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Washington DC

Toronto

April 10, 2000

Michael McBane
National Coordinator
Canadian Health Coalition
2841 Riverside Drive
Ottawa, Ontario K1V 8X7

Dear Mr. McBane:

Re: NAFTA Investment Chapter Implications of Alberta Bill-11

At your request, we have reviewed a legal opinion prepared by Shawna Vogel of the Edmonton law firm of Cruickshank Karvellas for the Government of Alberta on the proposed Alberta Health Care Protection Act (Bill 11) and the North American Free Trade Agreement (NAFTA), dated March 23, 2000.

Health care is a business worth over fifty billion dollars per year in Canada. Health care service providers are covered as Investments under the NAFTA either as sole practitioners, partners or as private entities. The term "investment" is very broadly defined by the NAFTA. It encompasses every kind of asset owned or controlled, directly or indirectly, by an investor. This description includes, but is not limited to, enterprises, debt, equity, contract rights, economic interests, intellectual property, rights granted by laws such as licenses, and any other tangible or intangible property. The NAFTA is so broad that it covers investors in Canadian incorporated private health care providers or even American companies that makes loans to Canadian providers. Under the NAFTA's broad definitions of "investor" and "investment", much of Canada's health care delivery vehicles could constitute an investment under international trade law under the NAFTA.

Given the broad scope of what constitutes an investment under the NAFTA, we were very interested to see Ms. Vogel's opinion, which we understand is to be relied upon by the Government of Alberta in asserting that the passage of Bill 11 raises no potential NAFTA liability. Given that Bill 11 would permit many new investors and investments to commence business in Alberta, we are concerned that the opinion may not have been as comprehensive as necessary.

Having now reviewed the opinion, we are very concerned by the analysis and conclusions it contains. In our opinion, Ms. Vogel's legal opinion is inaccurate both in areas of international law and fact. As a result of these serious inadequacies, we have no choice but to conclude that many of its key legal conclusions are misleading. If we were advising the Government of Alberta, we would urge them to seriously reconsider the NAFTA implications of their proposed policy and to ignore the conclusions of Ms. Vogel's legal opinion.

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Our opinion is based on the following points:

Alberta's best reservation is being lost

The NAFTA permitted provincial governments to exempt government measures that would otherwise be inconsistent with certain NAFTA Investment Chapter obligations, so long as these measures were already in force when the NAFTA came into effect on January 1, 1994 and were not changed to become any more inconsistent with any NAFTA obligations. Canada made general reservations for all such "non-conforming" provincial measures in March, 1996. These reservations, also known as Annex I reservations, only cover provincial policies that were in force on January 1, 1994 and which are still in force today. The NAFTA requires that all future changes be more consistent with the NAFTA and never be any less NAFTA-inconsistent. Once a reservation is lost, by a province changing its old policies or practices, the old reservation is spent and cannot be renewed. It is for this reason that most provinces are very careful when they change their health care policies as their changes can lower the threshold for their NAFTA obligations.

In our opinion, the most powerful reservation to protect Alberta's health care practices from NAFTA Investment Chapter challenges is its Annex I reservation. This reservation applies to all provincial health care policies that were continued from January 1, 1994, without having to even consider the nature or context of such policies, as required under the other available reservation in NAFTA Annex II.

Enacting Bill 11 would result in Alberta losing a significant portion of its existing Annex I reservation. Once Bill 11 becomes effective, it would largely invalidate much of Alberta's current NAFTA Annex I reservation because it would significantly liberalise the conditions under which foreign health care service providers could establish and operate investments in the province. Once the new regime is in place, there will be no ability to return to the circumstances that were protected under Alberta's Annex I Reservation.

Canadian reservations for health care

In addition to the Annex I reservations that Canada made for all provincial non-conforming measures, Canada has also made the following sectoral reservation for social services under NAFTA Annex II:

Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

This wording of the description is substantially identical to the Mexican and American reservations at II-U-5 and at II-M-11.¹ Significant questions remain as to the actual protection provided by this reservation. While the reservation purports in its title to cover social services, it actually only provides complete coverage for public law enforcement and correctional services. All the other areas covered by this reservation are qualified in that they only cover “social services established or maintained for a public purpose.”

The terms “social services” and “public purpose” are not defined under the NAFTA, leaving a significant interpretative question open as to the scope of this reservation. This question is particularly important due to differences in approach among governments within the NAFTA. For example, Canadian provinces have long maintained health care as a public social service. In other NAFTA jurisdictions, such as Mexico or the United States, these activities are delivered almost exclusively by the private sector or are not accessible to all.

Ms. Vogel’s opinion does not appear to note what could amount to a crucial, potential restriction on Canada’s ability to protect federal or provincial health care policies and practices. We find this very surprising as the term “social service” obviously constitutes a key part of Canada’s reservation.

Our concern over the meaning of the term “social service” is evidenced in the position of the U.S. government on the meaning of its social services reservation under NAFTA Annex II. In a letter advising American state governments on what to reserve as a social service, the U.S. government suggested that social services provided by for-profit providers were not social services.² According to the U.S. government, the delivery of health services by for-profit providers can transform the service from a “social service” to a commercial service. These American guidelines state:

[NAFTA] Chapters 11 and 12 only apply to the provision of “government services” (i.e. law enforcement, correctional services, social welfare etc.) by NAFTA investors/service providers if the state allows private providers to offer similar services on a commercial basis.³

If this type of definition were adopted by a NAFTA Tribunal, it could render Canada’s reservation virtually meaningless for many portions of the health, public education and child care sectors, as each sector contains services provided by private commercial providers in Canada.

¹ It should be noted that the Mexican and American reservations, unlike Canada’s, do not extend to reserving against most-favoured-nation treatment.

² *Inside NAFTA*, Nov. 29, 1995.

³ Draft USTR Guidelines for U.S. States’ NAFTA Service Reservations: Guidelines for NAFTA Non-Conforming State Measures, published in *Inside NAFTA*, November 29, 1995 at 18.

Without any definitions in the NAFTA text, it is necessary to rely upon the international rules of treaty interpretation to give meaning to this NAFTA reservation. Such a process would be unpredictable and any government relying on the kind of non-specific and ambiguous terms found in Canada's Social Service Reservation, would do so at its peril. For example, an examination of the appropriate definitions of "*social service*" and "*public purpose*" in international law may shed some light on the potential for this reservation.

i. Social Services

This term is capable of a number of different definitions. The *Oxford English Dictionary* defines the term "*social service*" as:

A service supplied for the benefit of the community, especially any of those provided by the central or local government, such as education, medical treatment, social welfare, etc.

The *Webster's American Encyclopaedic Dictionary* provides a much narrower definition:

organized welfare efforts carried on under professional auspices by trained personnel.

There is no definition of the term "social service" in the decisions on international courts and tribunals. All that one can surmise from these discordant definitions is that the term "social service" refers to services that provide public welfare benefits. The indication from the U.S. Trade Representative's Office that these same social services could change into commercial services if provided by for-profit providers suggests that the term may have significant limits when used within the context of a reservation.

ii. Public Purpose

On the other hand, the international law definition or usage of "public purpose" may assist application of this reservation to health care services, post Bill 11. The term "public purpose" is not defined in the NAFTA but it is recalled in its expropriation provisions. Within the context of expropriation, the phrase "public purpose" have been discussed extensively, as has the analogous terms "public use," "public policy" and its civil law equivalent, "*ordre public*." The term "*ordre public*" was examined by the International Court of Justice in the *Boll* Case. In the separate opinion of Judge Sir Hersch Lauterpacht, he stated:

[I]n the sphere of private international law the exception of ordre public, or public policy, as a reason for the exclusion of foreign law in a particular case is generally—or, rather, universally—recognised. It is recognised in various forms, with various degrees of emphasis, and, occasionally, with substantive differences in the matter of its application. ... On the whole, the result is the same in most countries—so much so that

*the recognition of the part of ordre public must be recognised as a general principle in the field of private international law ...*⁴

Accordingly, one might conclude that the term “public purpose” is very broad and could provide governments with significant leeway to designate what constitutes a “public service” for the purposes of providing or regulating health care services. However, it is equally as plausible that the operative term of the social services reservation will be the meaning of “social service” regardless of whether a government attempts to designate it as being performed for a “public purpose”. In other words, the operative question may well be exactly what constitutes a “social service”.

On the basis of the foregoing, we are able to conclude that there is a considerable amount of uncertainty in the meaning to be given to the words of the Social Service Reservation, especially the term “social service.” The definition of this term will need to reflect the varied backgrounds of NAFTA members such as Mexico and the United States and may be construed far more narrowly than Canada would hope or claim. The use of the term “social services” in this reservation is particularly problematic because of the differences in how NAFTA governments actually provide these social services and the fact that there is a different definition in use by the U.S. government. Accordingly, the only thing about which we can be certain is that undue reliance should not be placed on this reservation.

The opinion misconstrues Canada’s NAFTA reservation for health care

Ms. Vogel is incorrect when she categorically states that Annex II-C-9 protects measures related to health services from the application of national treatment and most-favoured-nation treatment under the NAFTA. In passing Bill 11, Alberta would necessarily need to rely upon Canada’s general Social Service Reservation, contained in Annex II-C-9. The reservation contained in Annex II-C-9 is only designed to deal with “social services” as opposed to commercial health services, and may therefore be inadequate to deal with government measures that would attempt to prevent private health care providers from offering “commercial” health services while permitting public or not-for-profit providers to do so. For example, Alberta might be able to outlaw the provision of corrective eye surgery throughout the province (at least in so far as the national treatment obligation is in issue), but could not selectively prevent foreign enterprises from providing for-profit eye surgery while permitting public or not-for-profit facilities to provide the same service.

Ms. Vogel states that in her opinion the Annex II-C-9 general reservation would broadly protect all health services that are “open to the public and provided for the public good”. Ms. Vogel does not appear to have based this conclusion on any of the accepted sources of international law under the customary rules of treaty interpretation. Instead, she appears to have based her conclusion about the meaning of such well-traversed international law concepts as “public good” or “public purposes” on a single dictionary definition. Ms. Vogel’s approach to this issue raises serious questions about the quality of her legal opinion as it is not consistent with the approach that a competent international

⁴ *Case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, [1958] I.C.J. 55.

lawyer would usually take to complete a legal opinion dealing with such a well-known international law concept⁵.

Reservations are to be narrowly interpreted

Ms. Vogel's opinion is inadequate in that it fails to discuss the way in which treaty reservations are interpreted by international tribunals. The NAFTA sets out how its obligations are to be interpreted in NAFTA Article 102(2). It states that the NAFTA must be interpreted in accordance with its objectives, as listed in NAFTA Article 102(1), and in accordance with international law.

We must point out that in accordance with the customary international law of treaty interpretation, **all reservations and exceptions are to be strictly construed because they represent variations from the general objectives of that treaty**⁶. The narrowness of Canada's reservation is also enhanced by its terms in that they provide complete control to all governments in respect of law enforcement and corrections measures but offer only limited control to governments in dealing with health care measures by limiting coverage of the reservation to social services provided for a public purpose. No doubt the federal government, and even the government of Alberta, would argue that this reservation should be broadly interpreted. However, there is absolutely no question that under existing international law interpretative principles, this reservation should be construed narrowly.

Canada's best mechanism to protect its health care system would have been a forceful, unambiguous and broad reservation such as the one that Canada took to protect its regulation of the banking sector in NAFTA Chapter 14. Because of the unduly narrow reservation taken by Canada, all governments must therefore be exceedingly careful of any changes that they make regarding the way health care is delivered and regulated in Canada.

Canada's reservation does not cover all issues.

Even if Canada's reservation under Annex II-C-9 was wide enough to encompass services that will be provided under Bill 11, this reservation is nonetheless critically limited in its scope and coverage. Annex II-C-9 does not exempt Alberta or Canada from all the obligations covered by NAFTA's Investment Chapter. In particular, it does not cover claims made under NAFTA Articles 1105 and 1110. Such claims could arise out of Alberta's failure to compensate American or Mexican Investors if a future government makes changes to the regime established under Bill 11. Claims could also arise whenever such changes had the effect of either expropriating, or unfairly or inequitably treating the investments of health care service providers who qualify under the broader definition of "investor" and "investment" under the NAFTA. Thus even under the best case

⁵ For example, typically an international lawyer would look to the sources of international law identified by Article 38 of the *Statute of the International Court of Justice* (which is a part of the Charter of the United Nations). Ms. Vogel has not looked to any of these sources of law in formulating her opinion. We find this unusual decision quite troubling.

⁶ The Latin term "*exceptionis est strictissimae applicationis*" expresses this long-standing international law principle. For more on this point, please see Barry Appleton "International Agreements and National Health Plans: NAFTA" in Drache & Sullivan (eds) *Health Reform: Public Success, Private Failure* (Routledge Press: Toronto, 1999).

scenario, Canada's NAFTA Social Service Reservation may still not be adequate to cover all of the risks occasioned by the change in policy envisioned by Bill 11.

Even if the Annex II "Social Services Reservation" Applies, Significant NAFTA Investment Chapter Obligations May Still Apply

Ms. Vogel's opinion states that the "majority of the obligations in Chapter 11 do not apply to measures related to health services set out in Annex II-C-9." This is not an accurate statement.

NAFTA Chapter 11 has two parts, Part A which contains substantive obligations and Part B which contains a dispute settlement procedure. All of Part B is involved in the case of a dispute, so we assume that Ms. Vogel means is that the majority of the NAFTA obligations of Part A do not apply. Even this statement is incorrect.

Part A of NAFTA Chapter 11 contains seven key obligations. These are:

- Article 1102 - National Treatment
- Article 1103 - Most-Favored Nation Treatment
- Article 1105 - Treatment in Accordance with International Law
- Article 1106 - a Prohibition on certain Performance Requirements
- Article 1107 - Senior Management
- Article 1109 - Freedom for Transfer
- Article 1110 - Expropriation and Compensation

It is particularly important that we discuss the impact of two of these obligations: treatment in accordance with international law(Article 1105) and expropriation (Article 1110). Neither of these two NAFTA Investment Chapter obligations are subject to any NAFTA reservations of any kind under NAFTA Annex I (the existing provincial reservation) or NAFTA Annex II (Canada's general reservation in Annex II-C-9).

Article 1105: Minimum Standard of Treatment

NAFTA's Article 1105 requires that NAFTA Investors be treated in accordance with international law, which includes such basic concepts of due process, non-discrimination, transparency and overall fairness. For example, under this obligation, a government is not permitted to follow policies which have the effect of treating an investor unfairly, for example by establishing a course of action targeted to disadvantage one type of health care provider (such as US-based, for-profit providers) over another. This provision would also apply to policy changes that are procedurally unsound, fail to provide sufficient notice or comment, or are otherwise arbitrary in form or effect. It is important to note that at least two NAFTA cases currently against the Canadian government have included allegations of a breach of this obligation, as well as three against the Government of the United States. As a result, it is very surprising the Ms. Vogel failed to even mention the existence of this powerful NAFTA obligation.

Article 1110: Expropriation

Ms. Vogel does mention the NAFTA's expropriation and compensation obligation but does not provide any analysis of its application. The NAFTA contains a powerful obligation that requires immediate fair market compensation to investors from other NAFTA governments who have had their investment expropriated by government conduct. The NAFTA largely includes a well-established definition of expropriation – used for over one hundred years of international law.⁷ Accordingly, the expropriation obligation is not new. Under international law, expropriation is any act by which governmental authority is used to deny some benefit of property. This denial can be actual or constructive.

More specifically, for there to be an expropriation under international law it is necessary to establish that a government has interfered unreasonably with the use of private property.⁸ The expropriating government need not take formal title to the property. An expropriation occurs when the property of an individual or business has been substantially interfered with by a governmental authority.

The expropriation provision of the NAFTA has also broadened the types of activity that could be considered as an expropriation, with the inclusion of the words “*measures tantamount to expropriation*” in its text. As substantial interference with a property right is likely an activity in the nature of expropriation under international law, it would almost certainly constitute a measure tantamount to expropriation.⁹

The American Law Institute's *Restatement (Third) on the Foreign Relations Law of the United States* comments upon the obligation to pay compensation for an expropriation. It provides that compensation for an expropriation:

⁷ The key element regarding the definition of expropriation is not the undefined elements but in fact the defined elements. For example, the NAFTA explicitly modifies international law by setting a level of compensation that is higher than that established by customary international law, and by providing for compensation for measures that are “tantamount to expropriation.”

⁸ This principle was recognized in section 3(a) of the *Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens* which states that:

a “taking of property” includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable time after the inception of such interference.

⁹ The Iran-U.S. Claims Tribunal has come to this same conclusion in a number of cases. In *I.T.T. Industries* (at 351) the Tribunal stated: *Property may be taken under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected* and in *Harza Engineering* (at 404), the Tribunal stated that “*the taking of property may occur under international law, even in the absence of a formal nationalization or expropriation, if a government has interfered unreasonably with the use of property.*”

applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory.

(§ 712 Comment (g))

This comment underscores the fact that an expropriation can take place whenever there is a substantial and unreasonable interference with the enjoyment of a property right. The action of a government to provide services in a sector where there is existing commercial competition could well be seen as a government measure harming the property of a NAFTA investor. If governmental action taken to reverse the policy course set by Bill 11 significantly harmed an American service provider's investment (including its market share or goodwill), that service provider could make a claim for expropriation under the NAFTA. Essentially, whenever a government exits a sector such as health care and allows the private sector to gain entry, it will be forced to pay compensation in order to return the sector to its original state.

The NAFTA is a very generous treaty when dealing with the quantum of investor compensation. The Agreement specifically sets out that an investor will receive fair market value for its expropriated property.¹⁰ This valuation basis provides compensation at levels that could be higher than those established under Canadian domestic law. This generous compensation standard augments the broad definition of what constitutes an expropriation under the NAFTA. As governments begin to appreciate their international obligations, and understand the costs of taking measures tantamount to expropriation, these two factors will act to limit the range of public policy options available to governments.

Article 1106: Performance Requirements

Ms. Vogel is completely mistaken when she states that Canada's obligations under NAFTA Articles 1106 do not apply to sectors listed in Annex II. Ms. Vogel is also incorrect when she states that Alberta provincial health care policies that would otherwise constitute a performance requirement would be exempt from NAFTA's Article 1106 Performance Requirement obligations. She comes to this conclusion because she states that the health care sector is covered by Canada's Annex II-C-9 reservation and thus it is protected because of the operation of NAFTA Article 1108(3). Unfortunately, Ms. Vogel has failed to carefully analyze the terms of this provision carefully. It states:

- (3) Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

Canada's reservation under Annex II-C-9 does not cover NAFTA Article 1106 obligations. The Chapcau of Annex II states that the "type of reservation" taken by a Party specifies the obligation

¹⁰ NAFTA Article 1110 (1)(d).

under NAFTA Article 1108(3) for which a reservation is taken. Since Canada did not take a reservation for Performance Requirements (NAFTA Article 1106) in Annex II-C-9, it is not covered by the terms of NAFTA Article 1108(3).

Article 1109: The NAFTA Transfer Obligations

Ms. Vogel states that restrictions on the transfers of licenses which are contained in Bill 11 would not violate the terms of NAFTA Article 1109 because this provision only deals with monetary transfers. Ms. Vogel is mistaken in making this statement. The terms of NAFTA Article 1109 deal with monetary issues and “returns in kind”. The term “returns in kind” would clearly permit an investment in Alberta to transfer a licence to an American or Mexican investor. Furthermore, this transfer would have to be made “freely and without delay”.

It is also important to note that Alberta is not permitted any reservation against this obligation under its Annex I reservation or its under Canada’s Annex II reservation (i.e. its Social Service Reservation). In other words, Alberta is obligated under NAFTA to never engage in this type of behaviour.

Article 1102: National Treatment

Of course, if the Annex II Social Services Reservation is found not apply to commercially provided health care services post Bill 11, every single one of NAFTA Chapter 11's obligations could apply to a future government's attempt to change the policies and practices established under Bill 11. For example, the powerful national treatment obligation would apply.

National Treatment is a powerful obligation that has developed from over fifty years of international trade law practice. Under this obligation, governments are required to treat all investments operating in the same business in the same fashion, and with a similar result. If there is a difference in the treatment received between a local investment and an investment from an investor from another NAFTA Party, that foreign investor is entitled to the most favourable treatment available in Alberta for the domestic investment.

Ms. Vogel states that Alberta health authorities could discriminate against foreign health care providers by imposing conditions that a foreign provider could not meet. She states:

Essentially the principle of National Treatment is very simple - a Canadian government cannot discriminate against a US or Mexican service provider solely and simply on the basis of nationality of the service provider. However, if the service provider cannot meet the criteria established by the government or does not supply the best bid on a project, there is nothing in National Treatment that requires the Canadian government to select that US or Mexican service provider.

She then goes on to state that

Further if a US service provider meets the criteria in one particular instance, there is absolutely nothing in the principle of national treatment that requires a subsequent US

service provider to be allowed to provide the service if that subsequent service provider does not meet the criteria.

The principle of national treatment ensures that Canadians receive the best treatment in the United States and similarly that Americans and Mexicans receive the best treatment in Canada. The obligation is not met by looking only at cases of formal discrimination. Further, Ms. Vogel does not appear to appreciate that the national treatment obligation is not only owed to US or Mexican service providers but to any Canadian investment in which a Mexican or an American might have an investment. Thus, an Ontario health care company that has an American Investor must be given the best treatment in Alberta. If the Alberta health authority does not permit the Canadian company to have market access because it is from outside Alberta, its US Investor could launch a NAFTA claim, because it would have been precluded from receiving the best available treatment for similarly situated service providers in Alberta.

We are very concerned about the legal conclusions made by Ms. Vogel in this area. These conclusions lead us to question Ms. Vogel's knowledge of NAFTA law. The obligation of national treatment has been interpreted by many GATT and WTO Tribunals as having both procedural and substantive effects¹¹. In other words, foreign investors from other NAFTA Parties must be provided with equality of economic opportunities in Alberta. Even if a provincial health care measure applies generally to all health care service providers but has the effect of failing to provide either NAFTA investors or their investments with the most favourable treatment available, such a measure would certainly run afoul of the national treatment obligation. Indeed, in similar circumstances under the Most Favoured Nation Treatment obligation contained within the WTO General Agreement on Trade in Services, Canada recently lost its ability to maintain the ostensibly non-discriminatory policies it began under the Auto Pact in 1965.

Accordingly, we would urge great caution upon any government agency that heeded Ms. Vogel's legal advice on this point.

Provincial Procurement is not exempt from NAFTA's Investment Chapter

Ms. Vogel suggests that provincial procurement by a province is exempt from the operation of the NAFTA's Chapter 10 Procurement Chapter. This conclusion is incorrect. Government procurement activities are indeed governed by NAFTA's Investment disciplines. NAFTA Article 1108 (7) states that NAFTA Articles 1102, 1103 and 1107 do not apply to procurement **by a NAFTA Party or a state enterprise**. Under the customary rules of treaty interpretation, by specifying exactly for whom the exemption applies, the drafters are presumed to have necessarily excluded its application to other parties. In other words, since provincial government procurement is clearly not listed in this exclusion, it is covered by NAFTA's investment disciplines.

¹¹The leading decision on this point is the *Section 337 decision*, 36 BISD (1989) 345. There are many decisions which deal with this very well-settled point, including two involving Canada in the last year, the AutoPact decision [WT/DS139/R, WT/DS142/R, 11 February 2000] and the WTO decision on Canadian Magazine Policies [WT/DS 31/AB/R, 30 June 1997].

Alberta is not a Party to NAFTA nor is it a “state enterprise” (ie. what we would call a Crown Corporation). The Parties to the NAFTA are the federal-level governments of Canada, the United States and the United Mexican States¹². Under no circumstance could a provinces’s provision of health care services be considered an element of the federal government’s procurement policy.¹³ While there are no bidding rules, provincial government purchasing practices which operate in a discriminatory manner are not exempt from the operation of the Investment chapter obligations contained in the NAFTA.

Bill 11 makes it easy for foreign investors to make a NAFTA Claim

The wording of Bill 11 could make it easy for a NAFTA Investor to commence a NAFTA Investor-State Claim if the Alberta Government decided to amend its policy in a manner that harmed the commercial interests of that Investor for example, by withdrawing funding to foreign owned health care providers. NAFTA Article 1116 sets out how an Investor from another NAFTA Party can bring a claim. In order to bring a claim, an investor must have an investment, it must file a Notice of Intent and then a Notice of Claim setting out the facts for its claim and it must show that a government has acted in breach of its NAFTA obligations in a manner that has harmed the Investor. Because of the potential NAFTA violations pointed out above, it is quite likely that an affected Investor could initiate a NAFTA claim in response to any government policy changes made after the promulgation of Bill 11.

Can Canada successfully defend a NAFTA Challenge?

In light of the strong wording of NAFTA and the weak reservations left to Canada after Alberta’s enactment of Bill 11, it appears that if Bill 11 were to become law, there may be an immediate impact on how health care could be delivered in Alberta. Under the terms of NAFTA, the Government of Alberta would not have the authority to change back to its previous (Pre-Bill 11) health care system without paying appropriate compensation to affected NAFTA investors.

Ms. Vogel suggests that since the NAFTA Free Trade Commission can make binding interpretations of the NAFTA, it is really the NAFTA Parties and not international trade tribunals that make decisions on NAFTA obligations. This statement is completely unrealistic and does not accord with the facts. First, the NAFTA Free Trade Commission can only make decisions on the basis of unanimity between the three NAFTA governments. We have already seen that there is a difference of opinion on the issue of what constitutes a “social service” between the governments of Canada and the United States. It is therefore highly unlikely that the American representative on the Free

¹² It is very clear from the wording of the Preamble and signature pages of NAFTA that this is correct. In addition, the NAFTA Investor-State Tribunal in the *Pope & Talbot* Claim also came to the conclusion that the only Parties to the NAFTA were the federal governments and that provincial governments were not Parties to the NAFTA in two recent decisions. (See award of the Pope & Talbot Tribunal made February 14, 2000 and the Award of the Pope & Talbot Tribunal made April 2, 2000).

¹³ Under Canadian constitutional law, the federal government’s authority is under its spending power but these funds are paid to the provinces who then engage in their own spending. This activity would not likely be considered federal government procurement by an international trade tribunal.

Trade Commission would ever agree to an interpretation of the NAFTA that would limit US investment rights in respect of commercial interests gained through the introduction of Bill 11.

Our law firm has been involved in every NAFTA Investor-State arbitration involving Canada. We have never seen a situation where the Free Trade Commission has issued an interpretive ruling that in any way impacted upon the ability of a Tribunal to make a decision on the merits. Moreover, the power of the Commission to actually modify the effects of various provisions is untested, and would most likely be invoked following an award by a NAFTA tribunal on the topic. Simply put, we do not believe that Ms. Vogel's conclusion is either realistic or viable, based on the experience of NAFTA lawyers to date.

In our opinion, Canada could have a very difficult time defending any future case brought against it by an American or Mexican investor arising out of the new health care policies being proposed by the Government of Alberta.

Recommendations

The protection of the provision of health and social services under the NAFTA is inadequate, particularly because the wording of Canada's health care reservation in Annex II-C-9 is ambiguous and qualified. Even with a broad reading by an international tribunal (a result that we believe to be unlikely), we are of the opinion that this reservation could be relied upon to provide full protection for the social services it wishes to cover. Further, even if the reservation was provided with widest possible reading, it would nonetheless fail to cover a number of important investment obligations.

Thus, we come to the unfortunate conclusion that in enacting Bill 11, Alberta may be going down a one-way street towards privatization of the health care sector. If the current government, or a future one, decided to modify the policy in a manner that harmed the rights acquired by NAFTA investors under Bill 11, there would certainly be the basis for a well-founded NAFTA Investor-State dispute. While this type of dispute would not force a government to change its laws, it could certainly result in a significant amount of compensation being paid to any affected NAFTA Investors.

Yours very truly,



Barry Appleton
Managing Partner

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BIOGRAPHY - BARRY APPLETON

Barry Appleton, the Managing Partner of Appleton & Associates, is an international lawyer specializing in NAFTA law. A member of the bars of Ontario, New York, the District of Columbia and the U.S. Court of International Trade, he is also the author of several free trade publications on international law, including *NAVIGATING NAFTA: A Concise Guide To The North American Free Trade Agreement*.

Mr. Appleton is designated as a leading Canadian practitioner of international trade law by Lexpert, and has served as counsel on a number of international commercial arbitration matters, (including, but not limited to, the Ethyl Corporation, S.D. Myers, Pope & Talbot and United Parcel Service of America NAFTA Investor-State disputes). He has appeared frequently as a media commentator on international trade issues on Canadian television, radio and printed media. He has also appeared before a number of Parliamentary and Legislative committees as an expert on international trade agreements such as the NAFTA, the proposed Multilateral Agreement on Investment (MAI) and the World Trade Organization (WTO).

Serving as a trade advisor to the Ontario Cabinet Committee on North American Free Trade in 1993, Mr. Appleton holds a Master of Laws in International Law from Cambridge University, a law degree from Queen's University and a B.A. (Hons.) from the University of Toronto in International Relations.

Appleton & Associates International Lawyers provide international solutions for clients at home and abroad. Based from offices in Toronto and New York City, the firm specializes in International Trade, NAFTA Law and international dispute settlement. Lawyers from Appleton & Associates act for Fortune 500 companies, Governments, Non-governmental organizations, and businesses in Canada, the United States and Mexico.

A list of Mr. Appleton's publications and memberships is attached to this summary.

BARRY APPLETON - RESEARCH AND PUBLICATIONS

Primary areas of interest include International Trade and Investment Law, International Public Law, International Environmental Law, International Dispute Settlement and Constitutional Law.

A. *BOOKS*

Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement, Lawyers Cooperative Publishing & Carswell Publishing Limited, 1994.

B. *CHAPTERS, MONOGRAPHS AND ARTICLES*

"International Investment Agreements and the Public Domain: External Limits on Public Policy Choices" in *Globalization and the Public Domain* (York University Press, forthcoming)

"International Agreements and National Health Plans: NAFTA?" in *Market Limits in Health Reform: Public Success, Private Failure*. in Drache & Sullivan (eds.) London: Routledge Publishing, 1999.

"Forestry and the MAI: Protecting Investors' 'Rights'," *Atlantic Forestry Review*, January 1998.

"The Impact of Trade Agreements on North American Financial Service Regulation." Paper presented at the Conference on Competition in the Financial Services Sector, The Canadian Institute, December 2, 1997.

"Expropriation and the North American Free Trade Agreement." Paper presented at the Annual Meeting of the Ontario Expropriation Association, October 17, 1997.

"Cross-Border Claims: Fast-Track Settlements Can Help Canadian Insurance Companies with NAFTA Investment Disputes," *Canadian Insurance Statistics Magazine*, 1996 Annual Review.

"NAFTA and Investment: An Economic Constitution?" *Canada Watch*, April/May 1996.

"NAFTA Rules Make Free Trade Less Free for Small Business," *Access Americas Magazine*, and *Trade and Commerce Magazine*, Spring 1995.

“The NAFTA ‘Investor-State’ Dispute Settlement Process,” *Ontario Business Journal*, March 1995.

“NAFTA’s ‘Investor-State’ ADR Process: System Settles Disputes Between Individuals and Governments,” *The Lawyers Weekly*, January 27, 1995.

“Bigger But Not Necessarily Better,” *Global Investment in Canada*, November 1994.

“The Missing Link: Meech Lake, Free Trade and Powers of Social Ordering” in Whyte & Peach (eds.) *Re-Forming Canada? The Meaning of the Meech Lake Accord and the Free Trade Agreement for the Canadian State*. 1 Deans Conference on Law and Policy 39 (Kingston, Canada: Institute of Intergovernmental Relations, 1988).

C. *PARLIAMENTARY AND LEGISLATIVE SUBMISSIONS*

"Expert Commentary on the Multilateral Agreement on Investment" Submission and Appearance before the Special Legislative Committee on the Multilateral Agreement on Investment of British Columbia. September 30 and October 1, 1998.

“NAFTA & Sports ,” Submission and Appearance before the House of Commons Standing Committee on Industry, Subcommittee on Sports & Industry, May 12, 1998.

“The Multilateral Agreement on Investment and Canadian Social Policy,” Submission and Appearance before the House of Commons Standing Committee on Health, December 2, 1997.

“The Multilateral Agreement on Investment and the Environment,” Submission and Appearance before the House of Commons Standing Committee on Foreign Affairs and International Trade, Sub-Committee on International Investment, November 18, 1997.

“Order Public and International Law,” Submission and Appearance before the House of Commons Standing Committee on Industry, March 4, 1997.

“The North American Free Trade Agreement and Investment,” Submission and Appearance before the Senate Standing Committee on Energy, the Environmental and Natural Resources, February 19, 1997.

“The Export Exception and the WTO TRIPs Code,” Submission and Appearance before the House of Commons Standing Committee on Foreign Affairs, 1995.

“The Parted Coronet: The Power of the Provinces and International Trading Agreements,” Submission to the Ontario Cabinet Sub-Committee on Free Trade, November 17, 1987.

D. *MEDIA*

Mr. Appleton is a regular commentator on International Law issues on national, regional and local television, radio and print media in Canada. His television appearances include CNN, CBC National News Magazine, Canada AM, Newsworld Business News and Southam Newsworld.

PROFESSIONAL MEMBERSHIPS

- New York State and American Bar Associations, Law Society of Upper Canada, Canadian Bar Association, American Bar Association, American Society of International Law, American Trial Lawyers Association, Canadian Council on International Business and the Toronto Board of Trade.

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