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May 11, 2000

DELIVERED BY COURIER

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 review and analyze the response of Mr. Barry Appleton to our opinion on NAFTA and Bill 11. A response to Mr. Appleton's comments on a point-by-point basis would lead to a restatement of our entire opinion, previously provided to you. Thus, in this letter, we provide comments on the most significant areas contained in Mr. Appleton's response. However, our silence on other comments of Mr. Appleton does not mean that we are in agreement with his point of view.

Annex II-C-9

We concluded that Annex II-C-9 protects health services that are open to the public and are provided for the public good, without reference to who owns, delivers or funds the service. We note that Mr. Appleton does not disagree with our interpretation of "public purpose".

Mr. Appleton expresses concern that our interpretation is not based on any accepted source of international law. Mr. Appleton ignores that our examination of the ordinary meaning of the terms of Annex II-C-9 is expressly based on the fundamental rule of the interpretation of treaties as required by the *Vienna Convention on the Law of Treaties*, as clearly stated in our opinion. Application of such an international convention is provided for as a source of law in the *Statute of the International Court of Justice* referred to by Mr. Appleton.

Mr. Appleton raises the question of the interpretation of “social service” as used in Annex II-C-9. (We note that he uses the same form of analysis that he criticizes – examining the ordinary meaning as evidenced by dictionary definition). Mr. Appleton’s conclusion supports our conclusion – that “social services for a public purpose” are services provided for the public good and welfare.

Mr. Appleton states that the U.S. government position is that the delivery of health services by private providers means that such services are outside the scope of Annex II-C-9. First, it is important to note this is not an official position taken by the U.S. in the NAFTA negotiations, it is not a position communicated to Canada and is not a position the U.S. has taken in dispute settlement proceedings. Rather the statement is contained in a letter that was sent by the U.S. Trade Representative (“USTR”) to the U.S. States during the NAFTA reservations process in 1995 (and subsequently obtained and published in the publication “Inside NAFTA”). These statements were intended to provide State officials with some guidance in the difficult and technical exercise related to a review of all states and provincial measures for possible listing in NAFTA Annex I. The advice given to U.S. States was not discussed with nor agreed to by Canada and Mexico. Further, the U.S. has never suggested that any Canadian interpretation of Annex II is wrong, or is even inconsistent with its own interpretation. Thus, it is only conjecture as to the meaning and implication of the U.S. memo in 1995 and it is only conjecture whether the U.S. continues to hold this position or would advance it in dispute settlement.

Annex I

Mr. Appleton curiously believes that Annex I, which is limited to protection of existing non-conforming laws, is Alberta’s “best reservation”, rather than Annex II which gives governments the ability to change or bring in new laws contrary to NAFTA obligations at any time. He also states that Bill 11 results in Alberta losing a significant portion of its existing Annex I reservation. Mr. Appleton does not point to any existing non-conforming Alberta laws relating to health whose current protection under the blanket Annex I reservation is being jeopardized if Bill 11 is passed. There is no support or evidence provided in Mr. Appleton’s opinion for the allegation that Alberta is significantly “liberalizing” “the conditions under which foreign health care service providers could establish and operate investments in the province”. It has been suggested that Bill 11 regulates activities that were not regulated previously but Mr. Appleton does not identify any elements of Bill 11 that do not conform with the NAFTA or that make existing health legislation more non-conforming. Without these, Mr. Appleton’s position on Annex I is weak and inconclusive.

Chapter 11

We concluded that the majority of the substantive provisions of Chapter 11 do not apply to laws relating to health services. Mr. Appleton states that this is incorrect and then examines the number of obligations in Chapter 11. This numbers game hides a key issue of whether a government has to comply with national treatment in measures relating to health services. Mr. Appleton accepts that measures relating to health services covered by Annex II-C-9 do not have to comply with National Treatment. Further, we concluded that health care measures under Annex II-C-9 do not have to comply with obligations of Most-Favoured-Nation, performance requirements, senior management and boards of directors. These are the key obligations requiring equal treatment to foreign investors.

We do not disagree with Mr. Appleton's statement that National Treatment applies to formal, informal, procedural and substantive applications and with his discussion of the principle of National Treatment. However, we clearly concluded that the National Treatment obligations do not apply to measures relating to health care services under Annex II-C-9 and, thus, his discussion is immaterial.

Further, regional health authorities may establish terms and conditions for any contracts that they enters into. Such terms and conditions may include termination and expiry clauses. If a contract, entered into pursuant to Bill 11 with an investor from another NAFTA country, is terminated for cause or expires naturally at the end of its term, there is no "expropriation" of an investment and the investor would not have a valid claim for compensation related to expropriation under domestic law.

Terminating such a contract for cause or at the end of its term is not a breach of NAFTA obligations and there would be no valid claim for compensation related to expropriation under the NAFTA. There is no obligation under the NAFTA to enter into perpetual contracts.

Government Procurement

We concluded that the NAFTA rules governing the manner in which governments procure goods and services do not apply to provincial governments. NAFTA Chapter 10 is a specific chapter dealing with government procurement and it clearly states that the obligations in Chapter 10 do not apply to state or provincial governments. Mr. Appleton does not disagree with our interpretation of Chapter 10. Rather, Mr. Appleton makes the incredible argument that, as Alberta is not a signatory to the NAFTA (we agree), NAFTA Article 1108(7) (which provides that certain Chapter 11 obligations do not apply to procurement by a "Party or a state enterprise") does not apply to a province. If Mr. Appleton is correct that an obligation of the NAFTA does not apply to a province because it is not a "Party", then all of Mr. Appleton's concerns should evaporate as a province would not have to comply with any of the obligations of the NAFTA.

Obviously, Mr. Appleton is totally wrong. There are countless provisions in the NAFTA illustrating that an obligation of a "Party" applies to provinces and states. Indeed, Article 1102, National Treatment, is a perfect example. Article 1102.3 provides how the treatment accorded by a Party is to be practically applied at the provincial level.

It is clear that Chapter 10 establishes the applicable rules for Government Procurement. It is equally clear from this Chapter that these rules do not apply to provinces. Thus provincial procurement of contracted health services can be done without concern for NAFTA's procurement obligations. While Mr. Appleton may state the general rules of treaty interpretation, his application of the rules is clearly incorrect.

Yours truly,

CRUICKSHANK KARVELLAS

Per:

A handwritten signature in black ink, appearing to read 'Shawna K. Vogel', with a period at the end.

Shawna K. Vogel

SKV/sf