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Our File No. 08-778

May 26, 2008

Mr. Paul Moist
President
CUPE National Office
1375 St. Laurent Boulevard
Ottawa, Ontario
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Dear Mr. Moist:

Re: The Legislative Assembly Of Alberta Bill 1: Trade, Investment And Labour Mobility Agreement Implementation Statutes Amendment Act, 2008

You have asked for our opinion about the constitutionality of Bill 1, the *Trade, Investment And Labour Mobility Agreement Implementation Statutes Amendment Act, 2008* ("TILMA" Act). Because of its unprecedented character and far-reaching effects on a diversity of governmental functions, the Bill raises serious and novel questions of constitutional law.

In particular, by imposing financial and other sanctions on the otherwise lawful acts of the province, municipalities and other public bodies, Bill 1 and the Agreement it seeks to implement, directly confront basic constitutional norms, including the rule of law and democracy. For the reasons set out below, there are several substantive grounds for impugning the constitutional validity of the TILMA regime, these are that:

i) Bill 1 purports to address matters of inter-provincial trade, investment and labour mobility which under 91(2) of the *Constitution Act*, 1867 are delineated as matters of federal authority and therefore *ultra vires* the provincial government;

ii) by imposing financial penalties and other sanctions on the province for the lawful actions of governments and other public bodies, TILMA and Bill 1 improperly fetter the exercise of legislative and governmental authority;

iii) by empowering *ad hoc* arbitral tribunals to adjudicate private claims concerning the actions of government and other public bodies, TILMA and Bill 1 improperly derogate from the role and authority of superior courts and therefore offend the constitutional safeguard of judicial independence engendered by s. 96 of the Constitution;

iv) by amending certain provincial statutes to accord Cabinet with discretionary power to nullify, through regulation, the application of provisions of those statutes, Bill 1 offends

constitutional limits on the delegation of legislative power to the executive. The courts have named such provisions "King Henry VIII clauses" after the propensity of that monarch to arrogate legislative power by proclamation; and

v) by empowering Cabinet to pass regulations authorizing the collection, use and disclosure of information, including personal information and privileged communication, Bill 1 offends constitutional protection for solicitor-client privilege which the courts have consistently characterized as "a principle of fundamental justice and a civil right of supreme importance in Canadian law." Depending upon the character of any such regulation, other constitutional norms relating to privacy, confidentiality and other forms of privileged communication may also be offended.

For these reasons it would be appropriate for the province to withdraw Bill 1, and abandon its present commitment to the TILMA scheme by advising British Columbia of its intention to invoke Article 20 to withdraw from the Agreement.

OVERVIEW OF BILL 1

Bill 1 implements TILMA; limits the resolution of any legal dispute arising therefrom to procedures set out in the Agreement; and grants Cabinet broad regulation-making authority under several of the 8 current statutes it would amend. These are the:

- *Business Corporations Act*
- *Government Organization Act*
- *Partnership Act*
- *Oil Sands Conservation Act*
- *Oil and Gas Conservation Act*
- *Cooperatives Act*
- *Coal Conservation Act, and the*
- *Pipeline Act*

A number of these consequential amendments remove requirements that a company or individual be based or resident in Alberta in order to carry on business there. Others grant Cabinet the authority to make regulations that may override the provisions of the statute from which that authority is taken. [1] Amendments to the *Government Organization Act* are arguably

[1] See for example Bill 1 amendments to *Cooperatives Act* s. 382.4, and the *Partnership Act*, s7(2) by adding s. 80.1(5).

the most important because these would make a monetary award made against the province by a TILMA tribunal enforceable in Alberta as if it was a judgment made by a Canadian court. For this purpose the *Government Organization Act* is amended to provide as follows:

> *The Party or person entitled to a TILMA award may at any time file a certified copy of the TILMA award or of the compliance report issued under Article 29(6) of the Agreement that contains the TILMA award with the clerk of the Court of Queen's Bench, and on being filed with the clerk of the Court of Queen's Bench the TILMA award has the same force and effect as if it were a judgment of the Court of Queen's Bench.*[2]

We consider these and other elements of Bill 1 further below. However, before considering the compatibility of these amendments with Canadian constitutional norms we should note two important qualifications to our opinion. The first is that in carrying out this analysis we have not considered the broader policy and practical consequences of these 'reforms' which, of themselves, certainly warrant further review. The second is to point out that as we and others have discussed elsewhere,[3] the reach of the TILMA regime, and of the potential sanctions it would authorize, extend well beyond the few statutes that are referenced by the provisions of Bill 1. It is important, therefore, not to take the specific statutory reforms of the Bill as providing a realistic indication of the true scope or impact of this regime.

1. Infringing Upon Federal Authority Over Inter-provincial Trade and Commerce

Constitutional authority regarding inter-provincial trade rests with the federal Parliament under section 91(2) of the *Constitution Act*, 1867, concerning trade and commerce. Therefore provincial legislatures cannot pass legislation concerning such matters. Where Alberta law or regulation interferes with inter-provincial trade and commerce, such measures may be set aside for being *ultra vires* the provincial government. Furthermore, the executive may not accomplish by agreement what would be constitutionally unsound for the legislature to achieve through law-making. Accordingly, to the extent that Bill 1 and TILMA deal with matters of inter-provincial trade, they may be challenged for infringing upon federal constitutional authority over trade and commerce.

However, as we have described elsewhere, the overwhelming majority of measures subject to TILMA rules have only the most incidental bearing on inter-provincial trade or commerce. While such measures may indirectly impact investment, trade and labour mobility, these effects

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[2] Bill 1, amending Schedule 6 to the *Government Organization Act*, by adding Schedule 6.1 section 3(1).

[3] *An Assessment of The Trade, Investment And Labour Mobility Agreement (TILMA) Between The Provinces Of British Columbia And Alberta* Prepared for the Canadian Union of Public Employees, SGMLaw, May, 2007. See *TILMA and the Environment A report on the potential environmental effects of the BC-Alberta Trade, Investment and Labour Mobility Agreement,* Keith Ferguson March 30, 2007 Sierra Legal Defence Fund and, *Asking for Trouble: the Trade, Investment and Labour Mobility Agreement*, Ellen Gould, the Canadian Centre for Policy Alternatives, Feb. 2007.

are incidental to their primary purposes, which may range from environmental protection to daycare regulation.

Ironically, while the measures impugned by TILMA almost certainly respect constitutional boundaries concerning trade, it is likely that TILMA and Bill 1 do not, for two reasons.

The first has to do with the retaliatory sanctions that may be authorized under the regime where measures interfere with, rather than facilitate, inter-provincial trade, investment and labour mobility. Thus, under Article 29(7), where a panel finds that the province has failed to comply with a panel report, it may:

> *a) if the disputants are both Parties, issue a monetary award determined in accordance with Article 30 or authorize retaliatory measures of equivalent economic effect, or both….* [emphasis added]

It is not clear what retaliatory measures might be authorized in this regard, but insofar as their intent and effect is to interfere with inter-provincial trade, investment, and labour mobility, they would, in our view, be *ultra vires* provincial authority. Nor would such measures be saved by the *Agreement on Internal Trade* (AIT) or federal legislation to implement it. While there is some scope for the delegation of federal powers to the provincial administrative tribunals,[4] in our view this prerogative could not be relied upon to empower *ad hoc* tribunals established under TILMA dispute procedures to authorize inter-provincial trade sanctions.

The other basis for challenging TILMA and Bill 1 as trenching on federal constitutional authority arises from the *de facto* discriminatory treatment authorized by the regime towards non-parties, ie. other provinces. In this regard several of the consequential amendments empower Cabinet to make regulations exempting, for example, certain extra-provincial corporations from certain requirements of the particular statute.

If Cabinet exercises this authority to favour goods, investors, or workers from British Columbia, which would be the only plausible outcome given its agreement with that Province, it would in effect be discriminating against goods, investors and workers from other provinces. In other words the intent and purpose of such a regulatory measure would be to differentiate, for example, between goods imported to Alberta depending on their province of origin – a purpose that is indisputably about inter-provincial trade. In our view making such extra-territorial distinctions infringes upon federal powers over trade and commerce.

Another example extant in TILMA is the special right accorded British Columbia residents to invoke TILMA dispute procedures to challenge Alberta measures and to obtain monetary awards where the province, municipalities and other public bodies fail to comply with the dictates of TILMA tribunals. This right now exists under TILMA, and if Bill 1 is proclaimed, monetary awards will be enforceable under Alberta law without the government needing to take any further step. As explained further below, these enforcement rights are offensive and

[4] Attorney General of Nova Scotia v Attorney General of Canada [1951] SCC

unconstitutional for reasons unrelated to the division of constitutional powers concerning trade and commerce. Quite apart from that concern, in our opinion, by according such special rights to British Columbia entities and persons, while denying the same to those from other provinces, TILMA and Bill 1 also trench on federal trade and commerce powers.

2. An Improper Fetter on Government Authority

There is also a strong argument that by imposing sanctions on the lawful acts of the legislature, TILMA improperly fetters provincial legislative authority.

It is not disputed that the essential purpose of TILMA is to constrain the prerogatives of governments and other public bodies, present and future. As British Columbia's Minister Hansen described, TILMA is binding on the House which as he stated "cannot bring in measures" contrary to the Agreement.[5] As the Minister also explained, under the TILMA regime new legislation would have to "go through a lens to make sure that it is, in fact, in keeping with this new agreement." A British Columbia government backgrounder from January, 2007 states:

> *TILMA includes a process whereby disputes concerning the interpretation of the Agreement can be settled by an independent panel. Provision for financial awards has been included as part of this process, not to allow for damage claims, but rather to ensure that the parties comply with the findings of these panels. Neither party can be sued for damages under the Agreement. The sole basis of a complaint is that a province has allegedly violated its obligations. If a panel determines that this is the case, the province is then obliged to change the offending measure. If this occurs, the dispute comes to an end and no financial award can be made by the panel. If, however, the province continues to maintain the offending measure the panel is then able to make a limited financial award to the complainant in certain circumstances.*

While Alberta Ministers have been less forthcoming about the regime, in virtually every material respect its effect on Alberta law makers and public bodies will be very much as Minister Hansen described for British Columbia.

By attempting to constrain the prerogatives of the legislature and other public bodies, TILMA offends the principle of Parliamentary sovereignty which precludes the Executive from preventing the Legislature from passing whatever laws it sees fit [*Reference re Canada Assistance Plan (B.C.)* [1991] 2 S.C.R. 595].

In the *Reference re: Initiative and Referendum Act (Man.)*, [1919] A.C. 935, the Privy Council struck down, as unconstitutional, the *Manitoba Initiative and Referendum Act*, since "it would compel the Lieutenant-Governor to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head, and would render him powerless to prevent it from becoming an actual law if approved by those voters". The constraint on

[5] Hansard for May 2, 2006.

government authority at issue in that case was somewhat more direct than the limitations at issue here. On the other hand, the constraints imposed by TILMA are much broader and lack the democratic imprimatur of a public referendum.

TILMA rules are not only stated to be binding on future governments, but authorize sanctions for non-compliance, including retaliatory 'trade' measures and monetary awards enforceable against those governments. It is true that the legislature, municipality, or other public body is not formally required to remove a measure impugned by a TILMA tribunal, but to suggest that it would be indifferent to substantial monetary penalties should it decline to do so, is absurd. Moreover it is quite possible for such an offending measure to be the subject of multiple and reoccurring claims, until it is removed. It is also true that the province may withdraw from TILMA, but it must provide twelve months' notice of its intention to do so, and will be bound during that period by the Agreement.

In response, it might also be argued that other inter-provincial and federal-provincial agreements impose similar constraints on the province. But such agreements are not equipped with legally binding enforcement procedures, and none authorize tribunals to make monetary awards against governments to the benefit of non-parties. Those defending TILMA may also point to the binding effect contracts to which governments are party, but TILMA is certainly not a commercial agreement or contract. It is, in fact, more analogous to an informal constitutional instrument intended to supercede the sovereign authority of government to act in varied and diverse spheres of public policy and law.

The Supreme Court of Canada has recently considered the issue of fettering in *Pacific National Investments Ltd. v. Victoria (City)* ([2004] 3 S.C.R. 575) That case concerned the impact of development agreements negotiated by a municipality on the prerogatives of future municipal councils.

The Court notes the importance of protecting the municipal legislative process from influence and embarrassment, and states that:

> *.. a very important policy consideration militates against municipalities being bound in ways that constrain their legislative powers. This is the policy consideration that runs through the jurisprudence in this area. Municipal governments are governments exercising powers delegated by the provincial legislatures, and they must be able to govern based on the best interests of their residents and based on conceptions of the public good. To help protect this important value, our Court has adopted such principles as the one that ambiguities in municipal government statutes are to be interpreted so as to favour the citizens and their ability to undertake a path of shared self-governance.*

As we know, TILMA rules bind municipalities and many other public institutions, including school boards, health authorities and Crown corporations.

However, municipalities and these other public bodies are creatures of statute - provinces are not. We could find no case that raises the question of fettering in relation to the authority of provincial governments in the broad sense that arises here. This is not surprising given the unprecedented nature of the TILMA regime. Nevertheless, the sweeping scope and coercive influence of TILMA enforcement procedures clearly support the argument that the threat of legal liability will, as a matter of both law and practical political reality, fetter the authority of government and public bodies to act in the public interest, or otherwise fulfill their democratic and statutory mandates.

It is clear, in our view, that exposing a government to monetary sanctions for lawfully exercising its authority delimits the scope of its constitutional and democratic mandate. Referring to NAFTA's investor-state procedures, which provided the template for TILMA's dispute regime, one member of a NAFTA tribunal acknowledged this fact by noting that such provisions "have an enormous impact on public affairs in many countries," and are not unlike "a country's constitution" because "[t]hey restrict the ways in which governments can act" and "they are very hard to change".[6] The result of imposing these overarching constraints on the exercise of governmental authority is to create a pervasive chill over the otherwise lawful actions of governments and other public bodies.

There can be no reasonable debate about the *de facto* impacts of TILMA constraints, and as the Minister has acknowledged, the intended purpose of Bill 1 is to ensure that these are made *de jure* limits of the exercise of public authority by the legislature, municipalities and other public bodies bound by TILMA rules. For the reasons canvassed, we believe there are strong grounds for challenging TILMA for fettering the lawful exercise of governmental authority.

3. Usurping the Judicial Functions of Superior Courts

TILMA Dispute Procedures

TILMA dispute procedures represent a radical departure from Canadian legal norms by according private parties a unilateral right to enforce and claim damages under an inter-provincial agreement to which they are not party. The architecture of TILMA dispute procedures represents an amalgam of elements taken from the AIT and NAFTA (the North American Free Trade Agreement). Under both regimes, individuals, as well as the Parties themselves, may invoke dispute resolution. However, by far the most significant feature of TILMA dispute procedures is borrowed from Chapter Eleven of NAFTA, which entitles foreign investors to claim damages where the Parties are allegedly failing to comply with their obligations under the treaty.

The dispute resolution provisions of TILMA are set out in Part VI, and as noted may be invoked by the Parties, or by a "*person of a Party*". "*Person*" is defined to be "*a natural person or an enterprise of a Party"* and an "*enterprise*" is an "*entity constituted, established, organized or registered under the applicable laws of a Party, whether privately owned or governmentally*

[6] Schneiderman, *Nafta's Takings Rule: American Constitutionalism Comes to Canada* (1996) 46 U.T.L.J. 499.

owned, including any corporation, trust, partnership, cooperative, sole proprietorship, joint-venture or other form of association, for the purpose of economic gain." Because disputes brought by persons are far more likely to arise and proliferate, it is this right of private action that is the focus here.

It is beyond the scope of this opinion to provide a detailed review of these dispute procedures. However some of the more salient features of the regime should be noted:

- Unlike the AIT, TILMA includes no screening mechanism to weed out frivolous, harassing or unmeritorious complaints.[7]

- TILMA includes no mechanism to prevent multiple claims. While TILMA precludes more than one contemporaneous proceeding concerning a particular measure, it does not preclude multiple proceedings by the same party concerning related measures, or successive complaints by other parties concerning the same measure.

- TILMA dispute procedures do not recognize third party rights.

For the following reasons, it is our opinion that TILMA dispute procedures and Bill 1, which gives them effect, may be challenged for offending constitutional safeguards that preserve the independence of superior courts. These are set primarily set out by s. 96 of the Constitution and preclude the delegation of certain judicial powers to entities created by the province. By empowering *ad hoc* tribunals to resolve private claims relating to the exercise of government authority, TILMA and Bill 1 arguably violate this Constitutional guarantee.

While expressed as a power reserved to the federal Parliament to appoint the judges of the superior, district and county courts, s. 96 of the *Constitution Act*, 1867 has been interpreted as preventing Parliament and provincial legislatures from impairing the status of the superior courts either by (1) transferring their work to other tribunals (the *Residential Tenancies* test) or (2) removing or derogating from the superior courts' core or inherent powers, particularly as these relate to the maintenance of the rule of law (the *MacMillan Bloedel* test). The fundamental rationale underlying s. 96 is the maintenance of the rule of law through the protection of an independent judicial role which cannot be encroached upon by legislative or executive action. Judicial independence is acknowledged to be an unwritten requirement of the Constitution.

The importance of preserving the integrity and independence of Superior Courts has been repeatedly underscored by the Canada's highest court. Thus, in *Reference re Residential Tenancies Act,*[8] a unanimous Supreme Court of Canada echoed and elaborated on its earlier decision in *Tomko*, stating:

[7] AIT Article 1713.

[8] *Reference Re Residential Tenancies Act* (1980), 123 D.L.R. (3d) 554 (S.C.C.), at pp. 566-567 [hereafter "*Residential Tenancies*"];

> *Sections 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a Province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the Superior Courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined. Section 96 has thus come to be regarded as limiting provincial competence to make appointments to a tribunal exercising s.96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.*[9]

Resolving Disputes Between Private Parties and the State

According to the methodology delineated by the *Residential Tenancies* case, the Court must determine whether the powers accorded TILMA tribunals broadly conform to those exercised by a superior court. If they do, then TILMA may represent an improper delegation of Superior Court powers. To make this determination the court must ascertain whether the adjudicative powers assigned to TILMA tribunals are analogous to those exercised by the superior, district or county courts at the time of Confederation. To carry out this historical inquiry, the court must characterize the particular power or jurisdiction in question.

It might be argued that the sweeping scope of the TILMA regime undermines the characterization of the causes of action it authorizes as being like, or analogous to, those that would have fallen under the purview of superior courts at the time of Confederation. As the courts have made clear, however, the inquiry under section 96 is a functional one, requiring a court to examine the true substance of the underlying dispute rather than relying on formal legal characterizations.[10] Thus, in the case of TILMA there is a strong argument that the nature of the disputes authorized by the regime are analogous to historic claims by individuals against the Crown for alleged interference by government with their contractual or proprietary interests.

Accordingly TILMA may be seen as simply giving modern, albeit expanded, expression to a right that existed at the time of Confederation. At that time, the only bodies which dealt with individual claims against the state alleging unlawful interference with property or contractual rights were s. 96 courts. Thus, applying the historical inquiry to the present case, the central functions performed by TILMA tribunals, *de facto* and *de jure*, are to determine whether the state, acting through its legislative, executive or judicial powers, has interfered with the property or contractual rights of British Columbia corporations or individuals. This judicial function was reserved to s. 96 courts at the time of Confederation.

A similar argument was raised in a challenge to the investor-state dispute procedures of NAFTA, which is the model for TILMA dispute resolution. In rejecting that challenge, the

[9] Idem, at pp. 566-567
[10] Idem.

Ontario Court of Appeal emphasized the international and treaty based character of the rights and remedies accorded by NAFTA dispute procedures, describing NAFTA tribunals as having been given:

> *.... the power to adjudicate only upon alleged breaches of the international obligations mutually undertaken by treaty by the NAFTA Parties, obligations which have no counterpart in pre-1867 domestic law in Canada. They are to do so using international law principles not domestic law, and they are to issue awards which have no effect beyond the disputing parties and the particular case. In all these respects there is no broad conformity with a s. 96 court power.*[11]

By contrast, the TILMA dispute regime is a creature of inter-provincial agreement, not an international treaty, and under TILMA disputes will be resolved in accordance with domestic not international law. Furthermore, where a government removes a law or regulation of general application, because it is found to be non-compliant with TILMA obligations, the consequences will almost certainly affect many others. Moreover, as a domestic rather than international enterprise, it is extremely unlikely that TILMA will attract the judicial deference shown by the Ontario courts to NAFTA.

Abrogating the Core Judicial Review Function of Superior Courts

Even if private TILMA disputes have no historical analogue, and therefore fail to meet the tests delineated by the court in the *Residential Tenancies* case, Bill 1 may nevertheless breach s. 96 if it limits the authority of the superior court to review the decisions of TILMA tribunals. As the Supreme Court of Canada made clear in *MacMillan Bloedel*,[12] a core jurisdiction of the s. 96 courts, such as the ability of superior courts to review inferior tribunals, can never be removed by action of Parliament or the legislature, much less the executive.

The question in respect of TILMA is whether the supervisory jurisdiction of the superior court is limited to an extent that supports a challenge to Bill 1 on this ground. Defenders of the regime will no doubt point to the fact that judicial review of arbitral awards is permitted under ss. 45(1)(c) and (f) through (i), and subsection 45(8) of the *Arbitration Act* (RSA 2000, c. A-43).[13] However, the scope for judicial review of TILMA awards is limited (by the terms of TILMA Article 31) to monetary awards made under Article 29(7). No judicial review is provided for with respect to: 1) awards made under Article 27, with which the province is obliged to comply within 30 days (Article 28); or 2) findings of non-compliance made by TILMA tribunals under Article 29 which authorize retaliatory measures to be taken by the complaining Party.

[11] *R v. Council of Canadians*, Ontario Court of Appeal, November 2006.
[12] *MacMillan Bloedel v. Simpson* (1995), 130 D.L.R. (4th) 385 (S.C.C.)
[13] Bill 1, Schedule 6.1 of the Government Organization Act, s. 6.

Similarly, keys aspects of the supervisory role that an Alberta court would otherwise exercise under the Arbitration Act in the case of other arbitral awards, may not be exercised under the Act with respect to awards made by TILMA tribunals.[14]

These limitations on the authority of superior courts to supervise the adjudicative functions of TILMA tribunals support the argument that the TILMA dispute regime offends s. 96 safeguards by displacing a core judicial function of these courts. This being said, it is common for courts to 'read down' attempts by parliament to limit judicial oversight of government functions or administrative tribunals, and a court will no doubt take that proclivity into account in considering whether the constitutionality of Bill 1 may be impugned on s. 96 grounds. While the core jurisdiction nevertheless has merit in our view, the stronger argument is that pursuant to the *Residential Tenancies* case, the substance of a TILMA dispute brought by a person is one exclusively reserved under the constitution to the superior court, and may not be delegated to *ad hoc* tribunals.

4. The Rule Of Law of Bill 1– the 'King Henry VIII Clauses'

In *Reference re Secession of Quebec,* the Supreme Court of Canada held that the Constitution embraces unwritten as well as written rules. Of particular importance to present issues are the principles of "constitutionalism and the rule of law." As explained by the Supreme Court, the rule of law is "a fundamental postulate of our constitutional structure", and conveys "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." [*Reference re Secession of Quebec*, at para. 32; *PEI Reference*, at para. 92]

It is certainly arguable that TILMA dispute procedures offend both the principles of constitutionalism and the rule of law by submitting the exercise of legislative and governmental action to arbitral review by tribunals which are unbound by legal precedent, subject to no right of appeal, and which operate to a significant extent outside the framework of the constitution. Under the TILMA regime government accountability is not to legal authority, but to *ad hoc* arbitral authority subject only limited judicial supervision.

There is also a more specific ground for regarding Bill 1 as offending fundamental constitutional norms. This concerns the fact that proposed amendments to the *Business Corporations Act*, *Cooperative Association Act* and the *Partnership Act* would empower Cabinet to make regulations exempting extra-provincial companies, corporations, associations, and partnerships from the application of any provision of those Acts. These amendments further provide that in the event of a conflict between the regulations and the Act, the former will prevail.[15]

A similar assertion of regulatory paramountcy was considered by the Ontario Supreme Court in *Ontario Public School Boards' Assn. v. Ontario (Attorney General)*, [1997] O.J. No. 3184. The

[14] Bill 1, Schedule 6.1 to the Government Organization Act, s. 6 limits judicial review of TILMA awards under the Arbitration act to the subsections delineated by TILMA Article 31.
[15] See note 1.

Court characterized such a provision as reversing the "usual rule . . . that legislative power is vested in the democratically elected Legislative Assembly to make laws after full public debate," not in the executive of a particular political administration. It went to characterize such a power in the following way:

> *This breathtaking power, to amend by regulation the very statute which authorizes the regulation, is known to legal historians as a "King Henry VIII" clause because that monarch gave himself power to legislate by proclamation, a power associated since the 16th century with executive autocracy…* " [para. 50]

It describes such as power as:

> *…constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority.*

However, the court acknowledged that:

> *[h]owever offensive this kind of power may be to our traditional sense of legality and public accountability, the constitutional capacity of legislative bodies to confer it has been upheld by the Supreme Court of Canada in the case of Re Gray (1918), 57 S.C.R. 150, 42 D.L.R. 1. That precedent upheld the war measures powers of the Dominion government to levy war during World War I.*

But went on to add:

> *It is one thing to confer this extraordinary power if it is actually needed for some urgent and immediate action to protect an explicitly identified public interest. It is quite another thing to hand it out with the daily rations of government power, unlimited as to any explicit legal purpose for which it may be exercised.*

Ultimately the Court decided that the question was premature because the government had not actually used its regulation making power to negate a statutory provision.

Therefore, with this caveat concerning prematurity, and while the precedents are somewhat mixed, it is our view that given the scope of present reforms and the absence of any meaningful public policy rationale for them, there are valid and substantive grounds for regarding the "King Henry VIII" type amendments of Bill 1 as unconstitutional for the reasons noted in the *Ontario Public School Boards* case.

5. Abrogating Claims to Private, Confidential and Privileged Communication

Finally, what is arguably the most astonishing 'reform' advanced by Bill 1 seeks to amend the *Government Organization Act* to empower Cabinet to make regulations allowing for disclosure of information, including personal and privileged information, for any purpose relating to compliance with and consultation under TILMA.

Thus s. 5(1) of new schedule 6.1 to the Act provides:

> *The Lieutenant Governor in Council may make regulations respecting the collection, use and disclosure of information, including personal information, to enable consultation under and compliance with the requirements of the Agreement.*
>
> *(2) Where information that*
>
> > *(a) is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
> >
> > *(b) is subject to any kind of confidence, including Cabinet or Treasury Board confidence and intergovernmental confidence, or*
> >
> > *(c) is supplied, explicitly or implicitly, in confidence, is disclosed under an agreement entered into between the Parties, under a regulation made under subsection (1) or otherwise pursuant to the Agreement, the disclosure of that privileged or confidential information does not waive or negate any privilege or confidence attached to that information, and the privilege or confidence continues for all other purposes.*

Before considering the constitutional implications of creating this regulatory power it is important to appreciate how truly sweeping it is in scope. As noted, the expansive reach of TILMA rules engage virtually every aspect of the exercise of public authority, from law making to program delivery. Moreover, and as noted, the purpose of the regime is to constrain the authority and actions of the provincial government, municipalities, regulatory boards, and other public bodies, ranging from the College of Physicians and Surgeons, to local school boards, unless these entities are explicitly exempt. One can readily conceive of any number of circumstances in which such bodies might seek legal advice they would wish to keep in strict confidence. Moreover the right to seek consultations and ultimately insist on compliance with TILMA is one that may be invoked by any individual, or company resident in either province.[16]

It is for any purpose of facilitating such consultations, dispute resolution, or other TILMA purposes that cabinet is to have the right to make regulations respecting "the collection, use and disclosure of information," including personal information and privileged communications. We believe there is no risk of being accused of hyperbole in describing this power as breathtaking in its scope and potential application. While it is beyond the scope of this opinion to assess the broader policy and legal implications of according Cabinet such unqualified authority, these

[16] See TILMA Articles 25-27.

certainly warrant further assessment. For present purposes however, it is clear that constitutional values and safeguards are engaged and potentially offended by the exercise of this new cabinet prerogative.

To begin with, section 8 of the *Charter of Rights and Freedoms* stipulates that "Everyone has the right to be secure against unreasonable search or seizure." Solicitor-client privilege as it arises in regard to this Charter guarantee has been considered on numerous occasions, and the courts have consistently found it to be "a principle of fundamental justice and a civil right of supreme importance in Canadian law" [Lavallee, Rackel & Heintz *v*. Canada (Attorney General); White, Ottenheimer & Baker *v*. Canada (Attorney General); R. *v*. Fink, [2002] 3 S.C.R. 209]. In that case, the Supreme Court of Canada described the privilege this way:

> *It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.*

While the Courts have acknowledged that solicitor-client privilege is not absolute and may be be displaced in the criminal law context by society's competing interest in protecting the safety of the public, we can conceive of no TILMA related rationale that could justify such an intrusion.

In addition to issues relating to s. 8 of the Charter, by engaging questions of fundamental justice, a breach of solicitor-client privilege would also, depending upon whether a liberty or security of the person interest is affected, offend the protection of life, liberty and the security of the person under s. 7 of the Charter.

It is also clear from the judicial characterization of this privilege, that a regulation authorizing the collection or disclosure of such information for TILMA related purposes could not be saved by the qualification that "the disclosure of that privileged or confidential information does not waive or negate any privilege or confidence attached to that information, and the privilege or confidence continues for all other purposes."[s. 5(1) cited above]. But as stated by the Supreme Court of Canada in the Lavallee case, "all information protected by the solicitor-client privilege is out of reach for the state." It is therefore clearly no answer to the offence of having intruded where it is not permitted by collecting and disclosing privileged information, for the government to attempt to close the door behind it.

Apart from the protection of solicitor client privilege, there are other important constitutional or quasi constitutional values concerning the right to privacy that might be offended by the exercise of this broad cabinet authority to authorize the "collection, use and disclosure of information, including personal information". We believe that it is apparent that this broad regulatory authority is offensive to policies that underpin the protection of privacy and various

forms of confidential communication. Whether a particular regulation would violate the constitution would depend upon the nature and extent of the intrusion it might authorize, and is certainly a question which would have to be assessed when the Alberta government chooses to exercise this power, if Bill 1 becomes the law of the province. However the very existence of the power itself would appear to offend basic constitutional values and privacy interests

Conclusion:

Having summarized our views at the beginning of this opinion we will not repeat that exercise here. We conclude simply by saying that Bill 1 and the inter-provincial agreement it seeks to implement represent an unprecedented challenge to the most fundamental principles and norms of Canada's constitutional arrangements. If called upon to do so, a Canadian court will inevitably have to chart new terrain. The outcome of such a judicial inquiry is always difficult to predict, but for the reasons we have canvassed here, there is a very sound basis for assailing Bill 1 on constitutional grounds.

Sincerely,

Steven Shrybman

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