the regime, on that account, fails to meet the requirements of the *Charter*. [45] The *Charter* claim is ripe for the determination by this Court.

C. Investor-State Regime Violates Section 7 of the *Charter*

34. Section 7 is "intrinsically concerned with the well-being of the living person." In contrast to the U.S. Constitution, section 7 does not guarantee "corporate-commercial economic rights" of the type protected under NAFTA Chapter 11. Such corporate rights must be distinguished from social and economic rights, recognized in international human rights law, which this Court has not excluded from the scope of section 7. In particular, this Court has confirmed that section 7 includes health-related interests and that measures affecting health and access to health care must accord with fundamental justice.[46]

35. As outlined above and demonstrated by the evidence in this case, investor-state adjudication frequently engages issues related to personal security or health, and the threat of such adjudication has had significant effects on government policy.[47] It is clear that investor-state tribunals do not have the authority or competence to consider how their adjudication may impact upon section 7 interests or to ensure that any ambiguities or gaps in NAFTA are resolved in favour of protecting such interests. Further, where an investor challenges a government measure as amounting to direct or indirect expropriation, there is no provision in Chapter 11 that enables the government to justify the measure based on its paramount *Charter* obligation to protect the right to life and security of the person.[48]

36. In addition, this Court has recognized in the *Charter* context that monetary awards and settlements against governments for public policy undertaken in good faith can interfere with the efficient functioning of government and reduce governments' ability to provide essential social programs and services, including health care.[49] Investor-state tribunals are under no obligation to consider or balance competing social interests in granting compensatory damage awards, even

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[45] Paras 13 – 19 above.
[46] *Chaoulli v. Québec (A.G.)*, [2005] 1 S.C.R. 791 at paras. 28-40. **[Tab 7E]**
[47] Paragraphs 15-19 above.
[48] Epps & Schneiderman, "Opening Medicare" at 373 **[Tab 7I]**; Johnson, "International Trade Agreements" at 14. **[Tab 7O]**
[49] Schneiderman Affidavit, *Application Record*, para. 11 **[Tab 6B]**; Sornarajah Affidavit, *Application Record*, at para. 72 **[Tab 7D]**; Ganguly, "Investor-State Dispute Mechanism"; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras 75, 93. **[Tab 7J]**

when *Charter* interests such as the right to health are engaged. Delegation of such unconstrained adjudicative authority to investor-state tribunals without ensuring that the rights to life, liberty and security of the person will be adequately considered or protected amounts to a violation of section 7.

D. Violation of Principles of Fundamental Justice

37. An infringement of a section 7 right will offend "principles of fundamental justice" if it violates "basic tenets of our legal system." These include principles recognized both in domestic law and under international conventions, and require a consideration of core values that are fundamental to our legal system.[50] This Court has affirmed that legal procedures established by treaty must also conform with the principles of fundamental justice.[51]

38. The Respondent has argued that, if a court were to find that NAFTA's investor-state adjudication regime violates the *Charter*, the same finding would apply to other adjudicative procedures, such as the individual communication procedure under the *International Covenant on Civil and Political Rights*, which similarly permits individual complaints against government legislation and policy to be adjudicated by an international body that does not apply the *Charter*.[52] Where, however, adjudication of individual rights has been delegated to international bodies in the *ICCPR* and other treaties, it has been crafted so as to respect basic tenets of Canada's legal system, including the paramount status of individual human rights. In contrast to the Chapter 11 regime, the complaints procedure under the *ICCPR*, is designed to protect and promote the rights to life, to liberty and to security of the person, which are included in articles 6 and 9 of the *ICCPR.*

39. This Court has emphasized the convergence between international human rights law and the principles of fundamental justice. The failure to ensure that substantive domestic and

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[50] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 113. **[Tab 7X]**
[51] *Schmidt* at para. 42.
[52] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 303, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

international human rights norms are taken into account in investor-state adjudication infringes fundamental justice.[53]

40. In addition to its substantive requirements, decisions that are likely to have a significant impact on section 7 interests will also violate fundamental justice where appropriate procedural safeguards are not in place. In the Chapter 11 context, individual Canadians whose rights are affected do not have standing as-of-right in investor-state disputes and at best have only discretionary participatory rights as *amicus* in such proceedings, even where laws and government policies protecting their section 7 rights may be at issue.[54] As such, NAFTA Chapter 11 does not meet the basic procedural requirements of fundamental justice, and thereby violates s. 7 of the *Charter*.

E. Investor- State Regime Violates Section 15 of the *Charter*

41. In the interpretation and application of law and the exercise of discretion, interpretive approaches that favour substantive equality and the amelioration of disadvantage must be preferred over those that do not.[55] In order to comply with *Charter* equality values, decision-makers must consider and respect the needs of disadvantaged or vulnerable groups.[56] In *Eldridge* and in *Little Sisters*, this Court emphasized that section 15 requires that decision-makers acting pursuant to statutory authority must make their decisions in a manner that respects equality rights.[57]

42. Disadvantaged groups such as women, people with disabilities and people living in poverty will often have limited access to courts and tribunals, and must depend on adjudication being informed by section 15 and equality values so that their needs and interests receive appropriate consideration, even in their absence. As noted in the affidavit submitted by CCPI for standing to advance the *Charter* arguments in this case: "a critical aspect of the protection of the constitutional rights of poor people is the assurance that courts and tribunals must consider

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[53] *Slaight Communications* at 423-428; *Baker* at paras 56, 69-71. **[Tab 7BB]**
[54] Sornarajah Affidavit, *Application Record*, at paras 25-30, 91. **[Tab 6D]**
[55] *Schachter v. Canada*, [1992] 2 S.C.R. 679 at p. 702. **[Tab 7Z]**
[56] *Slaight Communications* at 424, quoting Paul Davies & Mark Freedland, Kahn-Freud's Labour and the Law, 3d ed. (London: Stevens and Sons, 1983); *Irwin Toy*, at 625. **[Tab 7N]**
[57] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras 22-24, 29 **[Tab 7F]**; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue*), 2007 SCC 2 at paras 71-72,133. **[Tab 7R]**

Charter values and *Charter* rights, as well as rights contained in international human rights instruments ratified by Canada, even where these rights are not directly claimed by a party in the case at bar."[58]

43. This critical component of section 15: the guarantee that decision-making authorized by statute will protect the needs and interests of disadvantaged groups, has been revoked in granting NAFTA investor-state tribunals authority to adjudicate investor challenges to regulatory or protective measures without considering the equality rights of vulnerable groups. CCPI submits that this deprivation exacerbates the disadvantage of protected groups and amounts to a clear violation of section 15.

F: Section 1 of the *Charter*

44. Section 1 plays a dual role in the *Charter*, both as a guarantee of rights and a limitation on them. The positive function of section 1 has proven particularly important where corporate interests have challenged government measures and section 1 has ensured that the rights of vulnerable groups to measures of protection place limits on private economic rights. This balancing is fundamental to the architecture of the *Charter*. In *Irwin Toy*, for example, a challenge to advertising limits that would now constitute a potential expropriation claim under Chapter 11 was dismissed by this Court because the limits on corporate rights were found to be consistent with the important goal of protecting vulnerable groups, including children.[59] Such a balancing of rights would be impossible in a NAFTA Chapter 11 challenge by an investor to the same government measures.

45. In addition, the NAFTA Chapter 11 regime cannot be justified under the *Oakes* test. Even if the goal of promoting foreign investment in Canada and protecting Canadian investment elsewhere is deemed sufficiently important, Professor Bienefeld's affidavit provides un-refuted evidence that there is, in fact, no connection between levels of foreign direct investment and the existence of investor-state dispute procedures.[60] What is more, the Canadian government made no effort to minimally impair the loss of the protection of *Charter* rights in investor-state adjudication by including provisions which provide protections for these rights. Insofar as the

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[58] Affidavit of Bruce Porter, *Application Record,* at para. 31. **[Tab 6C]**
[59] *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at 994.**[Tab 7N]**
[60] Affidavit of Professor M. Bienefeld , *Application Record,* at paras 12-22. **[Tab 6A]**

proportionality of the impugned provisions is concerned, denying the Applicants' and other Canadians' life, liberty, security of the person and equality rights is in no way proportional to the goal of enhancing protection of foreign investor rights.

G: The Appropriate Remedy

46. This Court has suggested that a degree of judicial deference is appropriate in relation to *Charter* review of treaties negotiated by Canada.[61] In the present case, however, the need for deference can be fully met by way of remedy. The Respondent argued in the courts below that, in the event of a finding that the Chapter 11 investor-state procedures violate the *Charter*, the court should issue a suspended declaration of invalidity. This remedy would enable the Canadian government to explore various options with NAFTA parties with respect to remedying the *Charter* violation. CCPI agrees that, given the many different options that have been proposed by experts and international bodies to remedy the deficient protection of fundamental human rights in Chapter 11 adjudication, a delayed declaration of invalidity would be the appropriate remedy.

PART IV: SUBMISSIONS ON COSTS

47. None.

PART V: ORDER SOUGHT

48. The Applicants respectfully request that this Court grant them leave to appeal the Judgment of the Court of Appeal for Ontario dated November 30, 2006.

49. The Applicants do not seek costs and request that no costs be awarded, as was the case in the courts below.

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[61] *Schmidt*, at para. 42. **[Tab 7D]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 29TH DAY OF JANUARY, 2007.

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Martha Jackman
Counsel for the Applicants

PART VI: TABLE OF AUTHORITIES

Tab	Authority	At Para
A	Afilalo, Ari, "Constitionalization Through the Back Door: A European Perspective on NAFTA's Investment Chapter" 34 NYUJ Intl L. & Pol. 1-55 (2001)	7, 8, 28, 30
B	*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.	32, 39
C	Canada, *Commission on the Future of Health Care in Canada, Building on Values: The Future of Health Care in Canada – Final Report* (Ottawa: Comm., 2002) (Commissioner Roy Romanow).	19
D	*Canada v. Schmidt*, [1987] 1 S.C.R. 500.	2, 26, 37, 46
E	*Chaoulli v. Québec (A.G.)*, [2005] 1 S.C.R. 791.	34
F	*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.	41
G	*Ethyl Corp v. Canada* Statement of Defence (November 27. 1997) online at <http://www.dfait-maeci.gc.ca/tna-nac/disp/ethyl_archive-en.asp>	15
H	Epps, T. & Flood, C., "Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of NAFTA for Medicare" (2002) 47 McGill L.J. 747	19
I	Epps, T. & Schneiderman, D., "Opening Medicare to Our Neighbours or Closing the Door on a Public System? International Trade Law Implications of *Chaoulli v. Quebec*", in Flood, Roach & Sossin (eds), *Access to Care, Access to Justice: The Legal Debate Over Private Health Care in Canada* (Toronto: University of Toronto Press, 2005) 369.	19, 35
J	Ganguly, S "The Investor-State Dispute Mechanism and a Sovereign's Power to Protect Public Health" (1999) 38 Colum. J. Transnat'l L. 113	18, 36
K	German Constitutional Court, BVerfGE 37, 271 (1974) [*Solange I*]	30
L	German Constitutional Court, BVerfGE 73, 378 (1986) [*Solange II*].	30
M	*Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.	8

N	Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.	44
O	Johnson, J., *How Will International Trade Agreements Affect Canadian Health Care?* Discussion Paper No. 22 (Saskatoon: Commission on the Future of Health Care in Canada, 2002)	19, 35
P	Kälen, W., "The EEA Agreement and the European Convention for the Protection of Human Rights" (1992) 3 E.J.I.L. 341	9, 30
Q	Lamarche, L. *Retaining Employment Equity Measures in Trade Agreements* (Ottawa: Status of Women Canada, 2005)	12, 13
R	Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), 2007 SCC 2.	41
S	*Metalclad v United Mexican States*, ICSID Case No. ARB 97/1	10
T	*Mexico v. Metalclad Corp*., [2001] B.C.J. No. 950 (B.C.S.C.)	10
U	*Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381.	36
V	*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441.	2, 26
W	Porter, B. ""Canadian Constitutional Challenge to NAFTA Raises Critical Issues of Human Rights in Trade and Investment Regimes" (2005) 2(4) *ESC Rights Law Quarterly* 1.	3
X	*R. v. Malmo-Levine*, [2003] 3 S.C.R. 571.	37
Y	*S.D. Myers v. Canada*, Statement of Defence (June 18, 1999) online at <http://www.dfait-maeci.gc.ca/tna-nac/disp/SDM_archive-en.asp>	15
Z	*Schachter v. Canada*, [1992] 2 S.C.R. 679.	41
AA	Schneiderman, D. "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 U.T.L.J. 499.	10
BB	*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.	32, 39, 41
CC	UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Canada (2006) E/C.12/CAN/CO/5.	29

PART VII: STATUTES

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, 32 I.L.M. 289 (entered into force 1 January 1994), Chapter Eleven.

Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

BRUCE PORTER on his own behalf and on behalf of all of the members of THE CHARTER COMMITTEE ON POVERTY ISSUES

Applicant (Appellant)

- and -

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

Respondent (Respondent)

AFFIDAVIT OF ALEX NEVE

I, Alex Neve, of the City of Ottawa, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am the Secretary General of Amnesty International Canada (English speaking branch) and have held this position since January 2000.

Amnesty International Canada

2. Amnesty International was established at the international level in 1961. Amnesty International Canada (English-speaking branch) was created in 1973. Our first president, Dr. John Humphrey, played a central role in the drafting of the United Nations' 1948 *Universal*

Declaration of Human Rights. Today, between the English and Francophone branches of Amensty International Canada, we have more that 80,000 members and thousands more active supporters in communities, schools and networks across the country. These members work in partnership with some 50 staff and many volunteers based in our national office in Ottawa and our regional offices in Toronto and Vancouver. There is a separate office in Montreal, maintained by Amnesty International Canada's francophone branch.

3. The work of Amnesty International Canada is based on the mission of our global movement to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of our work to promote all human rights. Within this mission, we give priority to specific human rights issues. This allows us to take advantage of strengths and opportunities we have in Canada to build respect for human rights here and around the world. One of the issues to which we have assigned priority is the need to ensure better protection of human rights in trade and investment agreements such as the North American Free Trade Agreement (NAFTA).

4. At the heart of the work of Amnesty International Canada is the promotion of the rule of law and the recognition of the primacy of the rights and values enshrined in international human rights instruments. We believe that respect for human rights must be placed 'above all else'. The *Canadian Charter of Rights and Freedoms*, (the *Canadian Charter*) and constitutional principles affirmed by the Supreme Court of Canada, including constitutionalism and the rule

of law, ensure that courts in Canada play a pivotal role in promoting and protecting these international human rights values.

NAFTA Chapter 11 Investor-State Claims and Fundamental Human Rights

5. Amnesty International believes that the rights and values enshrined both in international human rights law and in the *Canadian Charter* have been seriously undermined by the investor-state dispute procedures in Chapter 11 of NAFTA, and by the continued negotiation of trade and investment agreements without ensuring the adequate protection of human rights.

6. Concerns about the impact of trade and investment agreements such as NAFTA on human rights are not unique to Amnesty International. Similar concerns have been expressed by most U.N. bodies dealing with human rights, including the U.N. General Assembly[62], the UN High Commissioner for Human Rights[63], the U.N. Human Rights Commission[64] and the U.N. Sub-Commission for the Promotion and Protection of Human Rights.[65]

[62] *Globalization and its impact on the full enjoyment of all human rights* (A/RES/57/205)
[63] *Human rights, trade and investment, Report of the High Commissioner for Human Rights*, (E/CN.4/Sub.2/2003/9).
Liberalization of trade in services and human rights, Report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2002/9).
[64] *Globalization and its impact on the full enjoyment of human rights* (E/CN.4/RES/2003/239).
[65] Sub-Commission for the Promotion and Protection of Human Rights, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy* (E/CN.4/Sub.2/RES/1998/12, *Trade Liberalization and Human Rights* (E/CN.4/Sub.2/RES/1999/30, *Human rights, trade and investment*, (E/CN.4/Sub.2/RES/2002/11)

7. Amnesty International has frequently called on the Canadian government to respond to these widespread concerns by ensuring that Canada's international human rights obligations are placed at the centre of its trade and investment policies and practices and incorporated into NAFTA and other trade and investment agreements.[66] Concerned that no action was being taken by the Canadian government to address these issues, we raised these concerns in 2006 before the U.N. Committee on Economic, Social and Cultural Rights on the occasion of that Committee's review of Canada's fourth and fifth periodic reports to that Committee.[67] The U.N. Committee questioned the Canadian government about the human rights impact of the adjudication of investor claims under NAFTA Chapter 11[68] and in its Concluding Observations, recommended that the Government of Canada "consider ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-state disputes under Chapter XI of NAFTA."[69] I am not aware of any action taken by the Government of Canada in response to this important recommendation.

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[66] Amnesty International Canada/Mexico/USA, Open Letter in advance of Summit of North American Leaders in Cancun Mexico, March 27, 2006; Amnesty International Canada, Business as Usual: Violence against Women in the Globalized Economy of the Americas, May 2006, pp. 7-8, 31-32; Amnesty International, Our Call for Human Rights: A message from Amnesty International members in advance of the Fourth Summit of the Americas, October 2005, pp. 3-4; Amnesty International Canada, Above all Else: A Human Rights Agenda for Canada, December 2004, pp. 11-13; Amnesty International Canada, At Home and Abroad: Amnesty International's human rights agenda for Canada, October 2003, pp. 6-7; Amnesty International Canada, Real Security: A Human Rights Agenda for Canada, May 2002, pp. 17-21.

[67] Amnesty International Canada, It Is A Matter Of Rights: Improving the protection of economic, social and cultural rights in Canada Briefing to the UN Committee on Economic, Social and Cultural Rights on the occasion of the review of Canada's fourth and fifth periodic reports concerning rights referred in the International Covenant on Economic, Social and Cultural Rights (May, 2006).

[68] Committee on Economic, Social and Cultural Rights, *List of issues to be taken up in connection with the consideration of the fourth periodic report of CANADA concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 2005, UN Doc E/C.12/Q/CAN/2 (2005) at para. 19.

[69] *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN ESCOR, UN Doc. E/C.12/CAN/CO/5 (2006) at para. 68.

The Importance of CCPI's Appeal from the Decision of the Court of Appeal for Ontario

8. In the view of Amnesty International Canada, the appeal sought by CCPI of the Court of Appeal's dismissal of its claim that NAFTA Chapter 11 investor-state dispute provisions violate sections 7 and 15 of the *Canadian Charter* and the principles of constitutionalism and the rule of law would provide the Supreme Court of Canada with an opportunity to consider, for the first time, one of the most critical contemporary issues of human rights and constitutional protections in Canada and internationally.

9. The appeal would provide the Court with an opportunity to consider the question of whether the Canadian Government is constitutionally permitted to negotiate and put into place adjudication and enforcement mechanisms for trade and investment agreements, in this case through the investor-dispute procedures under NAFTA Chapter 11, which are beyond the reach of the *Canadian Charter* and which fail to ensure that *Canadian Charter* rights and values are adequately protected by way of comparable protections of international human rights.

10. It is well recognized that NAFTA Chapter 11 creates an unprecedented enforcement mechanism through which individual investors are able to claim significant awards of compensatory damages for a broad range of legislation or regulatory measures, including measures to protect health or personal security, or to protect the dignity and security of

vulnerable groups. Amnesty International Canada is concerned that NAFTA Chapter 11 claims and the threat of such claims have had a dramatic effect on government policies in Canada related to the protection of life and security of the person, such as policies banning hazardous chemicals or regulating cigarette packaging, and on the protections of vulnerable groups.

11. This appeal would allow the Supreme Court of Canada to consider whether the *Canadian Charter* provides a broad guarantee, consistent with Canada's international human rights obligations, that the primacy of fundamental human rights such as the right to life, liberty and security of the person or the right to equality be assured in the adjudication of investor claims against government measures, whether they be adjudicated in domestic courts, subject to the *Canadian Charter*, or before international tribunals, under international law. Amnesty International Canada believes that the Supreme Court's consideration and ruling on this question would be of immense value, both in Canada and internationally.

12. The appeal sought would allow the Supreme Court of Canada to provide the government with clear guidance as to its constitutional obligations with respect to protecting fundamental human rights in future trade and investment agreements, as well as in NAFTA Chapter 11 adjudication specifically. Comprehensive human rights impact assessments of all existing and proposed trade and investment agreements, as recommended by Amnesty International Canada and a number of U.N. human rights bodies, with full consideration of the rights of vulnerable members of society such as women, Indigenous peoples, people with disabilities

and those living in poverty, might well be encouraged or required by the Court in response to the appeal.[70]

13. A significant challenge emerging from globalization is to ensure that human rights are accorded the paramount status in international adjudication that they enjoy, in domestic law, by way of the constitutional protection of human rights and the principle of constitutional supremacy. This challenge is increasingly evident in all areas of law in an era of globalization and proliferation of international agreements. This is the first appeal of which we are aware which would place this critical issue squarely before this Court.

14. I make this affidavit in support of a motion for leave to intervene in the above matter and for no other or improper purpose.

AFFIRMED BEFORE ME AT)
in the City of Ottawa, in the)
Province of Ontario, this 19th day of)
January, 2007) Alex Neve

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Anna Pollock
A Commissioner for taking affidavits

[70] Amnesty International Canada/Mexico/USA, Open Letter in advance of Summit of North American Leaders in Cancun Mexico, March 27, 2006; Amnesty International Canada, Business as Usual: Violence against Women in the Globalized Economy of the Americas, May 2005; Amnesty International, *Our Call for Human Rights: A message from Amnesty International members in advance of the Fourth Summit of the Americas*, October 2005, pp. 3-4; Amnesty International Canada, *Above all Else: A Human Rights Agenda for Canada*, December 2004, pp. 11-13; Amnesty International Canada, *At Home and Abroad: Amnesty International's human rights agenda for Canada*, October 2003, pp. 6-7; Amnesty International Canada, *Real Security: A Human Rights Agenda for Canada*, May 2002, pp. 17-21.