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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**DEMOCRACY WATCH and JUDY DARCY on her own  
behalf and on behalf of and for the benefit of all members of the  
CANADIAN UNION OF PUBLIC EMPLOYEES**

Applicants

- and -

**THE ATTORNEY GENERAL OF CANADA**

Respondent

**AFFIDAVIT OF JUDY DARCY  
(sworn July 23 2002)**

I, Judy Darcy, of the City of Ottawa, in the Province of Ontario, National President of the Applicant the Canadian Union of Public Employees ("CUPE"), on my own behalf and on behalf of and for the benefit of all members of CUPE, MAKE OATH AND SAY:

1. I am the National President of CUPE. I was first elected by the 1,693 delegates to the Fifteenth Biennial National Convention on October 16, 1991 in Winnipeg and have been re-elected every two years since, most recently at the Twentieth Biennial National Convention in Vancouver where 2,148 delegates re-elected me National President on November 21, 2001.
2. By authority of the CUPE Constitution, as National President I function as the chief executive officer of the union. I exercise supervision over the affairs of the Union, and sign all official documents on CUPE's behalf. In general my duties include the promotion of the welfare and purposes of the Union. As set out in CUPE's Constitution, the objectives of the Union include "[t]he defence and extension of the civil rights and liberties of public employees and the preservation of free democratic trade unionism." I am CUPE's chief spokesperson and I have the authority to represent the Union in any forum or legal proceeding.

3. CUPE has approximately 500,000 members across Canada, and represents workers providing front-line services in health care, education, municipalities, libraries, universities, social services, public utilities, transportation, emergency services and airlines.

4. CUPE was founded in September 1963, when delegates to the conventions of the National Union of Public Service Employees and the National Union of Public Employees decided to dissolve their respective unions and merge into one large union for public sector employees. Today, CUPE is Canada's largest union, with more than 2,100 locals in 10 provincial divisions and two service divisions (Airline Division and B.C. Hospital Employees' Union). CUPE is funded through membership dues.

5. Along with collective bargaining and providing ongoing support and services to our members, protecting public services is also at the core of CUPE's mandate.

#### **CUPE'S NAFTA CHAPTER 11-RELATED ACTIVITIES AND INTERESTS**

6. CUPE has actively monitored, researched and spoken out on the potential impacts of trade agreements on the provision, funding and regulation of public services since the first debates over the Free Trade Agreement ("FTA") in the late 1980s. In this context, CUPE has established an ongoing campaign on trade and globalization. Through this campaign and a parallel "Public Works!" campaign against contracting out and privatization, CUPE is working to foster informed public discussion and debate about public services.

7. CUPE's determination to preserve and expand public services is unqualified. However, we have certainly welcomed debate on these issues with the fundamental qualification that these debates take place in public, and with full access to information and participatory rights for all interested parties.

8. Therefore, in our view, key to our work on trade and globalization is full and unrestricted access to the systems and processes that administer trade agreements such as the *North American Free Trade Agreement* ("NAFTA"), including access to all aspects of the investor-state tribunal process set out in NAFTA's Chapter 11.

9. Of particular concern to our union are the potential adverse impacts of NAFTA's Chapter 11 investment provisions on the delivery of public services, particularly in the areas of health care, education and municipal services. CUPE has commissioned and published legal opinions and other research examining these questions in detail. In particular, CUPE has conducted research on the impact of international trade agreements (NAFTA, and the General Agreement on Trade in Services ("GATS")) on municipal decision-making. On the basis of this research, CUPE has argued the potential consequences of decisions by local governments to privatize municipal water and wastewater services, examining the cases of the Greater Vancouver Regional District, the City of Kamloops and the Halifax Regional Municipality.

10. CUPE has played a key role in the public policy debate in Canada concerning trade policy and law. In support of its efforts, CUPE has:

- commissioned public opinion polls (as a member of the Labour Opinion Coalition ("The Vector Poll"), CUPE has supported more than 50 trade-related opinion poll questions between 1984 and 2001);
- appeared before parliamentary and legislative committees (attached to this Affidavit as Exhibit "A" is a copy of "Submission to the House of Commons Standing Committee on Foreign Affairs and International Trade Regarding Canadian Interests in Forthcoming International Trade Negotiations at the World Trade Organization (WTO) and to Establish a Free Trade Area of the Americas", presented by the Canadian Union of Public Employees (CUPE) Manitoba on April 26, 1999);
- given media interviews (attached as Exhibit "B" to this Affidavit is a copy of "Sovereignty versus Chapter 11," from the Feb. 15, 2001 edition of the *Vancouver Sun*);
- published research studies (attached as Exhibit "C" to this Affidavit is a chapter entitled "At the stroke of a pen: Governments trade away public services" from the research document *Dollars and Democracy*, CUPE's 2001 Annual Report on Privatization); and
- engaged in other activities in order to increase public awareness and foster democratic discussion and debate about the environmental, public health, policy and fiscal implications of trade agreements including the FTA, NAFTA, GATS and other agreements of the World Trade Organization ("WTO"), as well as the Free Trade Area of the Americas ("FTAA").

11. CUPE also participates in government consultative bodies. For example, a CUPE representative has sat as a member of the Department of Foreign Affairs and International Trade sectoral advisory group on international trade for medical and health products and services.

12. CUPE is concerned with the potential threat that Chapter 11 of the NAFTA poses to public services such as universal health care, as well as the threat Chapter 11 poses to the ability of governments to regulate in the public interest.

### *Challenging Alberta's Bill 11*

13. More specifically, CUPE has played a key role in several recent debates concerning trade, Chapter 11 of the NAFTA, and public services. In 2000, CUPE led a campaign in Alberta that highlighted the potential dangers of privatizing health care under the province's Bill 11, now law. CUPE highlighted the possible consequences for universal health care in Canada of introducing private, for-profit health care given the provisions in NAFTA's Chapter 11.

14. As part of the campaign against Alberta's Bill 11, CUPE pointed to NAFTA's Chapter 11 investment provisions as one of many concerns with any move towards private health care in Canada. Incidentally, one of the identified concerns with Chapter 11 was the closed and secretive nature of Chapter 11 tribunals (a true copy of the briefing note "NAFTA and Alberta's Bill 11: Two cautionary tales" is attached to this Affidavit as Exhibit "D").

15. CUPE lobbied the federal government to respond to its concerns with Bill 11, and to provide a definitive answer concerning the possible trade implications of private health care for universal health care. A response never came. CUPE also pressed the Alberta government to respond to our concerns. The eventual response from the provincial ministry of health failed to allay CUPE's concerns. CUPE continues to monitor the situation in Alberta and across the country.

*Seeking to intervene in the Metalclad judicial review*

16. In February 2001, CUPE unsuccessfully sought leave to intervene in Mexico's application for judicial review of a NAFTA tribunal award that had found in favour of Metalclad, Inc. The British Columbia Supreme Court heard the judicial review application. To my knowledge, the *Metalclad* case is the first time a foreign investor has been awarded compensation by a Tribunal under NAFTA's Chapter 11. To my knowledge, Mexico's application for judicial review represented the first time a domestic court reviewed a decision made by a NAFTA Tribunal.

17. CUPE sought to intervene arguing that the *Metalclad* case has serious implications for the environment, for public services and for democracy. CUPE argued that the *Metalclad* decision could intimidate governments trying to protect the environment and accelerate the rate of privatization, affecting our members' jobs and the services they deliver to the public.

18. Furthermore, CUPE argued that fear of compensation awards – a type of 'expropriation chill' – could tilt government decision-making in favour of foreign corporations and constrain governments' will to reverse bad decisions. CUPE is of the view that the Tribunal's ruling in *Metalclad* undermines the authority of municipalities because it negates the responsibility of local governments to provide good government and protect community interests.

19. In our application to intervene in the *Metalclad* case, CUPE also reiterated our deep concern about the lack of transparency and fairness of investor-state claims under NAFTA. A true copy of the argument that was filed in CUPE's application for leave to intervene is attached to this Affidavit as Exhibit "E".

*Other NAFTA concerns*

20. CUPE has also made representations to various levels of government and government agencies concerning the NAFTA investment chapter consequences of many other public policy decisions including: contracting out of cancer care in Ontario; the privatization of

public utilities; bulk water exports; privatization of municipal water systems; and the introduction of private universities.

### CUPE'S INFORMATION GATHERING AND DISSEMINATING ACTIVITIES

21. As a national organization representing diverse members, CUPE plays an important role analyzing and commenting on trade agreements, as well as fostering debate amongst our members and the broader public. CUPE publishes information on many topics, and in a variety of formats. Providing information and analysis about the impact of trade on public services is a regular function of many CUPE publications, including:

- CUPE national web site, [www.cupe.ca](http://www.cupe.ca) (a true copy of the webpage on our website dealing with the ruling of the B.C. Supreme Court in the *Metalclad* case is attached to this Affidavit as Exhibit "F");
- *Organize* magazine, providing updates to CUPE members on issues relevant to the union and public services (true copies of "Legal opinions blast Klein's Bill 11" and "NAFTA and Alberta's Bill 11: A cautionary tale", from *Organize* (April 2000) Vol. 4, No. 3 are attached collectively to this Affidavit as Exhibit "G");
- weekly *Fast Facts* bulletins circulated to CUPE area offices and locals (attached to this Affidavit as Exhibit "H" is a true copy of Vol. 7, No. 13 (March 17, 2000) of *Fast Facts*. (*Fast Facts* and other CUPE National publications are reprinted in local and division newsletters and bulletins);
- research briefs and bulletins (referred to above in para. 10);
- submissions to federal and provincial standing committees on trade issues, and presentations to municipal councils (referred to above in para. "10"); and
- sponsor of the web site [www.wtoaction.org](http://www.wtoaction.org), a clearinghouse of information and analysis about trade issues including those related to NAFTA.

22. With respect to our national magazine, *Organize*, CUPE writers have been accredited as researchers and journalists at public policy conferences and events, including the federal budget lockup. *Organize* is published five times a year. Its circulation varies from issue to issue but the press run is generally 50,000 English and 12,000 French copies of each edition. It is circulated to all CUPE locals and officers, to the National Library and to legislative and

university libraries in several provinces, to other Canadian unions and to unions internationally, and to selected journalists, academics, elected representatives and employer groups.

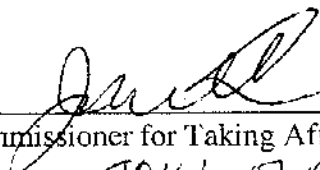
23. In addition to being a publisher in our own right, as mentioned above at para. 10, CUPE is also often called upon to comment in the media about trade issues as they relate to public services.

24. CUPE also provides education to its members, through its national Union Development department. In our view, the ability to understand and analyze Chapter 11 tribunal proceedings and their implications is essential to CUPE's goal of assisting our members to develop a critical analysis of NAFTA and other trade agreements, and the consequences for public services.

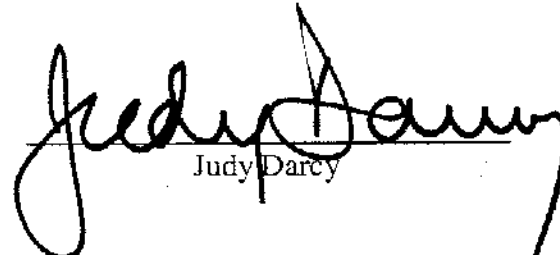
25. CUPE researchers also participate in the Trade and Investment Project Working Group of the Canadian Centre for Policy Alternatives, which produces briefing papers and longer research documents on trade issues.

26. Finally, CUPE National is a member of the Canadian Association of Labour Media, the national body for union journalists and communicators.

SWORN BEFORE ME at the City of  
Ottawa, on July 23, 2002.

  
Commissioner for Taking Affidavits

JOHN ELDER

  
Judy Darcy