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Avi Gesser

WHY NAFTA VIOLATES THE CANADIAN CONSTITUTION

AVI GESSER*

I. INTRODUCTION

With the proliferation of international economic treaties over the last decade, many of the traditional hallmarks of state sovereignty continue to erode. Each new round of negotiations on transnational economic integration, such as those surrounding the Multilateral Agreement on Investment[1] and the creation of the World Trade Organization ("WTO"),[2] challenges the very constitutional structures of the negotiating parties. As the states of the European Union have learned, many of the benefits of cross-border economic integration cannot be realized without relinquishing some of the old characteristics of independent statehood. In many instances, the new economic order requires significant reinterpretation of (or outright judicial amendment to) national constitutions.[3] This same dilemma now faces the countries of North America: what conflicts exist between their international trade obligations created by treaty and their national constitutions and how will these incongruities be resolved?

In December 1992, the governments of Canada, the United States,

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* L.L.M. New York University, 1998; L.L.M. Cambridge University, 1995; L.L.B. University of Manitoba, 1994; B.S.c. University of Manitoba, 1981. I thank Professors Thomas Franck, Bryan Schwartz and the late Butch Nepon for their assistance in preparing this article. The author is currently practicing law in New York City.

1. Multilateral Agreement on Investment: Consolidated Text and Commentary, Negotiating Group on the MAI, Directorate for Financial, Fiscal and Enterprise Affairs, Organization for Economic Cooperation and Development, OECD Doc. DAFFE/MAI(97)1/REV2 (May 14, 1997); *see also Multilateral Agreement on Investment: Report of the MAI Negotiating Group*, OECD Doc., Annex (May 21, 1997).

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

3. *See* cases in which national courts of European Union countries have adopted the supremacy of European law, even where the state's constitution suggests otherwise: Internazionale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] 37, 271 (1974) (F.R.G.), [1974] 2 C.M.L.R. 540 (1974); SpA Granital v. Amministrazione delle Finanze dello Stato, Corte costituzionale [Corte cost.] [Italian Constitutional Court], 8 jun. 1984, n.170, Guir. It. 1984, I, 1521, [1984] 21 C.M.L.R. 756 (1984) (Italy); Case 213/89, Regina v. Secretary of State for Transport *ex Parte* Factortame, Ltd., [House of Lords] 1990 E.C.R. I-2433, [1990] 3 C.M.L.R. 1 (1990) (Gr. Brit.).

and Mexico signed the North American Free Trade Agreement ("NAFTA"),[4] creating a North American trading bloc. NAFTA was designed to phase out tariffs and establish a free market framework between the signatories. Its objectives include eliminating barriers to trade, promoting conditions of fair competition, increasing investment opportunities, and establishing procedures for the resolution of disputes.[5]

Since NAFTA was signed, several articles have been written on the compatibility of certain NAFTA obligations with the national constitutions of the signatory states. Primarily, the debate has focused on whether the Articles of NAFTA which allow countries to settle certain trade disputes before Binational Panels violate the American[6] or Mexican constitutions.[7] In addition to the significant academic debate, this issue has generated two formal proceedings in the United States Federal Courts challenging the constitutional validity of NAFTA on the basis that the Chapter 19 Binational Panels process amounts to an unconstitutional relinquishment of sovereign powers.[8] Although these challenges did not succeed, the controversy has not been resolved. Despite the legal activity in the United States, thus far the issue of the consistency between NAFTA obligations and the Canadian Constitution has not generated much interest. However, two recent legal decisions may spark interest in this issue north of the 49th parallel.

Part of the reason that NAFTA has not been challenged in Canada is that public sentiment has not reached the level of animosity regard-

4. North American Free Trade Agreement, Oct. 7, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) & 32 I.L.M. 605 (1993) [hereinafter NAFTA].

5. *Id.* art. 101.

6. *See* Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT'L TAX AND BUS. LAW 101 (1995); Denis J. Edwards, *NAFTA and Article III: Making a Drama Out of a Crisis*, NAFTA: LAW & BUS. REV. AMS., vol. I, No. 2, 69 (1995); Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L. L.J. 141 (1994); Gregory W. Carman, *Resolution of Trade Disputes By Chapter 19 Panels: A Long-Term Solution or Interim Procedure of Dubious Constitutionality*, 21 FORDHAM INT'L L.J. 1 (1997); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

7. Luis Manuel Perez de Acha, *Binational Panels: A Conflict of Idiosyncrasies*, 3 SW. J.L. & TRADE AM. 431 (1996).

8. The first case was Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. Ct. App. filed Sept. 14, 1994, withdrawn by voluntary motion to dismiss Jan. 5, 1995) arising out of the Extraordinary Challenge Committee (ECC) proceeding, In re Certain Softwood Lumber Products from Canada, ECC-94-1904-01USA (Aug. 3, 1994). This action was withdrawn on the basis of the settlement reached in "Lumber IV." The second case was American Coalition for Competitive Trade (ACCT) v. United States, No. 97-1036 (D.C. Cir. Ct. App. Nov. 14, 1997) (complaint and petition for summary judgment). The case was dismissed unanimously by the U.S. Court of Appeals on the basis that ACCT did not have legal standing to bring the case against President Clinton or the U.S. government. *See* Timothy Burn, *Judges Dismiss Challenge to NAFTA*, WASH. TIMES, Nov. 15, 1997, at C1, *available in* 1997 WL 3689516.

ing international trade agreements that it has in the United States. However, in May of 1997, Canada lost an appeal before the WTO Appellate Body. The case, *Certain Measures Concerning Periodicals*,[9] held that several measures Canada was using to protect its magazine industry from the onslaught of American competitors violated obligations under the General Agreement on Tariffs and Trade ("GATT").[10] The decision was viewed by many Canadians as an affirmation of their fears that the cost of free trade with the United States would be the eventual loss of Canadian culture. For many Canadians, that is a price not worth paying, and the response to the decision was harsh.[11] While Canada has had many bitter trade disputes with the United States (e.g. softwood lumber,[12] durum wheat,[13] pacific salmon,[14]) they have generally involved goods that do not directly affect the average Canadian. Because the decision in the *Periodicals* case threatened the commercial viability of many Canadian magazines, it demonstrated to the Canadian public the potential impact of international trade agreements on Canadian identity.[15] As such, it is probably only a matter of time before the storm brewing in America over NAFTA's constitutionality blows into Ottawa.

The second decision that may bring NAFTA's constitutionality into question in Canada is less well known. In 1995, the Supreme Court of Canada decided the case of *MacMillan Bloedel v. Simpson*,[16] which held that the Canadian Parliament could not delegate core functions of the superior courts to inferior courts or administrative tribunals.[17] As will be discussed below, this decision raises serious doubts as to the constitutionality of the NAFTA dispute resolution process.

In anticipation of a constitutional challenge that is likely to come before a Canadian court in the near future, this article examines NAFTA's binational dispute resolution system and its compatibility with Sections 96 to 100 of the Canadian Constitution. Part II describes the NAFTA dispute resolution mechanism, while Part III briefly outlines constitutional concerns over NAFTA in Canada, the United States,

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9. *Canada - Certain Measures Concerning Periodicals, Report of the Appellate Body*, WT/DS31/AB/R, June 30, 1997, *available in* 1997 WL 432125, 1 (W.T.O.).

10. General Agreement on Tariffs and Trade, T.I.A.S. No. 1700, 55 U.N.T.S. 188.

11. *See* Marci McDonald, *Menacing Magazines: Ottawa Faces Another Threat From Washington*, MACLEAN'S, March 24, 1997, at 54; John Schofield, *Publish or Perish: Canada's Magazine Industry Faces an Uncertain Future*, MACLEAN's, June 2, 1997, at 44.

12. *See* In re Certain Softwood Lumber Products From Canada, Extraordinary Challenge Committee *(ECC) proceeding*, ECC-94-1904-01USA (Aug. 3, 1994).

13. *See* Marjorie Benson, *The NAFTA Durum Dispute and the Canada Grain Act: A Case Study in Institutional Development*, 5 CONST. F. 82 (1994).

14. *See* In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, United States-Canada Free Trade Agreement Binational Panel Review, Panel No. CDA-89-1807-01 (Oct. 16, 1989), 12 Int'l Trade Rep. (BNA), at 1026 (1991).

15. *See* Laura Eggertson et al., *Copps Sets Stage for War Over Culture*, GLOBE AND MAIL, Feb. 11, 1997, at A1.

16. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R. 725 (Can.).

17. *Id.* at 757, ¶ 43.

and Mexico. Part IV outlines the constitutional structure of Canada and its system of courts. Part IV also examines the constitutional limits on the ability of the Canadian Parliament to take power away from the superior courts and give it to other adjudicative bodies. Part V discusses the application of the constitutional limits on the delegation of decision-making power to the NAFTA binational tribunals. Part VI concludes that unless Canada addresses the implications of international free trade agreements as they relate to traditional notions of sovereignty and adjudication, it will not be able to reap the full benefits of the emerging global market.

II. THE NAFTA DISPUTE RESOLUTION PROCESS: CHAPTER 19

A. Canada's Non-NAFTA Antidumping Procedures

Chapter 19 of NAFTA creates a procedure for settling disputes involving antidumping and countervailing duties between NAFTA countries. In order to understand the significance of this change to Canadian law and procedure, it is important to examine the procedures used in Canada for disputes with non-NAFTA parties and compare them with the regime created by Chapter 19.

1. Dumping and Antidumping

Goods may be considered "dumped" when the price that exporters charge to their foreign consumers is less than the normal value of the goods or the price charged to customers in their domestic market.[18] Dumping exporters often subsidize these low export prices with high prices in the home market where the producer may have a monopoly. In this respect, dumping can be seen as the international equivalent of predatory pricing. Antidumping laws seek to prevent exporters from selling their products at unfairly low prices in other countries. In Canada, the offense of dumping contains two elements: (1) an export to Canada priced at less than its fair value that (2) results in injury or threat thereof to a Canadian industry.[19] The penalty that can be imposed in response to such practices is an "antidumping duty," a tariff placed on the good designed to restore the export price to its fair value.[20]

2. Subsidies and Countervailing Duties

Subsidies are financial contributions made by governments to local

18. *See* Special Import Measures Act, R.S.C., ch. S-15, § 2(1) (1985) (Can.).
19. Special Import Measures Act, R.S.C., ch. S-15, § 5 (1985) (Can.).
20. *Id.* § 3(1).

producers.[21] Companies that receive subsidies can sell their goods in foreign markets at prices lower than competing firms that do not receive government assistance. A countervailing duty seeks to prevent the importation of subsidized goods into Canada at prices that are unfairly low. A successful countervailing duty action requires: (1) a subsidy given by the exporter's government; and (2) a resulting injury to a Canadian industry.[22] The penalty is a "countervailing duty," a tariff intended to offset the government subsidy.[23]

The following discussion on the procedures for antidumping duties applies equally for countervailing duties. However, for the sake of brevity and to avoid repetition, only antidumping duties will be discussed.

3. Procedures for Imposing Antidumping Duties in Canada

The legislation regarding antidumping is set out in the Canadian Special Import Measures Act (SIMA)[24] and the Canadian International Trade Tribunal Act (CITTA).[25] Under these Acts, in order to impose an antidumping duty, there must be a finding of dumping and serious injury.[26] The institutional responsibilities for determining these issues are separated, with "dumping" determinations being made by the Deputy Minister of National Revenue (DMNR),[27] and "serious injury" determinations being made by the Canadian International Trade Tribunal (CITT).[28] Antidumping complaints can be initiated by the industry allegedly affected by the dumped good, which is usually a local competitor.[29]

If there is evidence of dumping, the DMNR makes a provisional determination of the dumping margin and imposes provisional antidumping duties equal to the margin of dumping on the imports.[30] The CITT then undertakes a thorough injury inquiry.[31] If the CITT makes a finding of material injury, anti-dumping duties are imposed which reflect the DMNR's final margin of dumping determination.[32] If the CITT does not find material injury, the investigation is terminated and any provisional duties paid are refunded.[33]

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21. *Id.* § 2(1).
22. *Id.* § 6.
23. *Id.* § 3(1).
24. Special Import Measures Act, R.S.C., ch. S-15 (1985) (Can.).
25. Canadian International Trade Tribunal Act, R.S.C., ch.47 (4th Supp.) (1985) (Can).
26. *Id.* § 26(4). *See also* Special Import Measures Act § 5.
27. Special Import Measures Act §§ 38-41.
28. Canadian International Trade Tribunal Act § 20.
29. *Id.* §§ 22-30.
30. Special Import Measures Act § 38(1).
31. Canadian International Trade Tribunal Act §§ 22-30.
32. Special Import Measures Act § 41.
33. *Id.* § 43.

While the CITT's decision is "final and conclusive," the CITT may review its own findings if it is satisfied that such a review is warranted.[34] For disputes between parties from Canada and a non-NAFTA country, there are also appeals to the Federal Court of Appeal and then to the Supreme Court of Canada on questions of law.[35]

B. Changes to the Canadian Procedures Under NAFTA

Under NAFTA, the substantive domestic antidumping and countervailing duty laws and procedures of the NAFTA countries are preserved,[36] but two new institutions have been created. The first entity is the Binational Panel that reviews final antidumping and countervailing duty determinations by domestic agencies.[37] The second entity is the Extraordinary Challenge Committee that reviews Binational Panel decisions.[38] The effect of these two tribunals is to replace judicial review by national courts with Binational Panel review for antidumping and countervailing duty determinations.[39] The SIMA and the CITTA have been amended to reflect the changes required by NAFTA obligations.

1. Policy reasons behind NAFTA Chapter 19

In the negotiations under the Canada-U.S. Free Trade Agreement,[40] and later under NAFTA, Canadian trade representatives were eager to take the final decision-making authority over antidumping and countervailing duties away from the courts of the United States. They believed that Canadian firms were subject to unfair treatment at the hands of American judges influenced by their national politics.[41] The Canadians sought to eliminate the American antidumping and countervailing duty laws as they applied to Canada and replace them with a new set of laws to be interpreted and enforced by a binational tribunal.[42] When the Americans rejected any changes to U.S. law, the compromise reached was the creation of the Binational Panels and the Extraordinary Challenge Committees discussed in detail below.

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34. *Id.* § 76.

35. Federal Court Act, R.S.C., ch. F-7, § 28 (1985) (Can.).

36. *See* NAFTA, *supra* note 4, at art. 1902.1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other party.

37. *Id.* art. 1904(1).

38. *Id.* art. 1904(13). *See also id.* annex 1904.13.

39. *Id.* art. 1904(1).

40. Canada-United States Free-Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (entered into force on Jan. 1, 1989).

41. *See* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 145 (1994).

42. *See* Gregory W. Carman, *Resolution of Trade Disputes By Chapter 19 Panels: A Long-Term Solution or Interim Procedure of Dubious Constitutionality*, 21 FORDHAM INT'L L.J. 1, 2 (1997).

2. Binational Panels

Once the CITT issues a final determination, an "involved party" from a NAFTA country has 30 days to request a review by a NAFTA Panel.[43] The term "involved party" is defined as the importing party or the party whose goods are the subject of the final determination.[44] Upon a request for Binational Panel review, that process begins and the traditional path of judicial review is unavailable. The Panel first obtains the administrative record from CITT. A representative of that agency can appear before the Panel.[45] Interested parties with standing to appear in a traditional appeal can submit briefs and present oral arguments.[46] Based on this evidence, the Panel assesses the agency's determination to see if it complied with the substantive law of the country.[47] The Panel then decides whether to uphold the agency's decision or remand the proceeding for action not inconsistent with the Panel's decision.[48] A written opinion with reasons for the decision is provided along with dissenting opinions. The standard of review, and the legal principles to be applied by the Panel are those that a court of the defendant party would use.[49] The decision is binding with respect to the parties and the particular matter before the Panel.[50] In the event of an adverse finding, a defendant state is required to change its laws to conform to the Panel's determination of the requirements of NAFTA.[51] Article 1904(11) states that:

> A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.[52]

The purpose of this section is to avoid Panel decisions that contradict rulings by federal courts with respect to the same final determinations. By way of example, suppose an American producer is exporting to Canada and is accused of dumping. If the CITT rules against her, an antidumping duty is levied against her products. She may then request a Binational Panel review. In this case, all Canadian importers bound to pay the antidumping duty would have to appear before the Binational Panel and would thereby be unable to go before the Canadian

43. NAFTA, *supra* note 4, art. 1904(4).
44. *Id.* art. 1911
45. *Id.* art. 1904(7).
46. *Id.* art. 1904(14).
47. *Id.* art. 1904(8).
48. *Id.*
49. NAFTA, *supra* note 4, art. 1904(3).
50. *Id.* art. 1904(11).
51. *Id.* art. 1904(15).
52. *Id.* art. 1904(11).

courts to challenge the ruling.

Now suppose that the Binational Panel decides in favor of the American exporter and her Canadian competitors believe that the Panel exceeded its jurisdiction or applied the wrong standard of judicial review. In such an instance, there would be no recourse to the Canadian courts. As is often the case with international adjudication, the Panel's decisions are made by *ad hoc* judges who are appointed from a roster for a particular case.[53] There are no permanent clerks or research assistants.[54] So unlike an appellate court, the Binational Panels have no institutional longevity, increasing the likelihood of poor reasoning or inconsistent decisions.

Each of the three NAFTA countries is to select at least 25 candidates for membership on Binational Panels.[55] The Agreement expresses a preference for sitting or retired judges as panelists.[56] Each Panel is to consist of five members; two selected by each country involved in the dispute and the final panelists selected by agreement between the two countries.[57] If no agreement can be reached as to the final panelist, the countries are to decide by lot which of them will select the fifth panelist, excluding candidates eliminated by peremptory challenges.[58]

Additionally, the Binational Panels serve one function other than judicial review. Under Article 1903, a NAFTA country may request that an amendment to another Party's antidumping or countervailing duty laws be referred to a Panel for a declaratory opinion on whether the amendment is consistent with the GATT and NAFTA.[59]

3. The Extraordinary Challenge Committee ("ECC")

NAFTA allows a limited right of appeal to the ECC that reviews certain Panel decisions.[60] However, appeals are only permitted when: (1) there has been gross misconduct, bias, serious conflict of interest, or other material misconduct on the part of a panelist; (2) there has been a serious departure from a fundamental rule of procedure; or (3) a Panel manifestly exceeds its powers, authority or jurisdiction, for example, by failing to apply the appropriate standard of judicial review.[61] It must also be established that the action materially affected the Panel's decision, and that the decision threatens the integrity of the Binational

53. NAFTA *supra* note 4, annex 1901.2.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. NAFTA, *supra* note 4, art. 1903.
60. *Id.* art. 1904(13).
61. *Id.* art. 1904(13)(a).

Panel review process.[62]

Each NAFTA country selects five sitting or retired judges as potential ECC members.[63] From this roster, the two opposing countries in a dispute pick a committee of three.[64] After each country selects one member, the two countries draw lots to determine which side gets to choose the third member.[65] The ECC either affirms the Panel decision or vacates it for remand to a new Panel.[66] The ECC's rulings are binding with respect to the matter and the parties involved.[67] As is the case for the Binational Panels, Chapter 19 of NAFTA expressly prohibits any Party to the Agreement from establishing legislatively a procedure to challenge ECC determinations in their respective court systems.[68]

III. THE CONSTITUTIONAL PROBLEM POSED BY CHAPTER 19

A. United States

Several articles have been written as to whether Chapter 19 of NAFTA violates Article III of the U.S. Constitution, with no consensus having been reached as to the correct answer.[69] The principal issue is whether NAFTA Binational Panels are without authority to review decisions of the United States' Department of Commerce and the United States' International Trade Commission by virtue of Article III Section 1 of the United States Constitution. That Section reads: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[70]

By entering NAFTA, Congress and the President may have exceeded the authority granted to them respectively by Articles I and II of the Constitution, having unlawfully ceded powers encompassed within the sovereignty of the United States to an international tribunal.

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62. *Id.* art. 1904(13)(b).
63. NAFTA, *supra* note 4, annex 1904.13.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* art. 1904(11).
69. For example, Demetrios Metropoulos concludes that Chapter 19 of NAFTA does violate Article III of the United States' Constitution. *See* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L. L.J. 141 (1994). Denis J. Edwards reaches the opposite conclusion. Denis J. Edwards, *NAFTA and Article III: Making a Drama Out of a Crisis*, NAFTA: LAW & BUS. REV. AMS., vol. I, No. 2, 69 (1995). For other articles on this topic, see *supra* note 7.
70. U.S. CONST. art. 3, § 1.

B. *Mexico*

Article 13 of the Mexican Constitution states that, "[n]o one shall be judged based on special laws or statutes."[71] The second paragraph of Article 17 provides that, "[a]ll persons have a right to the administration of justice by expedite courts that shall administrate justice in the time and terms established by law and the decisions of such courts shall be issued in a prompt, complete and impartial manner."[72] It has been suggested that by removing judicial review from the Mexican courts, Article 1904(11) of NAFTA is inconsistent with the above-mentioned sections of the Mexican Constitution.[73]

C. *Canada*

The same type of contention could be raised in Canada. A strong argument can be made that Chapter 19 of NAFTA takes away the power of judicial review of administrative tribunals from the Canadian superior courts in violation of Section 96 of the Canadian Constitution. What follows is a detailed description and evaluation of this argument.

IV. LIMITS ON THE DELEGATION OF JUDICIAL POWERS

Before addressing the constitutionality of NAFTA Chapter 19 Binational Panels, it will be helpful to review Canada's constitutional and judicial structures. This will assist in illustrating the limitations the Canadian constitution places on Parliament's ability to relocate decision-making powers from the superior courts to administrative tribunals.

A. *Constitutional Structure of Canada*

The Constitution of Canada is composed of written documents and constitutional customs.[74] The written documents consist of what was formerly known as the British North America Act of 1867 (the BNA Act) [75] and the more recently adopted Canadian Charter of Rights and Freedoms (the Charter).[76]

The BNA Act is the imperial statute that triggered the confederation of the British Colonies that became Canada. It divides legislative power in the Canadian federal system between the Federal Parliament

71. CONSTITUTION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 13 (Mex.).

72. *Id.* art.17.

73. *See* Luis Manuel Perez de Acha, *Binational Panels: A Conflict of Idiosyncrasies,* 3 SW. J. L. & TRADE AM. 431, 434 (1996).

74. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, ch. 1 (3d ed. 1992).

75. British North America Act, 30 & 31 Vict., ch. 3 (U.K.) (now referred to as the Constitution Act, 1867).

76. Schedule B Canada Act, 1982, ch. 11 (U.K.).

and the Provincial Legislatures.[77] Section 92 of the BNA Act sets out the enumerated classes of subjects over which the provinces have exclusive legislative competence and Section 91 outlines the areas in which the federal Parliament has exclusive jurisdiction.[78] In 1982 two developments occurred. First, the BNA Act was renamed the Constitution Act 1867. Second, the Charter came into effect and entrenched a number of rights and freedoms and gave Canadian courts the responsibility to enforce them.[79]

B. Courts

One of the principal foundations upon which the Canadian Constitution rests is its unified national judiciary, the result of a compromise between federal and provincial powers made by the Fathers of Confederation in 1867. While the provinces were given responsibility for the administration of justice under Section 92(14) of the constitution,[80] under Section 96, the Governor General was given the power to appoint judges to the superior, district and county courts in each province.[81] Section 100 obliges the Parliament of Canada to fix and pay the salaries of these judges.[82] The possible overlap of federal and provincial constitutional power with respect to the courts has led to cooperation between the levels of government in maintaining a strong unified judicial presence throughout Canada.

1. Nature of the Superior Courts

The Canadian Constitution applies a British parliamentary model for government to a federated state. At the time of Confederation in 1867, each of the uniting provinces' own courts were modeled on the English system.[83] The superior courts had jurisdiction throughout the province.[84] Upon the creation of Canada, it was decided that the courts already existing in the provinces would continue to operate.[85] This gave rise to the general jurisdiction trial courts that are now the superior courts in the provinces.[86] As direct descendants of the English superior courts, the Canadian provincial superior courts (often referred to as the Section 96 courts), possess "inherent jurisdiction," which means they

77. Constitution Act, 1867, R.S.C., App. No. 5, §§ 91-92 (1985) (Can.). *See also* ALBERT ABEL, LASKIN'S CANADIAN CONSTITUTIONAL LAW ch. 1 (4th ed. 1973).
78. Constitution Act, 1867 §§ 91-92.
79. Constitution Act, 1982, R.S.C., App. No. 44, § 53(2) (1985) (Can.).
80. Constitution Act, 1867 § 92(14).
81. *Id.* § 96.
82. *Id.* § 100.
83. T.A. Cromwell, *Aspects of Constitutional Judicial Review in Canada*, 46 S.C.L. REV. 1027, 1029 (1995).
84. PETER W. HOGG, *supra* note 74, at 162.
85. *Id.*
86. *Id.*

have original jurisdiction in any matter unless it is clearly taken away by statute.[87]

As discussed in the next section, the Supreme Court of Canada has recently held in *MacMillan* that the Section 96 courts possess a constitutionally guaranteed core of jurisdiction that cannot be removed by either provincial or federal legislation.[88] The Court also held that neither the federal nor the provincial government could confer on an inferior court or tribunal the powers of a superior court.[89] It is these two limitations on the delegation of adjudicative power that question the constitutional validity of Chapter 19 of NAFTA in Canada.

Because the Section 96 courts have general jurisdiction, there is no need for separate federal courts to decide "federal" issues.[90] This gives rise to a largely unitary court system operating within the federal state. In Canada, the jurisdiction of a court does not depend on whether the law to be applied emanates from the federal or the provincial governments. As a result, while contract law is within the provincial sphere of jurisdiction, contract cases are presided over by federally appointed judges in the provincial superior courts. The courts are creatures of provincial legislation, with facilities and staff provided and paid for by the provinces.[91] Appeals from the superior courts go to provincial courts of appeal and can then be appealed to the Supreme Court of Canada.[92]

Section 101 of the Constitution of Canada permits Parliament to create "a General Court of Appeal for Canada" and "any additional Courts for the better Administration of the Laws of Canada."[93] The Supreme Court of Canada and the Federal Court were created by the federal Government pursuant to Section 101. The Canadian Supreme Court is a general court of appeal for Canada, having jurisdiction over all laws within the legislative competence of both the federal or the provincial legislatures.[94] Appeals lie from all courts to the Supreme Court of Canada, which thereby exercises a unifying influence.[95]

The Federal Court has a trial and an appellate division.[96] Its jurisdiction is limited to administrative judicial review of federal tribunals, certain areas of federal law such as copyright and admiralty, and actions involving the federal Crown.[97] The Federal Court does not have "ancillary" jurisdiction, and its jurisdiction is largely concurrent with

87. T.A. Cromwell, *Aspects of Constitutional Judicial Review in Canada*, *supra* note 83, at 1031.
88. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R.725, 740, ¶ 15 (Can.).
89. *Id.*
90. T.A. Cromwell, *supra* note 83, at 1030.
91. *Id.*
92. PETER W. HOGG, *supra* note 74, at 162-166.
93. Constitution Act, 1867, R.S.C., App. No. 5, § 101 (1985) (Can.).
94. T.A. Cromwell, *supra* note 83, at 1029.
95. *Id.*
96. Federal Court Act, R.S.C., ch. F-7, § 4 (1985) (Can.).
97. *Id.* §§ 16, 18, 20, 22, 28.

the provincial superior courts.[98]

2. Delegation of Judicial Powers

As Canadian society has grown more complex, the number of disputes involving Canadians has increased dramatically. To cope with the greater demand for the judicial settlement of disputes, Parliament and the legislatures have created many specialised tribunals to supplement the work of the Section 96 courts.[99] Each new social structure created has given rise to new conflicts, which the government has addressed through regulation. This in turn has often resulted in the creation of new administrative tribunals.[100] Several factors can explain the preference of Parliament and the legislatures for administrative tribunals with decision-making powers: the desire for a specialist body; the need for a comprehensive investigative, adjudicative and policy-formation approach to certain problems; and lack of another way to address the sheer volume of disputes which arise in certain sectors.

Little attention was paid to Sections 96 through 101,[101] the "judica-

98. Quebec N. Shore Paper Co. v. Canadian Pac., Ltd., (1977) 2 S.C.R. 1054, 1065-66 (Can.).

99. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R at 761, ¶ 53.

100. *Id.*

101. Sections 96 to 101 of the Constitution Act, 1867 provide:

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

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Constitution Act, 1867, 30 & 31 Vict., ch. 3 (U.K.).

ture sections" of the Constitution at the time of Confederation.[102] However, since the 1930s, the Privy Council and the Supreme Court of Canada have attached considerable significance to these Sections, extending the scope of their application beyond the mere appointment of judges.[103]

The conferral of judicial functions on bodies that are not superior courts is not expressly prohibited by the judicature sections of the Constitution. However, the Supreme Court of Canada has interpreted Sections 96 to 100 as a limit on the power of the provincial legislatures to delegate decision-making power.[104] The Court has held that the provincial legislatures may not confer on a body other than a superior court, judicial functions analogous to those performed by a superior court.[105] A tribunal that is given such functions is illegally constituted unless it meets the requirements of Sections 96 to 100 (*i.e.* members must be appointed by the federal Government, drawn from the bar of the appropriate provinces and receive salaries that are fixed and provided for by the federal Government).[106] Recently it has been made clear that the same restrictions apply to the federal Parliament at least to the extent that it cannot take certain "core" functions away from the superior courts and give them to inferior courts or administrative tribunals.[107]

It should be noted that as the courts of inherent jurisdiction, Canadian superior courts seem to have no limits to their jurisdiction. Therefore, they can be given novel jurisdiction or they can adjudicate disputes that were traditionally heard by inferior courts.[108]

3. History of the Section 96 Cases up until *MacMillan*

Initially, Canadian courts refused to accept that Parliament or the legislatures could transfer any adjudicative powers of the superior courts to inferior courts or tribunals.[109] However, as modern society led to a proliferation of economic relationships that required regulation by specialised administrative agencies, the courts gradually relaxed their grip on adjudication.[110] In order to preserve the constitutional role of the Section 96 courts, Canadian judges developed a test that sought to

102. *See* REESOR, *supra* note 50, at 251.

103. *See* discussion of cases *infra* pp. 114-16.

104. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 7.3(a) (3rd ed. 1992).

105. *See* Reference re Residential Tenancies Act (N.S. 1992), [1996] 1 S.C.R. 186. (Can.); Sobeys Stores Ltd. v. Yeomans [1989] 1 S.C.R. 238 (Can.); Attorney Gen. of Que. v. Grondin [1983] 2 S.C.R. 364 (Can.); Re Residential Tenancies Act [1981] 1 S.C.R. 714 (Can.).

106. Constitution Act, 1867, R.S.C., App. No. 5, §§ 96-100 (1985) (Can.).

107. *See* the majority decision *in* MacMillan Bloedel v. Simpson [1995] 4 S.C.R. 725, discussed *infra* notes 75-81 and accompanying text.

108. *See* HOGG, *supra* note 56, at 7.3(d).

109. MacMillan Bloedel v. Simpson [1995] 4 S.C.R. ¶ 55.

110. MacMillan Bloedel v. Simpson [1995] 4 S.C.R. ¶ 57.

balance the need to maintain a strong constitutional position of Section 96 courts with the need to provide sufficient scope for the creation of effective administrative tribunals.[111]

The "no-delegation" position was entrenched law in Canada as late as 1938, when the Judicial Committee of the Privy Council held that the Ontario legislature could not confer any judicial powers on the Ontario Municipal Board by virtue of Section 96 of the Constitution.[112] But that doctrine proved to be unworkable. In *Reference re Adoption Act,*[113] the Supreme Court rejected the "no-delegation" approach and held that increases in the jurisdiction of inferior tribunals were permitted so long as their new power broadly conformed to the jurisdiction exercised by inferior courts.[114] In light of the need for more adjudicators, the legislatures and the courts continued to expand the provinces' power of judicial delegation. In 1949, the Privy Council held that as long as a judicial power had not been one that was traditionally exercised by the Section 96 courts, the legislatures could delegate it to an inferior tribunal.[115]

The next major development in this doctrine occurred in 1977 when the Supreme Court of Canada decided *Tomko v. Labour Relations Board (Nova Scotia).*[116] In *Tomko*, the Nova Scotia Labour Relations Board issued a 'cease and desist' order.[117] That order was challenged under Section 96 because it was analogous to a mandatory injunction, which was within the traditional jurisdiction of the superior courts.[118] The Supreme Court ruled that, in determining whether a delegation of judicial power violated Section 96, the transferred power must be considered in the context of the tribunal's object and purpose.[119]

The test from *Tomko* was refined by the Supreme Court of Canada in 1980 in the decision of *Re Residential Tenancies Act, 1979.*[120] The Justices in *Residential Tenancies* held that courts must examine the institutional setting of a tribunal in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body. The Court wrote:

> An administrative tribunal may be clothed with power formerly exercised by Section 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the func-

111. *See* Madam Justice McLachlin *in* MacMillan, *supra* note 58.
112. *See* Toronto v. York [1938] 1 D.L.R. 593 (Can.).
113. Reference re Adoption Act, 1938 S.C.R. 398 (Can.).
114. *Id.* at 421.
115. *See* Labour Relations Bd. of Sask. v. John East Iron Works, Ltd. [1949] 3 D.L.R. 488 (Can.).
116. *See* Tomko v. Labour Relations Bd. (N.S.) [1977] 1 S.C.R. 112 (Can.).
117. *Id.*
118. *Id.* at 113.
119. *Id.* at 120.
120. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. 714 (Can.).

> tion of the tribunal, such that the tribunal itself must be considered to be acting 'like a court', then the conferral of the power is *ultra vires*.[121]

Under this approach, an administrative scheme is only invalid when adjudication is the sole or central function of the tribunal, such that the tribunal can be said to be operating like a Section 96 court.[122]

Justice Dickson laid down a three-step approach to determining whether a transfer of power from a Section 96 court to an inferior court was constitutional.[123] The first step is to determine if the power given to the inferior tribunal historically fell within the jurisdiction of the Section 96 courts.[124] The second step is to determine whether the power is judicial.[125] If the power is judicial and was exercised exclusively[126] by the superior courts at the time of confederation, the inquiry moves to the third step, the consideration of the institutional setting in which the judicial power is employed.[127] If the exercise of power is subsidiary or ancillary to what is predominantly an administrative function, or is incidental to the achievement of a broader policy goal of the legislature, the transfer of Section 96 judicial power is nonetheless valid.[128] If, however, the superior court power conferred on the tribunal is a dominant part of its function, the tribunal will be seen as acting like a Section 96 court and will be found to be unconstitutional.[129]

While the above Section 96 case law clearly binds provincial legislatures, the applicability of this analysis to the federal Parliament was an undecided issue in Canada for some time.[130] In 1992, in the case of *Chrysler Canada v. Canada (Competition Tribunal),*[131] the majority of the Supreme Court of Canada decided not to rule on whether Section 96 limited the powers of Parliament.[132] However, this issue now seems to have been resolved with *MacMillan* and the decisions that have

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121. *Id.* at 733-34.

122. *Id.* at 736.

123. *Id.* at 734-35.

124. In Sobeys Stores Ltd. v. Yeomans [1989] 1 S.C.R. 238 (Can.), Madam Justice Wilson suggested that the issue was not the remedies exercised by the superior courts at the time of Confederation, but whether the dispute was one which fell within their jurisdiction.

125. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. 714, 734 (Can..).

126. The requirement that the imputed power had to have been exercised exclusively by the superior courts at the time of confederation in order to be unconstitutional was laid down by the Supreme Court in *Attorney General of Que. v. Grondin*, [1983] 2 S.C.R. 364 (Can.).

127. Addy v. Queen [1985], 22 D.L.R. (4th) 52 (Can.).

128. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. at 735-36.

129. *Id.*

130. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 7.2 (3d ed. 1992).

131. Chrysler of Canada Ltd. v. Canada (Competition Tribunal) [1992] 2 S.C.R. 394 (Can.).

132. *Id.* at 443-44.

adopted it.[133]

C. *MacMillan Bloedel v. Simpson*

In *MacMillan*, the defendant Simpson was a minor who was 17 years of age at the time of his arrest.[134] Simpson violated an injunction issued by the British Columbia Supreme Court prohibiting certain protests.[135] As a result, Simpson was charged with contempt of court.[136] At trial, Simpson made an application to be tried in youth court pursuant to Section 47(2) of the Young Offenders Act, an Act of the Parliament of Canada, which transfers jurisdiction over contempt of court committed by a minor to the youth court.[137] That section reads:

> 47. . . (2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.[138]

The application was dismissed and Simpson was convicted.[139] Simpson appealed on the ground that the British Columbia Supreme Court had no jurisdiction to try him.[140] The Court of Appeal upheld the conviction holding that 47(2) of the Young Offenders Act was unconstitutional.[141] It reasoned that because the contempt power is within the core jurisdiction of the superior courts, it is beyond the competence of Parliament to remove any part of the contempt powers from those courts.[142] In a five-four decision, the Supreme Court upheld the ruling of the Court of Appeal.

On the basis of the *Residential Tenancies* test, the Supreme Court held that the grant of jurisdiction to youth courts was permissible. First, on the historical test, the contempt of court charge was clearly within Section 96 jurisdiction at the time of Confederation.[143] Second, jurisdiction of the youth court was unquestionably to be exercised judi-

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133. In Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1994] 3 S.C.R. 3 at 68 the majority of the Supreme Court affirmed that section 96 did apply to tribunals created by Parliament as did the majority of the Supreme Court in Reference re Residential Tenancies Act (N.S. 1992), [1996] 1 S.C.R. 186 ¶ 73.

134. MacMillan Bloedel, Ltd. v. Simpson [1995] 4 S.C.R. at 734, ¶ 4.

135. *Id.*

136. *Id.*

137. *Id.* ¶ 5.

138. Young Offenders Act, R.S.C., ch. Y-1, § 47(2) (1985) (Can.).

139. MacMillan Bloedel at 734, ¶ 5.

140. *Id.* at 736, ¶ 8.

141. *Id.*

142. *Id.*

143. MacMillan Bloedel at 747, ¶ 26.

cially.[144] However on the third test, the institutional setting test, the grant of jurisdiction was found to be constitutional.[145] The Court concluded that the institutional setting of the transfer of power was the youth courts, which were part of a novel approach to curbing criminal conduct.[146] These courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The Court held that the power to punish youths' contempt of superior courts was merely ancillary to those primary functions.[147] Accordingly, granting jurisdiction to punish youths for contempt of superior courts did not infringe upon Section 96 of the Constitution Act, 1867.[148] On that issue, the entire Court agreed. The real issue in the case was whether the delegation of contempt power over youths to an inferior court could be *exclusive*, such that superior court jurisdiction was completely removed.[149] On this issue the court split five judges to four.

Chief Justice Lamer wrote the majority decision that made two dramatic changes to the law regarding Section 96. First, the majority decision made clear for the first time that Section 96 limits the powers of both Parliament and the provincial legislatures, since the case involved a delegation of judicial power by Parliament. The dissent did not take any objection with this innovation and subsequent cases have affirmed this principle.[150] Second, the majority held that under Section 96, jurisdiction to decide certain matters could never be taken away from the superior courts, and that contempt of court was part of that "core" jurisdiction.[151] Chief Justice Lamer wrote:

> The superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said either to ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary. Furthermore, the power of superior courts to fully control their own process is, in our system where the superior court of general jurisdiction is central, essential to the maintenance of the rule of law itself.[152]

Lamer did not attempt to provide a finite list of the "core functions"

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See* Reference re Remuneration of Judges of the Provincial Court (P.E.I.) 68; Reference re Residential Tenancies Act (N.S. 1992), ¶ 73.
151. MacMillan at 740, ¶ 15.
152. *Id.*

of the Section 96 courts. Instead, he quoted Keith Mason with approval to the effect that the "ubiquitous nature" of inherent jurisdiction "precludes any exhaustive enumeration of the powers which are thus exercised by the courts."[153] Chief Justice Lamer was of the opinion that inherent jurisdiction is that which is integral to the operations of the superior courts.[154] For such jurisdiction, no part of it could be removed by either level of government in the absence of a constitutional amendment.[155] The majority was of the opinion that adjudicating contempt of court proceedings was part of the "core functions" of the Section 96 courts.[156] Therefore, Section 47(2) was valid to the extent that it conferred jurisdiction on the youth court but was inoperative in depriving the superior court of its jurisdiction to convict the appellant of contempt.[157]

Lamer quoted from I. H. Jacob's "The Inherent Jurisdiction of the Court" and concluded:

> While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.[158]

Madam Justice McLachlin wrote for the four dissenting judges. The dissenting opinion viewed the *Residential Tenancies* test as sufficient for preserving the functions of administrative tribunals without violating the constitution. Justice McLachlin rejected as unnecessary the additional condition that the transfer of judicial power to inferior tribunals not involve any aspect of the "core" powers of the superior courts.[159] The dissenters wrote that the proposed "core test" needlessly derogated from the functional approach of the *Residential Tenancies* test.[160]

153. Keith Mason, *The Inherent Jurisdiction of the Court*, 57 AUSTL. L.J. 449, 449 (1983), as quoted by Justice Lamer in MacMillan, *supra* note 75, ¶ 33.

154. MacMillan, 4 S.C.R. at 754, ¶ 38.

155. *Id.* at 757, ¶ 42.

156. *Id.* at 754, ¶ 38.

157. *Id.* at 757, ¶ 43.

158. *Id.* ¶ 30, Justice Lamer *quoting* Isaac H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 27 (1970).

159. MacMillan 4 S.C.R. at 780, ¶ 93

160. *Id.* at 779, ¶ 91.

V. APPLICATION OF SECTION 96 JURISPRUDENCE TO THE NAFTA PANELS

A. Constitutionality of Chapter 19 Panels

1. Does Section 96 Jurisprudence Apply to the Federal and Supreme Courts?

A threshold question concerns the applicability of cases like *MacMillan* to the federal courts. An argument can be made that the cases discussed above address the unconstitutional creation of provincial superior courts or the removal of power from provincial superior courts. Since NAFTA Binational Panels remove the power of judicial review from the Federal Court and the Supreme Court of Canada, and not the provincial superior courts, there is no constitutional difficulty, at least not as defined above. This argument is not completely without merit. There has been some debate in Canada as to whether the Federal Court and the Supreme Court of Canada, as creations of federal statute, are "superior courts" such that the limitations of Sections 96-100 of the Constitution apply to them.

The issue was first raised in an article by W.R. Lederman,[161] where he argues that the term "superior court" in Section 96 of the Constitution applies to the federal superior courts created under Section 101.[162] According to Lederman, the Federal and Supreme Court are subject to the same constitutional limitations regarding delegation of decision-making authority as are the provincial superior courts:

> [I]ndeed the General Court of Appeal for Canada would necessarily and pre-eminently be a superior court on the English model. To consider that Section 101 could mean anything else would be so incongruous as to be absurd.
>
> Surely the B.N.A. Act necessarily implies that the "General Court of Appeal for Canada" must be a superior court in the fullest sense, and it is guaranteed typical and appropriate superior court appellate jurisdiction.
>
> When one realizes that the guaranteed jurisdiction of the provincial superior courts rests upon a wider basis of necessary implication than the "mere" federal appointing power in section 96, as explained earlier, then it follows that the same wider basis of implication is equally relevant to the federal superior courts and should confer on them a similarly guaranteed jurisdic-

161. William. R. Lederman, *The Independence of the Judiciary*, 34 CAN. B. REV. 1139, 1176 (1956).

162. *Id.* at 1175-77.

tion.[163]

This view was rejected by Justice Laskin as follows: "It has been suggested by Lederman that the limitations of ss. 96 to 100 of the B.N.A. Act may properly be imported into Section 101 so as to restrict federal courts in the same way, but there is no tenable ground of history or text to support the suggestion."[164]

Under the Lederman approach, Parliament can take "core" jurisdiction away from the provincial superior courts and give it to the federal superior courts, but it cannot take it away from all superior courts and give it to an inferior tribunal.[165]

This issue seems to have been resolved in favor of the Lederman approach in the case of *Addy v. The Queen.*[166] In *Addy*, the plaintiff was a judge of the Federal Court who was 69 years of age.[167] The Federal Court Act provided that judges of the Federal Court must cease to hold office upon attaining the age of seventy years.[168] Section 99(2) of the Constitution provided that judges of the superior courts could hold office until they reached the age of 75.[169] Addy argued that the mandatory retirement provision of the Federal Court Act was inconsistent with Section 99(2) of the Constitution and therefore was of no force and effect.[170] The Federal Court agreed, holding that the Supreme Court of Canada and the Federal Court of Canada were superior courts within the meaning of Section 99(2). The Court quoted from Blackstone's Commentaries:

> A superior court as distinguished from an inferior court possess broad supervisory jurisdiction over inferior tribunals and keeps them within the bounds of their authority by removing their proceedings to be determined in such superior court or by prohibiting their progress in the inferior tribunal.[171]

If the federal courts are "superior" for the purposes of Section 99, they must also be "superior" for the purposes of Section 96, as Sections

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163. *Id.*

164. *See* BORA LASKIN, CANADIAN CONSTITUTIONAL LAW 76 (4th ed. rev. 1975).

165. Justice Lamer in *MacMillan* seems to reject the notion that inherent powers could always be transferred between superior courts. At paragraph 42 of that decision he wrote: The full panoply of contempt powers is so vital to the superior court that even removing the jurisdiction in question here and transferring it to another court with judges appointed pursuant to s. 96 would offend our Constitution." *See* MacMillan Bloedel, ¶ 42.

166. Addy v. Queen [1985], 22 D.L.R. (4th) 52 (Can.). The federal Government did not appeal the decision, and section 8 of the Federal Court Act was amended to raise the age of retirement for federal court judges to 75 years. S.C. 1987, ch.21, §7.

167. Addy v. Queen [1985] 22 D.L.R. at 53.

168. The Federal Court Act R.S.C. ch. 10 (2d Supp.) § 8(2) (1970) (Can.).

169. Constitution Act, 1867, R.S.C., App. No. 5, § 99(2) (1985) (Can.).

170. Addy v. Queen [1985], 22 D.L.R. at 55.

171. 3 BLACKSTONE'S COMMENTARIES 43-46 (1768), *cited in* Addy, 22 D.L.R. at 58.

96 to 100 have consistently been read together to form the "judicature sections" of the Canadian Constitution. As a result, the constitutional restrictions of Section 96 apply equally to the federal and provincial superior courts.

Having established that Section 96 applies to Chapter 19 of NAFTA, two similar but distinct questions must be addressed. The first is whether it is a violation of Section 96 of the Canadian Constitution to give the Binational Panels the power of judicial review in antidumping cases. The second is whether taking the power of judicial review away from the Federal Court violates Section 96. Each of these will be addressed in turn.

2. Is the Grant of Jurisdiction to the Binational Panel Unconstitutional?

According to recent Canadian case law on Section 96, before applying the *Residential Tenancies* test, the essential nature of the inferior tribunal and the power being delegated must be determined. Only after the court has properly categorized the pith and substance of the legislation, can it proceed with the three-part test laid down in *Residential Tenancies*.

a. Characterization of the Law

The implementing legislation for Chapter 19 of NAFTA creates a Binational Panel that reviews antidumping decisions of federal tribunals. This can only be characterized as judicial review. The scheme created may be considered judicial review in the broad sense or, alternatively, could be characterized more specifically as judicial review of antidumping and countervailing decisions. In either case, the primary nature of the issue in question revolves around the question of the limits on Parliament's ability to delegate judicial review power.

b. Historical Inquiry Test

The Historical Inquiry Test is the first part of the inquiry laid down in *Residential Tenancies*. It asks whether the subject matter at issue is one which is "broadly conformable" to the exclusive jurisdiction exercised by section 96 at the time of Confederation.[172] There can be no doubt that this is true of judicial review. But that does not end the historical inquiry. In *Reference re Young Offenders Act*, Chief Justice Lamer added a qualification to the "historical inquiry" test.[173] Justice Lamer suggested that the legislative purpose of the grant of power, and

172. Re Residential Tenancies Act, 1979 [1981] 1 S.C.R. 714, 734 (Can.).
173. Reference re Young Offenders Act (P.E.I.), [1991] 1 S.C.R. 252, 269 (Can.).

the nature of the scheme in question, should be considered.[174] If what appeared to be a power that was traditionally exercised by the superior courts, forms part of a new legal regime, it will not violate Section 96. Applying this approach to *Reference re Young Offenders Act*, Justice Lamer concluded that the powers granted to youth courts, and the administrative scheme set up under the Young Offenders Act, could be viewed as having created "new powers or jurisdiction." Such jurisdiction was not within the power of the superior courts at the time of Confederation and therefore the transfer of power was held valid.[175]

Using this analysis it could be argued that Chapter 19 of NAFTA also forms part of a novel jurisdiction, as there was no antidumping or countervailing duty laws in Canada at the time of Confederation. It was not until 1904 that Canada amended its Customs Tariff Act[176] to provide for antidumping duties, making it the first country to establish such a regime.[177] A related argument that can be made is that had the drafters of the BNA Act thought about international trade disputes in 1867, they would have created Binational tribunals rather than giving the power to the Section 96 courts. Some evidence for this assertion can be found in the International Joint Commission (IJC) created under the 1909 Boundary Waters Treaty between Canada and the United States.[178]

However, it could also be argued that there is nothing novel about judicial review, a power that was exclusively in the hands of Section 96 courts at the time of Confederation.[179] In *Reference re Young Offenders Act*, the tribunal's power of contempt was one small part of its overall function to provide a different scheme of criminal justice for youth offenders. By contrast, the primary function of the Binational Panel is judicial review. Therefore, it can be argued that Chapter 19 does not form part of a novel jurisdiction, and as such, the analysis must continue.

c. Judicial Function

In discussing the judicial function part of the Section 96 test, the Court in *Residential Tenancies* wrote:

> . . . the hallmark of judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness

174. *Id.* at 269-72.

175. *Id.* at 271.

176. Act to Amend Customs Tariff 1897, S.C., ch.11, (1904) (Can).

177. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE, 101 (1995).

178. *See* THE INTERNATIONAL JOINT COMMISSION SEVENTY YEARS ON, (R. Spencer, et al. eds., 1981); S. Wex, *Boundary Waters Treaty, Article VIII: The Legal Status of the International Joint Commission under International and Municipal Law*, XVI Can. Y.B. Int'l. L., 276 (1978).

179. T.A. Cromwell, *supra* note 83, at 1032.

> and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.[180]

The exercise of judicial review by Chapter 19 Binational Panels is clearly a judicial function. Some authors have tried to characterize the Chapter 19 Panels as arbitration boards and not super-national tribunals in order to ensure that these Panels are not prevented from settling disputes under the Mexican constitution.[181] In light of their procedures and functions outlined above, this argument is not convincing.

d. Institutional Setting

It is a long established principle of Canadian constitutional law that the constitutionality of legislation is to be determined by its substantial essence rather than by its minor or incidental characteristics.[182] For this part of the *Residential Tenancies* test, court must examine the features of the scheme that have been attacked in the context of the overall institutional setting.

With Chapter 19, the primary function of the tribunal is judicial review. It would seem that the institutional setting therefore leads to the conclusion that the Binational Panel process is unconstitutional. The minority's judgment in *MacMillan*, highlights the difficulties the Binational Panel system will face in trying to meet the "institutional setting" test:

> The *Residential Tenancies* test is based on the premise that any judicial power can be transferred from a s. 96 court to an inferior tribunal, provided that the power is ancillary to the tribunal's larger mandate. Shadow courts, devoted exclusively or primarily to rendering judgments which s. 96 courts have traditionally rendered, are forbidden.[183]

Like the *Young Offenders Act* case, one could argue that the Chapter 19 Panels form part of international agreement so they are ancillary to the NAFTA as a whole. But that is not the test. The requirement is that the judicial function is only a small part of the tribunal's mandate.[184] Here it is virtually the tribunal's entire mandate, as was the case in *Residential Tenancies.*

Therefore it would seem that the NAFTA Binational Review Panels

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180. Re Residential Tenancies Act [1981] 1 S.C.R. at 743.

181. *See* Luis Manuel Perez de Acha, *Binational Panels: A Conflict of Idiosyncrasies*, 3 SW. J. L. & TRADE AM. 431, 433.

182. PETER W. HOGG, *supra* note 74, at 377-79.

183. *See* Madam Justice McLachlin *in* MacMillan Bloedel v. Simpson [1995] 4 S.C.R. ¶ 70.

184. Re Residential Tenancies Act [1981] 1 S.C.R. at 736.

may indeed violate Section 96 by conferring judicial power on an inferior tribunal. The best argument against this position is that such a conferral is not unconstitutional because the jurisdiction over antidumping disputes is novel. In any event, as the next section illustrates, it is the removal of judicial review power from the superior courts that is the most constitutionally indefensible aspect of NAFTA's Chapter 19 Panels.

B. *Is the Removal of jurisdiction from Section 96 Courts Unconstitutional?*

In order to answer this question it is first necessary to determine whether judicial review is one of the "core functions" of the Section 96 courts. In *Crevier v. A.G. Quebec*,[185] the Supreme Court held that judicial review of administrative decisions was part of the essential functions of the Section 96 courts and could not be exercised by another tribunal.[186] Chief Justice Laskin wrote for a unanimous Court: "I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review."[187]

In *Crevier*, the *Profession Code* of Quebec governed several professional corporations in that province.[188] It required each corporation to establish a Discipline Committee to deal with allegations of misconduct.[189] Upon a finding of guilt, the Committee had the power to impose a broad range of sanctions.[190] Two members of a professional corporation were convicted by the Discipline Committee and appealed that decision to the Professions Tribunal.[191] The Tribunal quashed the conviction on the basis that the Discipline Committee had exceeded its authority.[192] The complainants then brought a writ before a Quebec Superior Court challenging the constitutionality of the Tribunal. That court found that the Tribunal had wide powers to confirm, alter or quash any decision of the Discipline Committee, and was able to make almost any determination of law, fact or jurisdiction. The Quebec Superior Court concluded that the Tribunal's powers were such as to offend Section 96 of the Constitution.[193] The Supreme Court of Canada agreed, holding that an attempt to insulate a statutory tribunal from any review of its adjudicative functions is unconstitutional under Section

185. Crevier v. Attorney Gen. Que. [1981] 2 S.C.R. 220 (Can.).
186. *Id.* at 237-39.
187. *Id.* at 237.
188. *Id.* at 222.
189. *Id.*
190. *Id.*
191. Crevier [1981] 2 S.C.R. at 223.
192. *Id.*
193. *Id.*

96.[194] A statutory tribunal may not, in the face of Section 96, determine the limits of its own jurisdiction without appeal or review.[195]

Apparently a significant factor in the Court's decision was the fact that the sole function of the Tribunal was to hear appeals,[196] as opposed to exercising final appellate authority as part of an institutional arrangement by way of a regulatory scheme. Chief Justice Laskin wrote: "The Professions Tribunal is not so much integrated into any scheme as it is sitting on top of the various schemes and with an authority detached from them . . . ."[197]

The Court cited *Residential Tenancies* with approval holding that a scheme will be invalid "when the adjudicative function is the sole or central function of the tribunal so that the tribunal can be said to be operating like a section 96 court."[198]

In *Attorney General v. Farrah*,[199] the Quebec provincial Legislature established a statutory tribunal of appeal with jurisdiction, to the exclusion of any other court, to hear and dispose of an appeal on any question of law.[200] This had the effect of transferring the supervisory jurisdiction of the Quebec Superior Court to the Tribunal, which the Supreme Court of Canada ruled was beyond the power of the provincial legislature by virtue of Section 96. Commenting on *Farrah*, the Court in *Crevier* wrote:

> In short, what the *Farrah* case decided was that to give a provincially-constituted statutory tribunal a jurisdiction in appeal on questions of law without limitation, and to reinforce this appellate authority by excluding any supervisory recourse to the Quebec Superior Court, was to create a Section 96 court.[201]

Applying these cases to the NAFTA Binational Panels, it would seem that there is little doubt they are unconstitutional. Like the tribunal in *Crevier*, 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 of reviewing legislation, however, it is far more likely the case that this supervisory role over legislation is incidental to its dispute settlement function.

The only plausible retort would be that judicial review is not part of

194. *Id.* at 234.
195. *Id.* at 238.
196. Crevier [1981] 2 S.C.R. at 233.
197. *Id.*
198. *Id.* at 233 (citing Tomko v. Labour Relations Bd. (N.S.) [1977] 1 S.C.R. 112 (Can.)).
199. Attorney Gen. Que. v. Farrah, [1978] 2 S.C.R. 638 (Can.).
200. *Id.* at 641-42.
201. Crevier, [1981] 2 S.C.R. at 238.

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, nowadays be said to be part of its inherent jurisdiction, for this jurisdiction is exercised by virtue of prerogative orders."[202]

Whether Justice Lamer's "core functions" of the provincial superior courts are co-extensive with Jacob's "inherent jurisdiction" is unclear. In *Residential Tenancies (N.S. 1992)*, Chief Justice Lamer, writing for the minority, concluded that jurisdiction over residential tenancy disputes was not part of the "core" jurisdiction protected by Section 96.[203] Justice Lamer held that core jurisdiction is very narrow and includes "only critically important jurisdictions which are essential to the existence of a superior court . . . and to the preservation of its foundational role within [the Canadian] legal system."[204] Perhaps this definition is so narrow that it excludes judicial review. However, *MacMillan* itself suggests that judicial review would be a "core function."

In upholding the constitutionality of the exclusive jurisdiction of the Youth Courts to try minors for contempt, the dissenting judges in *MacMillan* wrote: "[T]ransfers of s. 96 jurisdiction to inferior tribunals have not ousted the power of the superior courts, but merely elevated it one remove. Administrative tribunals deal with the factual minutiae of multitudinous disputes; the superior courts ensure that the law is followed and fair process maintained."[205]

This would suggest that with respect to the constitutionality of Chapter 19 of NAFTA, even the minority in *MacMillan* would be concerned over Chapter 19 since it completely ousts the judicial review power of the superior courts in antidumping and subsidy cases.

VI. CONCLUSION

It is unlikely the Supreme Court of Canada will strike down the legislation that implements Chapter 19 of NAFTA 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.[206] If Canada

202. I. H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 49 (1970).

203. Reference re Amendments to the Residential Tenancies Act (N.S. 1992), [1996] 1 S.C.R. 186, 224, ¶ 56 (Can.).

204. *Id.*

205. MacMillan Bloedel [1995] 4 S.C.R. ¶ 83.

206. A U.S. official described Chapter 19 as the linchpin of the FTA. *See Remarks by John O. McGinnis, Deputy Assistant Attorney General, United States-Canada Free Trade*

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.

Instead, the Court will likely utilize one of the arguments outlined above to find that Chapter 19 is either outside the scope of the Section 96 jurisprudence or that it does not violate that section. This can be achieved by finding that the Panels have a novel jurisdiction exercised by no court at the time of confederation, that they are not "judicial" in nature or they are an ancillary part of the entire NAFTA scheme. A court upholding NAFTA's constitutionality would also have to decide that judicial review is not a "core function" of the superior courts or that the "core function" test does not apply to the Federal Courts. All of these arguments are weak, but plausible. However, such judicial acrobatics will only create more confusion in Canadian constitutional law while postponing the real issue for another day. Canada, including the courts, the government and the people, must address the looming confrontations between their constitution and the global economic order - an issue of critical importance that has thus far been ignored.

Chapter 19 is not the only part of NAFTA that raises constitutional problems for Canada. The Canadian Government can bind the country to international obligations under international law. However, international treaties are not self-executing in Canada and do not automatically become Canadian law upon accession. Instead, as a result of the principle of parliamentary supremacy, if the implementation of a treaty requires changes to Canadian law, legislation is necessary. However, the constitutional power to legislate is divided between the federal and provincial governments. The federal Government's trade and commerce power enables Ottawa to regulate interprovincial and international trade, whereas the provincial governments have the power to regulate intra-provincial trade. There is no supremacy clause like there is in the U.S. Constitution that would similarly bind the provinces to the accord.

As international trade agreements shift their focus from tariff to non-tariff barriers, the role of Canadian provinces has increased in the international sphere because of their constitutional jurisdiction over services, labor and investment.[207] These activities fall under provincial jurisdiction that can resist Parliamentary interference, even to implement international law obligations.[208] In the *1937 Labour Conventions*

Agreement: Hearing Before the Senate Comm. On the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases, 100th Cong., 2d, Sess. 96 (1988).

207. Constitution Act, 1867, R.S.C., App. No. 5 § 92 (1985) (Can.).

208. James P. Mcilroy, *NAFTA and the Canadian Provinces: Two Ships Passing in the*

case[209], the Privy Council, struck down legislation enacted by the federal Government pursuant to its obligations under an ILO convention on constitutional grounds.[210] It held that there was no general federal power in Canada to implement international treaties. Instead, Canadian courts are to look at the substantive subject matter of the implementing legislation.[211] If that legislation deals with a matter allocated to the federal Parliament, then Ottawa had the power to implement the treaty.[212] If however, the subject matter is allocated to the provincial legislatures, then Ottawa could not enact treaty-implementing legislation.[213]

With the rising importance of international trade agreements, Canada may soon not be able to afford to have its federal Government without the power to implement legislation in order to comply with international trade obligations when such obligations relate to matters within the provincial jurisdiction. In time, Canada's trading partners may become reluctant to enter agreements with Canada if it cannot guarantee provincial compliance. This potential dilemma is not without possible remedies. The first is obtaining provincial approval before negotiating any international agreement. However this would substantially impede Canada's ability to negotiate and is therefore undesirable. Moreover, it will also lead to provinces withholding their approval in the hopes of gaining some benefit from the federal Government. The second solution is to have the Supreme Court rehear the issue. It is likely that the Supreme Court would depart from the *1937 Labour Conventions* case if given the opportunity to do so. That case was decided more than sixty years ago, by the Judicial Committee of the Privy Council at a time when international treaties did not have the same importance to domestic economics as they do now. The third possibility is a constitutional amendment, expressly granting Parliament the power to implement treaties, regardless of their subject-matter, through legislation that bind the provinces. Which of these three approaches is most appropriate is beyond the scope of this paper but it is another one of the issues Canada must face due to its economic integration through NAFTA.

The dubious constitutionality of the NAFTA Chapter 19 binational tribunals can be resolved through adept judicial maneuvering if re-

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Night?, 23 CAN.-U.S. L.J. 431, 433 (1997).

209. Attorney Gen. Can. v. Attorney Gen. Ont. [1937] 1 D.L.R. 673, (Labour Conventions). Until 1949, Canada's highest court was the Judicial Committee of the Privy Council (J.C.P.C.), which is in fact the House of Lords under another name convened for the purpose of hearing and determining matters originating outside the United Kingdom in the former British Empire. Canada abolished appeals to the J.C.P.C. in 1949, at which time the Supreme Court of Canada became Canada's highest court.

210. *Id.* at 684.

211. *Id.* at 682.

212. *Id.*

213. *Id.*

quired. But it forms part of the larger debate that is best not decided by the courts alone. The questions Canada must face as a nation are: how much sovereignty is it willing to relinquish to the international system in the hopes of economic benefit and when is loss of Canadian identity or culture too high a price to pay?

Chapter 19 of NAFTA is probably not a real threat to Canadian sovereignty and the benefits of free trade under NAFTA surely outweigh the small infringement on the jurisdiction of the Canadian superior courts. However, as NAFTA widens in scope and deepens in commitments, similar issues will arise where the losses and gains may be more evenly balanced. It is important for Canada to face the conflict between free trade and national sovereignty while there is adequate time for significant consultation, debate and reflection. Soon court challenges or international pressure may make a thoroughly considered decision on these issues much more difficult.