

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 Amnesty International Canada, we have more than 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 Assembly¹, the UN High Commissioner for Human Rights², the U.N. Human Rights Commission³ and the U.N. Sub-Commission for the Promotion and Protection of Human Rights.⁴

¹ *Globalization and its impact on the full enjoyment of all human rights* (A/RES/57/205)

² *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).

³ *Globalization and its impact on the full enjoyment of human rights* (E/CN.4/RES/2003/239).

⁴ 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.⁵ 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.⁶ The U.N. Committee questioned the Canadian government about the human rights impact of the adjudication of investor claims under NAFTA Chapter 11⁷ 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."⁸ I am not aware of any action taken by the Government of Canada in response to this important recommendation.

⁵ 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.

⁶ 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).

⁷ 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.

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

⁸ *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.

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.⁹

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)



A Commissioner for taking affidavits



Alex Neve

⁹ 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.