



Barristers and Solicitors, Trademark Agents

3400 MANULIFE PLACE  
10180 101 STREET  
EDMONTON AB T5J 4W9  
CANADA

March 23, 2000

Ministry of International and  
Intergovernmental Relations  
Government of Alberta  
12th Floor, 10155 - 102 Street  
EDMONTON AB T5J 4G8

**ATTENTION: Helmut Mach, Executive Director**

Dear Mr. Mach:

Re: **Bill 11 - Health Care Protection Act and the NAFTA**

We have been asked to provide our opinion on the implications of the North American Free Trade Agreement (NAFTA) for Bill 11, *Health Care Protection Act* ("Bill 11 ") and, in particular, whether provincial measures (laws, regulations, procedures, requirements or practices<sup>1</sup>) related to health care services must comply with the obligations of Chapter 11, Investment and Chapter 12, Cross-Border Trade in Services. In the course of providing this opinion, we have reviewed and considered Bill 11 and the relevant provisions of the NAFTA. The opinions expressed in this letter are for the sole benefit of, and may only be relied upon by the Government of Alberta.

#### **A. SUMMARY AND CONCLUSION**

From our review of Bill 11 and the relevant provisions of the NAFTA, the following are our conclusions:

1. We interpret the reference in Annex II-C-9 to health services for a "public purpose" as meaning services that are open to the public and are provided for the public good. The identity of whom or what owns, operates or funds health services is not a consideration in determining whether health services are provided for a public purpose.
2. Annex II-C-9 protects measures related to health services from the application of National Treatment and Most-Favoured-Nation obligations of the NAFTA. Therefore, health authorities do not have to apply the same standard of treatment to U.S. and Mexican investors, investments and service providers that they apply to domestic investors, investments and service

providers. Further, health authorities do not have to treat Mexican investors, investments and service providers in the same manner as it treats U.S. investors, investments and service providers (and vice versa).

3. Even in the absence of the reservation for measures related to health services as found in Annex 11-C-9, the National Treatment and Most-Favoured-Nation obligations of the NAFTA do not have the consequence of requiring other provinces to offer the same treatment to U.S. and Mexican investors, investments and service providers that Alberta does.

4. The prohibition against Performance Requirements in Article 1006 does not apply to measures related to health services as set out in Annex II-C-9.

5. The restrictions on the kind of measures that a government can enact respecting transfers and investments relate solely to monetary transfers.

6. Investor-state dispute settlement procedures under Chapter 11 are only available to foreign investors if there has been a breach of Chapter 11 and the majority of the obligations in Chapter 11 do not apply to measures related to health services set out in Annex II-C-9. Further, in an investor-state dispute, the Free Trade Commission, consisting of cabinet-level representatives of the three Parties, have the authority to issue interpretations of any part of the NAFTA, including the interpretation of Annex II-C-9 and these interpretations are binding on an Chapter 11 arbitration tribunal.

7. The restrictions on the manner in which governments can procure goods and services do not apply to provincial governments.

## **B. ANNEXES TO THE NAFTA AND HEALTH SERVICES**

Annexes I and II set out certain reservations of Canada, United States and Mexico (the "Parties") to the provisions of the NAFTA.

### **1. Annex I**

Annex I lists the reservations of the Parties with respect to existing measures that do not conform to the National Treatment, Most-Favoured-Nation Treatment, Local Presence, Performance Requirements or Senior Management and Boards of Directors obligations found in Chapters 11 and 12. The effect of listing these measures in Annex I is that Parties can maintain these measures even though they contravene the NAFTA obligations listed above. However, the Parties cannot change those measures to make them even more non-conforming or bring in new laws that would be non-conforming.

As is evident from a review of this Annex, the federal governments of the three Parties entered into a comprehensive review of their existing federal laws to determine which laws contravened the obligations of the NAFTA, in order to determine which laws they wanted to preserve by listing in Annex I. Pursuant to NAFTA Articles 1108 and 1206, states and provinces had two years from the date of entry into the force of the NAFTA to prepare their own contributions to

Annex I. Rather than each province and state undertaking the comprehensive task of identifying all laws that were non-conforming and listing those, a single general reservation of all existing non-conforming measures of all provinces, states and territories was listed by each federal government.

## 2. Annex II

In Annex II, each Party lists the specific sectors, sub-sectors or activities that do not and will never have to conform with the National Treatment, Most-Favoured-Nation Treatment, Local Presence, Performance Requirements or Senior Management and Boards of Directors obligations contained in Chapters 11 and 12. Although existing measures are listed in the Annex, this is given for "information" purposes only. Measures that do not conform with the obligations can be introduced or amended at anytime with respect to the sectors listed in Annex II. Thus, Annex II is referred to as an "unbound" reservation.

## 3. Annex II-C-9 Social Services

Canada lists "Social Services" as a sector in which Canada (federal, provincial and territorial governments) can maintain or introduce laws, regulations, procedures, requirements or practices that do not conform to the National Treatment, Most-Favoured-Nation Treatment, Local Presence and Senior Management and Boards of Directors obligations.

Annex II-C-9 provides:

"Sector: Social Services

Sub-Sector:

Industry Classification:

Type of Reservation: National Treatment (Articles 1102, 1202)  
Most-Favoured-Nation Treatment (Article 1203)  
Local Presence (Article 1205)  
Senior Management and Boards of Directors (Article 1107)

Description: Cross-Border Services and Investment

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.  
Existing Measures:"

All three Parties to the NAFTA, Canada, United States and Mexico, have treated social services in the same manner and all have identical reservations for health care.' Thus, this was not solely a "Canadian issue" requiring a specific treatment, such as the treatment of cultural industry in Annex 2106.

In order to benefit from the reservation, the services listed in Annex II (other than public law enforcement and correctional services) must be "established or maintained for a public purpose." What is the meaning of "public purpose"? *The Concise Oxford Dictionary*' defines "purpose" as "object to be obtained, thing intended." "Public" is defined as "of or concerning the people as a whole"; "done by or for, representing the people"; "open to or shared by all the people"; "of or engaged in the affairs of the service of the people." Thus, combining the two definitions, the denotation of the phrase "public purpose" is an object or intent that concerns and is open to the people as a whole.

Article 31.1 of the *Vienna Convention on the Law of Treaties* provides that a treaty will be interpreted "in accordance with the ordinary meaning" of the terms of the treaty. We normally understand that a service would be for a "public purpose" if the service is open to the public and is for the public good. One way to test this meaning is to consider what a "private purpose" would be. We would normally consider a service for a private purpose to be one that would be restricted to and for the benefit of a select group of users with only their interests under consideration. A child care facility operated by a corporation for the exclusive use of its employees would be operated for a private purpose. An onsite health clinic that provides services only for employees of the corporation could also be considered a private purpose.

Another way to test the meaning of "public purpose" is to consider and contrast the phrase with other possible phrases that the Parties could have used. Annex II-C-9 could have referred to the sector as services that are "publicly owned," "publicly funded" or "publicly operated." The term "purpose" is broader than these terms and its use illustrates that the Parties to the NAFTA intended the term to be capable of broad interpretation and application.

In conclusion, we interpret Annex II-C-9 as providing that measures relating to health services that are open to the public and for the public good need not meet the National Treatment, Most-Favoured-Nation Treatment, Local Presence and Senior Management and Boards of Directors obligations of the NAFTA. Any Canadian government can amend existing health measures or bring in new health measures that discriminate on the basis of nationality of the service provider or investor or investment and can differentiate between the investors and service providers of different foreign countries.

## **C. NATIONAL TREATMENT AND MOST-FAVOURLED-NATION TREATMENT**

Two fundamental principles underlie the NAFTA and, indeed, all trade agreements:

1. National Treatment; and
2. Most-Favoured-Nation Treatment ("MFN").

These principles are designed to secure fair conditions of trade. NAFTA Chapter 11, Investment, and Chapter 12, Cross-Border Trade and Services, require that National Treatment be given by one Party to investors and service providers from the other two Parties. Chapter 12 also requires that Most-Favoured-Nation Treatment be accorded by one Party to investors and service providers from the other two Parties.

### **1. National Treatment**

National Treatment requires that foreign goods and services cannot be the subject of laws that are less favourable than the laws applicable to local goods and services.

Article 1102 applies to investors and investment and provides:

“Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.”

Article 1202, applying to trade in services, provides:

"Article 1202: National Treatment

1. Each Party shall accord to service providers of another Party treatment no less favourable than that it accords, in like circumstances, to its own service providers.
2. The treatment accorded to a Party under paragraph 1 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part."

The effect of National Treatment is that the government cannot have two sets of rules: one for service providers or investors that are from Canada and one set of rules for service providers or investors that are from the U.S. and Mexico (unless the rules for U.S. and Mexican investors and service providers are more favourable than the rules for domestic service providers and investors – an event highly unlikely to occur!). A government cannot set up more difficult criteria for a foreign service provider to meet than a domestic service provider and cannot require the foreign service provider to "jump through more hoops" or obtain approvals and meet requirements that domestic providers will have to meet.

Essentially, the principle of National Treatment is very simple - a Canadian government cannot discriminate against a U.S. 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 U.S. or Mexican service provider. The same principle applies to treatments of U.S. and Mexican investors under Chapter 11, Investment.

In our interpretation of Annex II-C-9, we concluded that a Canadian government does not have to comply with National Treatment in respect of measures related to health services as described in the Annex. Under the NAFTA, a health authority could, for example, decide that only Alberta-owned entities can establish an approved surgical facility under Bill 11. If our interpretation of Annex II-C9 is determined to be incorrect and a government cannot make a decision based on country of origin of the investor or service provider, it is important to note that National Treatment does not require a government to allow a U.S. service provider to provide services if that service provider cannot meet the required criteria (being the same criteria the domestic service provider has to meet). Further, if a U.S. service provider meets the criteria in one particular instance, there is absolutely nothing in the principle of National Treatment that requires a subsequent U.S. service provider to be allowed to provide the services if that subsequent service provider does not meet the criteria.

## 2. Most-Favoured-Nation Treatment ("MFN")

Within the NAFTA, MFN is an important principle found primarily in the provisions on services and investment. The following are the MFN provisions found in NAFTA Chapters 11, Investment and 12, Cross-Border Trade in Services:

### "Article 1103: Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favourable than it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

### "Article 1203: Most-Favoured-Nation Treatment

Each Party shall accord to service providers of another Party treatment no less favourable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party."

The essence of MFN is that a government cannot discriminate between one foreign country and another foreign country in its laws and regulations. Simply put, Canada cannot give more favourable treatment to the investors, investments and service providers originating in the United States than it does to those originating in Mexico on the basis of country of origin. For example, Canada could not require Mexican companies providing services to obtain a special license that is not required of U.S. service providers. The inclusion of the phrase "or of a non-party" also means that if Canada provides better treatment to service providers from Britain, for example, that same treatment must be applied to service providers from Mexico and the U.S.

To clarify the difference between MFN and National Treatment, MFN requires government to treat all foreign investments and services equally but does not deal with the treatment of foreign versus domestic services and investments. National Treatment addresses the issue of preferential treatment of local goods and services. It requires that foreign investments and services be treated the same as or no worse than domestic investments and services.

As with National Treatment, we interpret Annex II-C-9 as providing that a Canadian government does not have to comply with MFN in respect of health measures. Under the NAFTA, a health

authority could, for example, decide that U.S. investors can establish and operate an approved surgical facility under Bill 11, but Mexican investors cannot. If our interpretation of Annex II-C-9 is determined to be incorrect, MFN, like National Treatment, does not force a Canadian government to allow Mexican service providers to provide services once a U.S. service provider has been allowed to do so, if the Mexican service providers do not meet whatever criteria has been established. As well, if a U.S. investment is approved or allowed, MFN does not require that all future U.S. investments be allowed or approved.

### **3. Application of National Treatment by a Province**

NAFTA Articles 1102.3 and Article 1202.2, set out above, contain specific provisions on how National Treatment is to be applied at the state or provincial level. At the provincial or state level, the treatment must be:

"with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province, to domestic service providers or investors." (emphasis added)

It is easier to understand this provision by inserting the name of a particular province:

"with respect to *Alberta*, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by *Alberta* to service providers in Canada."

The standard is the best treatment given by a province to Canadian services providers, investors and investments. For example, if Ontario service providers have to meet fewer requirements to work in Alberta than service providers from British Columbia, then standards to be applied to the U.S. and Mexican service providers would be the standards Alberta applies to Ontario service providers.

The focus of the application of National Treatment to provinces and states, then, is that a province must accord U.S. and Mexican investors or service providers the same treatment as the best treatment it accords to Canadian investors or service providers. However, this has no implications for the standards of treatment accorded by other provinces to foreign investors or service providers. In no way does British Columbia, for example, have to adopt Alberta's treatment of service providers (whether they are from another province in Canada, from the U.S. or Mexico).

## **D. OTHER RELEVANT NAFTA PROVISIONS**

### **1. Article 1106, Performance Requirements**

The NAFTA contains a number of provisions restricting a government's ability to favour domestic goods and services in the investment approval process and in a government's own purchasing practices. Article 1106 deals with "Performance Requirements", being a term applied to the kind

of requirements a government might impose on an investor in return for government approval of the investment. Article 1106.1 prohibits a government from imposing performance requirements including requirements to:

- (a) achieve a given level or percentage of domestic content<sup>4</sup>;
- (b) purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory<sup>5</sup>;
- (c) transfer technology or proprietary knowledge<sup>6</sup>.

On the face of Article 1106, it would appear that a regional health authority would be prevented from, for example, requiring that a surgical facility purchase goods and services from Alberta sources, as a condition of entering into an agreement with that surgical facility. However, Article 1108.3 clearly states that the performance requirements set out in our Article 1106 do not apply to any measures affecting the sectors set out in Annex II. This provision is not limited or modified by another provision of the NAFTA. Therefore, the prohibition on performance requirements does not apply to measures in respect of health services as set out in Annex II-C-9. A provincial health authority could, for example, require the operators of a surgical facility to give preference to Alberta services or goods or require technology transfer as a condition of entering into an agreement with the operators.

## **2. Article 1107, Senior Management**

Article 1107 prohibits Canada from requiring that a U.S. or Mexican-owned business entity operating in Canada hire Canadians for senior manager positions. As with Performance Requirements, Article 1108.3 clearly states that Article 1107 does not apply to any measures affecting the sectors set out in Annex 11. Therefore, this prohibition does not apply to health services as set out in Annex II-C-9.

## **3. Article 1109, Transfers**

Article 1109 requires the Parties to "permit all transfers relating to an investment of an investor of another Party . . . to be made freely and without delay." The concern addressed by this Article is that countries can effectively hamper foreign investment by restricting the flow of profits from the investment or restricting the currency in which profits may be transferred. Thus, Article 1109 requires that such transfers must be able to be "made freely and without delay."

The transfers dealt with in Article 1109 are clearly monetary transfers. This is evidenced by:

- (a) the list of examples of transfers included in Article 1109 are solely payments of money;

- (b) Article 1109.2, which requires that a Party "shall permit transfers to be made in a freely usable currency" and deals with exchange rates;
- (c) Article 1109.3, which provides that a Party may not require investors to "transfer or penalize its investors that fail to transfer the income, earnings, profits or other amounts" derived from investments.

Thus, the provisions on transfers in Article 1109 would relate to health services only in respect of measures dealing with movement of profits across the border associated with health enterprises.

#### **4. Investor-State Dispute Settlement**

Section B of Chapter 11, Investment, provides a dispute settlement procedure that applies to investment disputes between individual investors and Parties. It is a procedure that can only be used by foreign investors; that is, it does not apply to domestic investors in Canada. A U.S. or Mexican investor can invoke the Chapter 11 arbitration process if the investor sustains losses as a result of a breach of the investment provisions by Canada. (Of course, Canadian investors have the same rights *vis a vis* the U.S. and Mexico.) The investor-state dispute settlement provisions are only available for a breach of the obligations contained in Chapter 11 (and a breach of Article 1503(2), which relates to monopolies and state enterprises).

Some might be concerned that the investor-state dispute settlement provisions could be a significant tool for foreign investors in health services. As discussed in this opinion, the underlying obligations contained in Chapter 11 relate to, primarily, National Treatment and MFN. Measures relating to investment cannot discriminate between local and foreign investors on the basis of nationality and cannot discriminate between U.S. and Mexican investors. However, as discussed above, these obligations do not apply to measures related to health services protected by Annex II-C-9. Should an investor initiate dispute settlement proceedings, alleging that certain measures related to health services have breached Chapter 11 National Treatment and MFN obligations, Annex II-C-9 would provide a defence to such an allegation. (The same applies to the imposition of Performance Requirements -these do not apply to measures relating to health services under Annex II-C-9.)

Further, Articles 1131 and 1132 deal with interpretation of issues in dispute in investor-state dispute settlement, including interpretation of Annexes:

"Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

### Article 1132: Interpretation of Annexes

1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.
2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue."

The Free Trade Commission, which is a body consisting of cabinet-level representatives from the three Parties, is given the authority to interpret the provisions of the NAFTA, including the scope and coverage of Annex II-C-9. The Commission's interpretation is binding on the arbitral tribunal established pursuant to Chapter 11. Further, while the tribunal is specifically directed, in Article 1131.1, to decide issues in dispute in accordance with international law, the Commission is not so required. Thus, it is the three Parties and not the investors' allegations regarding principles of international law nor the views of the arbitral panel members that will determine the meaning of Annex II-C-9.

Finally, it is important to recognize that dispute settlement provisions are only available for a breach of the obligations in Chapter 11. If an investor's bid does not meet the requirements that a government has set and those requirements do not breach Chapter 11, then dispute settlement is unavailable to the investor. Further, contracts with or awards to health service providers may contain specific provisions on, for example, levels of performance and consequences of not living up to the terms of the contract/award. Failure to live up to the criteria required will not give the investor rights to commence dispute settlement under Chapter 11 (unless the criteria breach Chapter 11). The same applies to a termination or expiry date in a contract or award - the termination or expiry of a contract or award would not be grounds to invoke dispute settlement.

## 5. Chapter 10, Government Procurement

The purchasing practices of government are also dealt with in NAFTA, Chapter 10, Government Procurement. Chapter 10 sets out specific rules on the use of technical specifications in a bid process and contains an entire section on tendering procedures and bid challenges. The essence of Chapter 10 is to ensure that government procurement by the Parties is done in a non-discriminatory and transparent way.

Do provincial governments have to comply with the government procurement provisions of the NAFTA? The short answer is no. Article 1001.1 (a) provides that Chapter 10 applies to measures of a state or provincial government entity "set out in Annex 1001.1 (a)-3 in accordance with Article

1024". Annex 1001.1 (a)-3 does not list any provincial entities. Article 1024 provides for a review process by the three Parties in respect of all aspects of government procurement. Prior to that review, which has not taken place, the federal governments of the three countries will consult with the state and provincial governments "with a view to obtaining commitments, on a voluntary and reciprocal basis, to include in this Chapter, procurement by state and provincial government entities and enterprises".' (emphasis added) Therefore, at this point, state and provincial government entities are not covered by the procurement provisions of the NAFTA and any future coverage will be on a voluntarily basis. In summary, the Chapter 10, Government Procurement provisions of the NAFTA do not apply to state or provincial governments and are inapplicable to any consideration of health care measures.

Yours truly,

CRUICKSHANK KARVELLAS  
Per:



Shawna K. Vogel

SKV/sf

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1. NAFTA Article 201.1.
2. The Mexico reservations are contained in Annex II – M-11 and the United States reservations are contained in Annex II - U-5.
3. J.B. Sykes, ed., *The Concise Oxford Dictionary of Current English*, (7th Ed.) (Oxford: Oxford University Press, 1976).
4. NAFTA Article 1106.1(b).
5. NAFTA Article 1106.1(c).
6. NAFTA Article 1106.1(f).
7. NAFTA Article 1024.3.