Canada: Constitutionality of Chapter 19 of NAFTA

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CANADA

CONSTITUTIONALITY OF CHAPTER 19 OF NAFTA

Executive Summary

Chapter 19 of the North American Free Trade Agreement provides for the creation of Binational Panels to review the imposition of antidumping and countervailing duties on certain goods from one of the parties. Under Chapter 19, appeals to national courts are not allowed. The implementing law that substitutes the Binational Panel process for judicial review has not been judicially considered in Canada and is not the subject of extensive literature. One author has written an article in which he contends the Chapter 19 process does violate the Canadian Constitution, although he admits that the courts will probably not strike it down. The leading Canadian author on constitutional law does not appear to interpret the relevant case law in the same manner. While Chapter 19 has not been judicially considered, related investor state provisions in Chapter 11 were considered by a superior court judge in 2005. The judge sided firmly with the government in holding that the appointments clause of the Canadian Constitution does not apply to the law implementing NAFTA. Furthermore, he held that even if it did, the law would not be unconstitutional because it did not withdraw any historical powers from the superior courts.

I. Introduction

Both Canada and the United States have laws providing for the imposition by administrative bodies of duties on foreign goods that are either subsidized or dumped on the domestic market. Under these laws, administrative decisions usually are appealable to the domestic courts. Chapter 19 of the North American Free Trade Agreement (NAFTA) replaces domestic judicial review with review by Binational Panels. This raises the question of whether the law implementing this part of NAFTA is constitutional.

In approaching this question, it is important to note that Canada's various constitutional documents[1] do not contain an article that, like Article III of the United States Constitution, is specifically designed to establish an independent judiciary for the country. Canadian courts are created by statutes of Parliament or the provincial legislatures. This fact, again unlike in the United States, even applies to the Supreme Court.[2]

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[1] Canada's Constitution is made up of a series of enactments. The two most important documents are the Constitution Act, 1867 and the Constitution Act, 1982, R.S.C. No. 5 and 44 (app. 1985).

[2] Supreme Court Act, R.S.C. ch. s-26 (1985). When Canada was made a dominion in 1867, the London-based Judicial Committee of the Privy Council was the highest court of appeal for all commonwealth jurisdictions. Canada abolished appeals to the Privy Council in 1949. Section 52 of the Supreme Court Act now gives it "ultimate" appellate jurisdiction.

II. Appointment of Judges

The appointment of judges is addressed in the Canadian Constitution. Section 96 of the Constitution Act, 1867 provides that "the Governor General shall appoint the judges of the Superior, District, and County courts in each province, except those for the Courts of Probate in Nova Scotia and New Brunswick."[3] The qualification respecting probate courts is a historical anomaly that has little significance today. In practice, the Governor General, the formal head of state, acts upon the advice of the Prime Minister, the head of the government in the House of Commons, in appointing what are known as "section 96" judges. Judges of the lower provincial courts are appointed by the provinces. The Constitution also gives Parliament authority to create courts not mentioned in section 96. This power has been exercised to create not only the Supreme Court of Canada, but also the Federal Court of Canada. The latter court has limited jurisdiction and generally hears appeals against governmental actions and decisions. Parliament has not created a full range of federal courts to hear all cases involving federal law. As a result, most cases that involve federal or provincial law are tried in provincial courts and may be appealed to the Supreme Court of Canada, regardless of whether they involve federal or provincial law. Most Supreme Court cases, including all criminal and most constitutional cases, directly come from the highest provincial courts. These highest provincial courts are called the Courts of Appeal. Thus, Canada mostly has a unified judicial system rather than separate and parallel federal and state judiciaries.

III. The Creation of Chapter 19

The leading author on constitutional law in Canada has written as follows:

> The absence of any general separation of powers doctrine in Canada means that there is no general prohibition on the delegation of judicial power to bodies other than courts. However, s. 96 of the Constitution Act, 1867 has been interpreted as implicitly prohibiting the delegation of judicial functions analogous to those performed by a superior, district or county court to a body that is not a superior, district or county court. This prohibition applies to the provincial Legislatures, but not to the federal Parliament, except when the federal Parliament invests a provincial body with judicial functions.[4]

This statement seems to indicate that Parliament has the power to enact a provision for the creation of Binational Panels to review antidumping and countervailing decisions of the Canadian International Trade Tribunal and Extraordinary Challenge Committees to hear appeals in limited circumstances, as required by Chapter 19 of NAFTA. When the acts to implement the original 1988 U.S.-Canada Free Trade Agreement and the subsequent 1993 North American Free Trade Agreement Act were debated in Parliament, more of the opponents' questions and constitutional objections focused on Parliament's powers to enact legislation governing matters that generally fall under provincial jurisdiction,[5] than on the constitutionality of binational review. Two major reasons explain why the

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[3] Constitution Act, 1867, R.S.C. no. 5, §. 96.

[4] PETER HOGG, CONSTITUTIONAL LAW OF CANADA, para. 14.2(b) (2005).

[5] Canada's Constitution does not give the federal government authority to implement all international agreements or provide that treaties are the supreme law of the land. Implementing laws must be enacted to give effect to treaties. Even then, implementing laws that encroach upon provincial powers may be found to be unconstitutional. There has been considerable discussion as to whether parts of NAFTA encroach upon provincial powers. While the arguments in the debate are complicated, most constitutional scholars believe the Supreme Court of Canada would probably allow the minimal encroachment necessary for the operation of a free trade agreement.

latter issue did not receive more attention. First, leading constitutional scholars seemed to accept the legality of Canada participating in international review processes in trade matters. Second, the system of binational review initially was embraced in Canada to a much greater extent than it was in the United States. Canada had entered the U.S.-Canada Free Trade Agreement negotiations hoping for an agreement that the two parties would not apply their countervailing and antidumping duties against each other's products.[6] After the United States indicated that it was not prepared to take that step, Canada's representatives actually walked out of the negotiations,[7] contending that it could not enter into an agreement that left all decisions respecting the imposition of antidumping and countervailing duties in the U.S. up to American authorities. Canadian producers had long complained of favoritism in the U.S. courts and the government could not obtain the support of industry without an entrenched independent review process. Without the support of industry, the Progressive Conservative Government headed by former Prime Minister Mulroney might not have secured the Parliament's acceptance of NAFTA. The creation of a binational review system was a compromise that was generally seen as a major achievement of the Canadian negotiators. The system satisfied the business community and what is now Chapter 19 of NAFTA generally has worked well for Canada, despite feelings that the United States has not followed all panel decisions. In the United States, by contrast, there has been far more discontent over panel decisions and the methodology employed by certain panels. The United States has contended that softwood lumber panels have exceeded their jurisdiction in fashioning their own laws, rather than ensuring that U.S. laws are applied properly. The Coalition for Fair Lumber Imports, an organization representing U.S. lumber producers, has been the most vocal in criticizing panel decisions that support Canadian positions, despite other panel and World Trade Organization findings that Canadian exports of lumber are subsidized through low stumpage fees and other means. Consumer groups have also criticized the system of binational review.[8] These latter critics generally have focused on the sovereignty issue from an American perspective.

IV. Canadian Opposition to Chapter 19

Even though the creation of the Binational Panel system was a major achievement of the Canadian negotiators, many Canadian nationalists have opposed the free trade arrangements with the United States because they require Canada to cede its own sovereignty in what they consider to be too many areas ever since the U.S.-Canada Free Trade Agreement was first signed.[9] Control over energy, water exports, foreign investment, procurement, intellectual property rights, and cultural industries all have been major concerns that have received considerable attention in academia and the media. Signing NAFTA in 1993 only made certain nationalists even more vocal in expressing that Canada had made too many concessions in negotiating the expanded free trade agreement. In recent years, resentment over NAFTA has been fueled not only by the longstanding softwood lumber case, but also by several other trade disputes involving agricultural and other products. Some Members of Parliament have repeatedly charged that the United States is failing to live up to its commitments. Canada and the United States reached a compromise agreement on the softwood lumber issue that was announced on July 1, 2006, but it has not been approved yet by Parliament. The Prime Minister has stated that his

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[6] Eric J. Pan, *Assessing the NAFTA Chapter 19 Binantional Panel System; An Experiment in International Adjudication*, 40 HARV. INT'L L.J. 379, 382-383 (1999).

[7] JUDITH H. BELLO AND ALAN F. HOLMER, GUIDE TO THE U.S.-CANADA FREE –TRADE AGREEMENT 29 (1990).

[8] Ralph Nader, *NAFTA on Democracy*, MULTINATIONAL MONITOR, Oct. 1993, at 4.

[9] JOYCE HOEBING, SIDNEY WEINTRAUB & M. DELAL BAER, NAFTA AND SOVEREIGNTY: TRADE-OFFS FOR CANADA, MEXICO, AND THE UNITED STATES (1996).

government intends to introduce implementing legislation in the fall and, with opposition to the agreement growing, he already has announced that he will call an election if the bill is defeated in a vote of "no confidence." Because the Conservative Government is a minority government, it will probably need the support of one other party or a decision from a number of opposition members to abstain from voting for the measure to avoid defeat. A vote of no confidence would launch an election campaign that would squarely focus, at least initially, on the issue of free trade with the United States. Canada has had one other recent election on free trade. When the opposition-controlled Senate, Canada's upper house, refused to pass the U.S.-Canada Free Trade Agreement implementation Act in 1988 without a clear mandate, former Prime Minister Mulroney called a general election. After the Prime Minister's party won an overwhelming victory, the Senate immediately stopped its blocking tactics and the Act, which was the predecessor to NAFTA, was implemented shortly afterwards.

Some Canadian nationalists have looked for arguments that could be used to strike down the NAFTA Implementation Act[10] on constitutional grounds ever since it went into effect. One possibility that has been discussed is challenging the legality of Chapter 19. Even though most opponents to NAFTA have not generally seen Chapter 19, in itself, as one of the most objectionable parts of the Agreement, it is seen by many of these persons as the most vulnerable. This fact has been particularly true in the climate fueled by the softwood lumber dispute. Parliament's powers to implement most of NAFTA's provisions are generally unquestioned. For example, it is generally conceded that the Parliament was acting well within its powers when it agreed to tariff elimination. Therefore, Chapter 19 forms a target for persons who are opposed to NAFTA for many different reasons.

V. An Agreement That Chapter 19 is Unconstitutional

The long-running softwood lumber case has been fought almost entirely within the United States. Binational panels have not been reviewing the decisions of the Canadian government. Therefore, the softwood lumber case has not provided a convenient forum to contest the legality of Chapter 19 within Canada, and there has not been a case of nearly the same magnitude contested in Canada. However, some authors have predicted that Chapter 19 is very likely to be challenged in Canada. In 1998, Avi Gesser[11] wrote an article that was published in the *Denver Journal of International Law and Policy* entitled "Why NAFTA Violates the Canadian Constitution."[12] This article focused almost entirely on Chapter 19. He begins by stating the reason Chapter 19 "has not been challenged in Canada is that public sentiment has not reached the level of animosity regarding international trade agreements that it has in the United States."[13] While it is true that support for free trade in Canada has been fairly strong and consistent, it is also true that many Canadians have harbored doubts over NAFTA's terms. A 2003 study by the prestigious C.D. Howe Institute reported that one survey indicated that only 10 percent of Canadians believed that the Agreement favored Canada even though Canada's historical merchandise trade deficit has turned into an enormous trade surplus with the United States over the past eighteen years. This study also cited a survey that showed that 31 percent of Canadians are opposed to stronger economic ties with the United States and 12 percent are strongly

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[10] North American Free Trade Agreement Implementation Act, 1993 C.S. c. 44, as amended.

[11] Mr. Gesser is an associate at the law firm of Davis Polk & Wardell. The Web site for the firm is available at www.dpw.com.

[12] Avi Gesser, *Why NAFTA Violates The Canadian Constitution*, 27 DENV. J. INTER'L LAW & POLICY 121 (1998).

[13] *Id.* at 122.

opposed to stronger economic ties with the United States[14] Thus, it would appear to be a fairer statement that NAFTA probably enjoys broader support in Canada than in the United States, but that a higher percentage of the population north of the border is strongly opposed to the Agreement.

In presenting his arguments, Mr. Gesser relies heavily upon a Supreme Court of Canada's decision in *MacMillan Bloedel v. Simpson,*[15] limiting Parliament's powers to delegate the judicial powers of superior courts. The case involved the delegation of the power to hold a youth in contempt of a superior court to a special juveniles court. The Supreme Court upheld this delegation, but Gesser has interpreted it as establishing for the first time that Section 96 of the Constitution Act, 1867 limits the powers of Parliament as well as those of the provincial governments. This position seems to directly contradict Professor Hogg's quote at the beginning of section III in the immediate report. [16] Gesser then quotes the portion of the decision where the Chief Justice wrote that superior courts have a core or inherent jurisdiction, which is integral to their operations that cannot be removed without amending the Constitution. The majority of the Supreme Court in *MacMillan Bloedel* determined that Parliament could give the juvenile court jurisdiction to hold a youth in contempt but could not completely remove this power from the superior courts, as it is one of their "core functions."[17]

Gesser argues that the primary function of the Binational Panels is judicial review and that judicial review is a core function of the courts, although he concedes that the panel's function could be viewed as novel and allowable under a test that focuses on the historical functions of courts. Mr. Gesser cites a number of cases of in which conferring final appellate powers on tribunals or regulatory bodies has been held unconstitutional. However, it appears that these cases were decided on very narrow or technical grounds. Not all administrative decisions are subject to judicial review in Canada. Gesser suggests that the delegation of final appellate powers be allowed as part of a package of delegated powers but not by itself. He summarizes his case as follows:

> Applying these cases to the NAFTA Binantional Panels, it would seem that there is little doubt that they are unconstitutional. Like the tribunal in [a previously cited case], they sit on top of the Canadian antidumping and countervailing duty regime. Their primary purpose is judicial review. It could be argued that their judicial review function is an ancillary part of their role in reviewing legislation, however, it is far more likely the case that this supervisory role over legislation is incidental to its dispute settlement function.
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> The only plausible retort would be that judicial review is not part of the core functions of Section 96 courts and therefore the Binational Panels are not unconstitutional. There is some support for this position in the academic literature. Speaking about the English superior courts, I.H. Jacob wrote: 'The jurisdiction of the High Court to review the decisions of an inferior court cannot, however, nowdays be said the be part of its inherent jurisdiction, for this jurisdiction is exercised by virtue of prerogative orders.' [18]

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[14] DON GUY AND ALAN ALEXANDROFF, WHAT CANADIANS HAVE TO SAY ABOUT RELATIONS WITH THE U.S. (2003).

[15] Macmillan Bloedel Ltd. v. Simpson, [1995] 4 S.C.R. 72.

[16] Professor Hogg characterizes the case as standing for the proposition that "there are constitutional restrictions on the jurisdiction that can be withdrawn from a superior court. HOGG, *supra* note 4, at 7-30.

[17] *Id.* at 740.

[18] GESSER, *supra* note 7, at 146-147.

After stating his case, Mr. Gesser concludes:

> It is unlikely the Supreme Court of Canada will strike down the legislation that implements Chapter 19 as unconstitutional, as it is well aware that the results would be devastating for Canada and the NAFTA system. The Chapter 19 process is an essential part of the free trade regime between Canada and the United States and its demise might spell the end of the entire NAFTA project. If Canada could not carry out its international responsibilities under Chapter 19, it would likely be in fundamental breach of its treaty obligations and either the United States or Mexico could legally withdraw from NAFTA under Article 2205. Even a decision that the Binational Panels were constitutional so long as they did not remove the power of judicial review from the superior courts would be a disaster for Canada-U.S. trade relations.[19]

VI. Extraordinary Challenge Committees

NAFTA does allow for the appeal of binational panel decisions to an Extraordinary Challenge Committee (ECC). Despite some calls in academic literature for a true appellate review,[20] NAFTA limits the grounds for an ECC challenge to allegations of: 1) gross misconduct, bias, or a serious conflict of interest of a panelist; 2) serious departures from fundamental rules of procedure; and 3) a panel exceeding its powers, authority, or jurisdiction.[21] ECC challenges are heard by committees composed of three members from the involved parties. After each country selects one member, lots are drawn to determine which side gets to choose the third member.[22] An ECC can either affirm a decision or remand it to a new panel. ECC decisions cannot be appealed to national courts, raising issues regarding their constitutionality, in the United States or Canada, that are essentially the same as those for Binational Panels. The same would be true even if the ECCs were given full appellate review over Binanational Panel decisions.

Neither Canada nor Mexico has brought a case to an ECC. The United States has appealed three adverse decisions to ECCs.[23]

VII. Judicial Consideration of Chapter 11

Although Chapter 19 of NAFTA has not been the subject of litigation in Canada, the constitutionality of Canada's implementation of Chapter 11 of the Agreement was recently challenged by the Council of Canadians and the Canadian Union of Postal Workers in the Ontario Superior Court of Justice.[24] Chapter 11 of NAFTA contains investment provisions. Under the text, NAFTA parties are required to provide investors and investments from the other parties treatment that is no less favorable than the treatment accorded to its own investors and other most favored nations, along with a minimum standard of treatment, performance requirements, permit transfers, and a prohibition on discriminatory

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[19] *Id.* at 147-148.

[20] PAN, *supra* note 4, at 446.

[21] North American Free Trade Agreement, art. 1093, U.S.- Can. -Mex., Dec 8-Dec. 17, 1992 [hereinafter NAFTA].

[22] *Id.*; NAFTA, *supra* note 20, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited Aug. 31, 2006).

[23] NAFTA Chapter 19 Extraordinary Challenge Committee Decisions (USA), http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=796 (last visited Aug. 31, 2006).

[24] 2005 CanLII 28426 (ON S.C.), http://www.canlii.org/on/cas/onsc/2005/2005onsc14370.html (last visited Sept. 27, 2006).

expropriation. Under Chapter 11, investors can bring an action against a party for actions that violate these investment guarantees. The investor can choose to pursue his or her claim in domestic courts or elect for binational arbitration. Claims against Canada can be arbitrated in accordance with either the Intentional Center for the Settlement of Investment Disputes (ICSID) Additional Facility Rules or the United Nations Commission on International Trade Law (UNCITRAL) Rules. Arbitration tribunals can award damages and interest. In Canada, the enforcement of international arbitral awards is provided for in the Commercial Arbitration Code adopted under the authority of the Commercial Arbitration Act.[25] The Code allows for arbitral awards to be set aside by courts in very limited circumstances. These circumstances would include incapacity, failure to be notified, exceeding the scope of the submission, or conflict with the public policy of Canada.

As can be seen, the provisions of Chapter 11 guaranteeing foreign investors national treatment are quite different from the Chapter 19 Binational Panel system created to review countervailing and antidumping orders. Most notably, Chapter 11 awards are subject to judicial review even if the grounds are quite narrow. Also, Chapter 11 gives investors options as to how they will pursue their claims.

Under Chapter 11, a number of U.S. investors have successfully pursued or settled claims against Canadian governments. It appears, however, that no claims initiated by Canadian investors against the United States have been successful.

In the course of his opinion in *R. v. Council of Canadians*, Judge Pepall of the Ontario Superior Court of Justice did not address issues relating specifically to Chapter 19 of NAFTA. Nevertheless, a number of his findings would appear to be highly pertinent. A central aspect of his finding respects Section 96 of the Constitution Act, 1867. After outlining Chapter 11 and the remedies it contains, he stated "NAFTA tribunals address treaty obligations and international commitments made by the three parties to the Agreement" and "I fail to see how s. 96 which governs the domestic arena is applicable."[26] The Judge continued as follows:

> If I were to accede to the Applicants' submissions, Canada would be constrained by its domestic laws from entering into an international agreement that contained a dispute resolution mechanism unless claims were resolved by Canadian courts in accordance with Canadian law. This would not only affect the NAFTA but also Canada's participation in agreements like the CUSFTA, the WTO Agreement, Canada's Foreign Investment Protection Agreements..., the Convention on the Law of the Sea, and Canada's acceptance of the compulsory jurisdiction of the International Court of Justice....[27]

Judge Pepall then concluded that he was "of the view that the NAFTA is an international treaty that is unaffected by s. 96 of the Constitution Act, 1867."[28] As this finding related to the entirety of NAFTA, it encompasses Chapter 19.

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[25] Commercial Arbitration Act, R.S.C. c. 17 (2d Supp. 1986).

[26] NAFTA Chapter 19 Extraordinary Challenge Committee Decisions (USA), *supra* note 23, at 14.

[27] *Id.* at 15.

[28] *Id.*

Having concluded that the NAFTA implementation act's review procedures were constitutional, Judge Pepall then considered whether, if section 96 was applicable, had it been violated. The jurisprudence under that section of the Constitution Act, 1867 was reviewed and he determined that a judge's first step in answering whether there had been an illegal delegation of judicial powers was examining whether the courts had a historical power removed from them. Judge Pepall found that "treaty compliance was never the subject matter of s. 96 jurisdiction" and "there has been no subtraction from the superior court's original jurisdiction."[29] Having made these determinations, he found that an additional process or analysis to determine whether the impugned power was a "core function," as was outlined in *MacMillan Blodel v. Simpson,* was unnecessary.

In *R. v. Council of Canadians,* the applicants also argued that NAFTA tribunals are contrary to "constitutionalism and the rule of law." Judge Pepall made a number of findings respecting this argument. One of these was that the applicants were "seeking to require international tribunals to interpret international treaties to which Canada is a party by reference to Canadian constitutional values and principles" and that "this position is at odds with international law regarding treaty interpretation."[30]

VIII. Conclusion

It does not appear that *R. v. Council of Canadians* has been appealed to Ontario's Court of Appeal. Therefore, this case stands as the strongest authority for the legality of the tribunal and panel review procedures mandated by NAFTA.

In conclusion, determining whether the legislation implementing Chapter 19 is constitutional has not received as much attention in Canada as it has in the United States. The major reason for this is that there is no general separation of powers in the Canadian Constitution.[31] Nevertheless, there is a body of case law, built around the government's powers to appoint judges of the superior courts, that places some limits upon executive actions. One limit is on government's ability to withdraw core functions from the courts. One author has taken the position that this case law supports the argument that Chapter 19 is unconstitutional. This interpretation does not appear to be supported by the leading author on Canadian constitutional law.

While the legality of Chapter 19 of NAFTA has not been challenged in Canada's courts, the legislation implementing Chapter 11 of NAFTA was challenged in the Ontario Superior Court in 2005. The judge in this case sided firmly with the government in holding that the case law surrounding the appointment powers did not apply to the implementation act. The judge further held that even if that case law did apply, the implementing law would not offend the Constitution because it did not withdraw any of the superior courts' historical powers.

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[29] *Id.* at 18.

[30] *Id.* at 20.

[31] Hogg, *supra* note 4, at 7-24.