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Our File No. 08-1217

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Mr. Michael Hurley
President
Ontario Council of Hospital Unions
205 Richmond Street West
Suite 502
Toronto, Ontario
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Dear Mr. Hurley:

Re: Eastern Ontario Laboratory Association and Gamma-Dynacare Medical Laboratories

You have asked for our opinion about the extent to which international trade rules and US national security laws are engaged by US investments in the Ontario laboratory services sector. Of particular concern are the consequences of present plans to consolidate the delivery of hospital laboratory services under the auspices of the Eastern Ontario Laboratory Association (EORLA).

While many details of present EORLA restructuring plans for hospital laboratory services have yet to be determined or announced, the Association's Board has endorsed a corporatized delivery model that involves a greater role for the major private sector laboratory service company operating in this sector, Gamma-Dynacare Medical Laboratories (GDML).

Because GDML is a subsidiary of US-based Laboratory Corporation of America (LabCorp), for the reasons set out below, the expansion of its role in providing laboratory services under the EORLA scheme will create or exacerbate the risks that:

i) the confidentiality of patient health records will be compromised, because under the *United States Patriot Act*, the US Foreign Intelligence Surveillance Court can issue secret orders compelling the production of records in the control of LabCorp, including those gathered by its Canadian subsidiaries. Moreover, such orders cannot be disclosed, including to those whose confidential health records are revealed to US officials;

ii) key safeguards that currently insulate Canadian health care policy and law from international trade challenges and investor claims may be negated. This would in turn undermine the authority of Ontario governments to regulate or restrict foreign

investment in this health care sector, including for the purposes of sustaining Canada's medicare system; and that

iii) LabCorp will invoke NAFTA dispute procedures to claim damages if Ontario seeks to contract-in privatized laboratory services, or attempts to regulate these services in a manner the Company opposes. A similar claim, seeking $155 million in damages, has recently been made by a US health corporation alleging that Canadian laws and policies frustrated its plans to establish for-profit surgery clinics in Canada.

While these risks are clearly material to present EORLA plans, they do not appear to have been taken into account in planning for the consolidation and further privatization of laboratory services in eastern Ontario.

A. BACKGROUND

Our understanding of the facts of this matter is as follows. In the mid-1990s EORLA was created to consolidate the delivery of certain hospital laboratory services in the eastern part of the province. EORLA was subsequently registered as a non-profit organization in 2003, and is comprised of a membership of 16 eastern Ontario hospitals.

Currently, the provision of laboratory services in eastern Ontario is described as an oligopoly[1] between the hospital laboratories and GDML, a subsidiary of US-based LabCorp, one of the largest laboratory services companies in the world. According to US securities law filings, LabCorp owns, through various subsidiaries, a controlling interest in GDML.[2]

EORLA's relationship with GDML is described as "a successful partnership" with GDML providing "expert resources, purchasing agreements and management services." GDML has also been instrumental, and indeed played the lead role in developing a plan to transform EORLA into "regional corporate operation" that would consolidate many of the laboratory services now provided by eastern Ontario hospitals.

That plan,[3] which is styled "The February 2006 Business Case", has not to our knowledge been made public. It has however, been the subject of a review carried out by a consulting company, QSE Consulting, which was retained for that purpose by the Ministry of Health. The QSE report is available publicly and describes the general features of the "business case". It also indicates

[1] QSE Consulting: *Third Party Review Of The Eastern Ontario Regional Laboratory Association's Business Case;* Final Report Prepared For The Ministry Of Health And Long-Term Care, December 2006, at p.79.
[2] According to its Annual Report 2004, Form 10-K, filed with the US Securities Exchange Commission (SEC), LabCorp owns 100% of Clipper Holdings, Inc., a Delaware based company, which owns 100% of 3065619 Nova Scotia Company, which owns 100% of Dynacare Company, a Nova Scotia based company, which owns 99.9% of Dynacare Laboratories Limited Partnership, an Ontario based company, which in turn owns a 72.99% interest in Gamma-Dynacare Medical Laboratories, also an Ontario based company. More recently, LabCorp's Annual Report, Form 10-K filed on February 26, 2008, indicates that its subsidiaries include Dynacare Company, Dynacare Laboratories Limited Partnership, and Dynacare-Gamma Medical Laboratories.
[3] See note 1.

that in September, 2006, the EORLA Board adopted the GDML proposal that EORLA be "fully based on a corporate model of organization," the key features of which would include:

- Board and Chief Executive Officer
- Integrated: Management Structure and Corporate Services
- Regional employer and contractor of services
- Regional planning, decision making & performance management
- Centralized laboratory capital assets & funding
- MoHLTC/LHIN as banker.

However, many of the details of the "business case" have not been announced, including the future role for GDML, which, for the purposes of this opinion, is a crucial issue.

Nevertheless, the business case foresees an ongoing and expanded role for GDML which is described as the EORLA "community partner". As described by the QSE report:

> With the full implementation of the EORLA business model and the hiring of a leadership team, the relationship with its community partner should be examined closely by the EORLA Board, redefined and further strengthened.
>
> Among the options for the EORLA Board to consider for the future role of GDML are:
>
> - Continuing to serve as a Management Agency
> - Responding to tenders for the provision of contracted services such as financial accounting, transportation etc.
> - Fulfilling the ongoing need for project management services
> - Providing capacity and redundancy as part of the disaster plan or on a regular basis
> - Expanding the amount of community out patient testing performed, particularly in locations where this has become burdensome for the hospital laboratory
> - Continuing to provide services across the region and being clearly positioned as the EORLA community partner. [4]

We understand that the QSE Report was submitted with recommendations to Ministry of Health in January 2007, and that Cabinet provided direction to EORLA to proceed with an action plan to implement the business case.[5]

According to the QSE report, the plan prepared by GDML for EORLA represents the "first major initiative to implement a corporate regional business model for hospital laboratories in

[4] See note 1, p.38.
[5] Power point presentation: Hospital Laboratory Medicine, Service Delivery for the Champlain LHIN: Information Sharing, Ruth Jaegar General Manager EORLA, March 28 2008.

Ontario and may serve as a prototype for other regions".[6] QSE further confirms that "the model for delivery of laboratory services in EORLA will be closer to the private laboratory service delivery model."

Notwithstanding the fact that many of the details of the EORLA scheme have yet to emerge, based on the QSE report two key characteristics of this scheme appear to be settled. The first is the intention to adopt a corporate or business model for consolidating the delivery of laboratory services in eastern Ontario, the second is to further strengthen or integrate the relationship between EORLA and GDML.

For the reasons set out below, both of these features of the present plan engender risks that arise from the application of US security laws and international trade rules to the Canadian services sector.[7]

B. THE CONFIDENTIALITY OF CANADIAN PATIENT RECORDS UNDER THE US *PATRIOT ACT*

The Application of US Court Orders Concerning the Records of Canadian Subsidiaries

The US *Patriot Act* substantially expanded the intelligence-gathering powers of law enforcement and national security agencies by amending the US *Foreign Intelligence Surveillance Act* (FISA). Under FISA, the Foreign Intelligence Surveillance Court can issue secret orders which allow US authorities to gather information about any individual.

As described by Professor Geist, who is the Canada Research Chair in Internet and E-commerce Law, and one of Canada's leading authorities on privacy law:

> U.S. law does indeed grant law enforcement authorities the power to compel disclosure of personal information without notifying the targeted individual that their information is being disclosed (in fact, disclosing the disclosure is itself a violation of the law). Moreover, the application of these laws is not limited to U.S. companies but actually applies to any company with sufficient U.S. connections such that it could find itself subject to the jurisdiction of the U.S. courts. This is true both for U.S. companies operating subsidiaries in foreign countries as well as for foreign companies with U.S. subsidiaries.

The extraterritorial reach of US law when it comes to the production of records from a foreign subsidiary of a US based corporation has been confirmed by US courts in several cases.

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[6] Idem p. 8

[7] QSE Consulting: *Third Party Review Of The Eastern Ontario Regional Laboratory Association's Business Case;* Final Report Prepared For The Ministry Of Health And Long-Term Care, December 2006

In *re Grand Jury Subpoenas duces tecum addressed to Canadian International PaperCompany et al.*, a US court rejected the argument that the US parent corporation lacked possession of documents of its Canadian subsidiary which were being sought by US officials. According to the court the test was a matter of control, not location.[8]

In fact, US courts have often ordered production of such documents where the US parent corporation is deemed to have access to them. The test for making that determination was described in *In Re Investigation of World Arrangements* as follows:

> [I]f a corporation has power, either directly or indirectly, through another corporation or series of corporations, to elect a majority of the directors of another corporation, such corporation may be deemed a parent corporation and in control of the corporation whose directors it has the power to elect to office.[9]

On the facts as we understand them, this test would clearly be met in the case of LabCorp and its Canadian subsidiary GDML. Accordingly the only prudent assumption to make is that under the *Patriot Act*, a US Court would order LabCorp to produce health records in the control of its Canadian subsidiary.

Does Canadian Privacy Law Adequately Safeguard the Confidentiality of Canadian Health Records?

The next question to consider is whether that subsidiary is likely to comply with such an order. That question was considered by the B.C. Supreme Court in *BC Govt Serv. Empl. Union (BSGSEU) v. British Columbia (Minister of Health Services)*, 2005 BCSC 446 (CanLII). In considering the application of the disclosure provisions of the *Patriot Act* to health records being managed by a Canadian subsidiary of a US corporation, the Court offered this assessment:

> Accepting that a FISA court in the United States, acting under s. 215 of the *Patriot Act*, would order Maximus U.S. [the US parent corporation] to produce records and further accepting that the order would have extra territorial application in respect of Maximus U.S. subsidiaries, the issue still is which records are under control of Maximus U.S. and does Maximus U.S. have access? The opinions differ.

The Court then carried out a detailed assessment of the contractual arrangements and regulatory requirements that were established to ensure the confidentiality of the billing records that were to be processed by the contractor in the case. Those extensive safeguards included a $35 million penalty for any breach of confidentiality. On the basis of its review the Court concluded that all reasonable steps had been taken by the provincial government and its private contractor to ensure "more than reasonable security" for records kept in British Columbia. In arriving at that

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[8] In *re Grand Jury Subpoenas duces tecum addressed to Canadian International Paper Company et al*, 72 F. Supp. 1013 (S.D.N.Y. 1947) at 1020.

[9] 13 F.R.D. 280, 285 (D.D.C.1952). Qtd *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 at 1145.

conclusion, the Court did not contest the possibility of an order being made under the *Patriot Act* requiring disclosure of confidential BC health records, and as the court ultimately concluded "Privacy is not absolute".

In Ontario, the collection, use and disclosure of personal health information by health information custodians is governed by the *Personal Health Information Protection Act, 2004,* S.O. 2004, c. 3, Sched. A (PHIPA). Under PHIPA, custodians, such as GDML, must implement and follow information practices regarding when, how and for which purposes the custodian routinely collects, uses, modifies, discloses, retains or disposes of personal health information and the administrative, technical and physical safeguards and practices that the custodian has in place.

The provisions of the *Business Records Protection Act,* R.S.O. 1990 c. B. 19 (BRPA) may also come into play in this regard. This statute is commonly referred to as a "blocking statute" and was enacted "as a defence to the extraterritorial reach of United States anti-trust legislation and perhaps other forms of foreign judicial interference" (*Hunt v. T&N plc*, [1993] 4 S.C.R. 289). This Act prohibits the removal of business records from, or taking or sending them from, Ontario except in specific circumstances, such as where the transfer "is provided for by or under any law of Ontario or the Parliament of Canada." This act would allow a petitioner to mount a foreign compulsion defence in a U.S. court action. It is unclear, however, whether this law could effectively block a U.S. court order to disclose records to the U.S. government.

At the federal level, the collection, use or disclosure of personal information by private sector organizations is regulated under the federal *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 (PIPEDA). While PIPEDA does not apply to companies operating under provincial equivalent regimes, it does govern the disclosure of personal information by information custodians in Ontario to persons outside Canada in the course of commercial activities.

PIPEDA includes some sections which could arguably prevent a Canadian subsidiary from transferring personal information to an American parent corporation under a FISA order. PIPEDA, however, also contains a number of important exceptions regarding disclosure. For example, under s. 7(3), disclosure without consent is permitted when an organization is required to comply with a court order to compel the production of information, when the disclosure is to a government institution in response to a request for information related to national security or international affairs, or for the purpose of enforcing a law of Canada or a foreign jurisdiction.

Since PIPEDA does not expressly limit these exceptions to Canadian court orders or government institutions, arguably these exceptions could permit disclosure to foreign authorities without consent. The potential conflict that may arise here between the requirements of US and Canadian law has not been the subject of judicial interpretation. However, the issue has been addressed by the Privacy Commissioner for Canada. In her view:

> If the organization in the foreign country has a related organization in Canada that holds personal information about Canadians in Canada, an order by a foreign

> court cannot compel the disclosure of the information that is held in Canada. The organization in Canada will be subject to *PIPEDA* or its provincial equivalent. It is not bound by the order made in the foreign country. Furthermore, it has an obligation under *PIPEDA* to take appropriate security measures to prevent the unauthorized disclosure of the personal information it holds. This may mean employing technical measures to prevent its related organization in the foreign country from inappropriately getting access to the personal information held in Canada.

Unfortunately, in stating her position the Commissioner makes no reference to exceptions set out in PIPEDA, which we have noted. Nevertheless, her position is consistent with the findings of the Ontario Privacy Commissioner, who has also investigated complaints under PHIPA in relation to the application of the US *Patriot Act*. The Privacy Commissioner has also investigated the use of "Initiate" Software in the Ontario health care system. In-Q-Tel, the CIA's investment arm, has a significant investment interest in "Initiate". The Privacy Commissioner determined that stringent controls in place, including contractual provisions specifying permitted uses of the information; prohibiting remote access to, or removal of, personal health information; and requiring secure storage of the information in Ontario, were sufficient to protect the privacy of the personal health information.[10]

These decisions and opinions clearly emphasize the need to have proper contractual provisions in place to ensure that health information is not shared with American parent corporations but remains in Ontario in order to avoid compelled disclosure pursuant to the US *Patriot Act*.

As noted, the role of GDML in relation to EORLA restructuring plans for laboratory services has yet to be determined. We cannot therefore predict how an Ontario court might respond to questions similar to those before the BC Court as they might arise in the EORLA case.

This being said, in our view, the potential of Canadian privacy law to shield a Canadian subsidiary from a US court order that its US parent produce records the subsidiary has not shared with the parent is uncertain. Moreover as Professor Geist concludes, it is "unclear whether disclosures compelled by U.S. law would constitute a PIPEDA violation." In light of this uncertainty the Canadian subsidiary may see no impediment in Canadian law to complying with the US Court order.

The Practical Problem of Insuring the Confidentiality of Health Records in the Possession of Canadian Subsidiaries

Ultimately the most important question to ask is the practical one. How is GDML likely to respond to a US court order made under the *Patriot Act* that it disclose confidential health records it has gathered?

[10] Investigation Report- PHIPA Report H106-45 Initiate Systems Inc. and the Ontario Ministry of Health and Long-Term Care.

It is important in this regard to appreciate that anyone served with an order issued under FISA rules may not disclose the existence of the warrant or the fact that records were provided to the government. Therefore there would be no notice of such an order were it to require LabCorp to disclose records gathered by GDML. Assuming that LabCorp has no direct access to those records, it is likely to conclude, on the basis of the caselaw we have noted, that it must comply with the FISA order by requiring its GDML to make the records available.

GDML would then have to determine whether to comply with the US court order conveyed by its principal shareholder, in light of Canadian privacy law and any contractual obligations it might have to EORLA. As noted, the latter have yet to be determined, and according to one of Canada's leading authorities on the subject, Canadian privacy law arguably allows compliance with the orders of foreign courts.

In our view, such questions will be resolved by GDML in consultation with counsel and its US parent, but with no notice to Canadian officials, EORLA, or the patients whose records are at issue, for as noted, under US law GDML must keep the court order a secret.

In sum:

If the health records gathered by GDML are transferred, or otherwise made available to its American parent corporation, or stored in data banks located in the US, the *Patriot Act* can be invoked to compel the disclosure of such personal information to US officials. However, even if access to GDML records is strictly confined to that corporation, a US order might nevertheless require its production.

According to the only Canadian court to have considered the question, a sufficiently strong firewall of privacy protection may safeguard that information from access by US officials. However, there is no clear statutory impediment that would preclude GDML from complying with a US court order. Moreover, under the *Patriot Act*, the fact of such an order must not be disclosed, so the resolution of any potential conflict with Canadian privacy law is likely to be resolved as an internal matter to GDML.

These circumstances create obvious and significant risks that confidential Canadian health records may be compromised when these are gathered by, or otherwise subject to the control of Canadian subsidiaries of corporations based in the US.

C. THE RISK OF NAFTA BASED CLAIMS ARISING FROM THE EORLA SCHEME

Since the advent of the first free-trade agreement with the United States in 1988, the scope of international trade and investment agreements has been substantially expanded to encompass broad areas of policy, programs and law which had previously only been matters of domestic and local concern. The World Trade Organization (WTO) framework now includes agreements concerning investment, services, procurement, intellectual property, and many forms of domestic regulation where these impinge even indirectly on trade or foreign investment. The same is true under the North American Free Trade Agreement (NAFTA).

Thus under the new generation of international trade agreements, investments such as those LabCorp has made through various subsidiaries in the Canadian health sector are subject to both WTO and NAFTA investment and services rules.

While the disciplines of both trade regimes apply, NAFTA investment rules are the most problematic because they can be unilaterally enforced by US investors who have been accorded the right to claim damages for violations of the broadly worded constraints established by these rules.[11]

Accordingly, Ontario must respect the several broadly framed constraints on its regulatory and policy options as they may affect US and Mexican investors -- in this case, LabCorp investments in GDML. The unalloyed application of these investment rules to health care laboratory services would:

i) prohibit Ontario from providing more favourable treatment to public sector laboratories than it accords to GDML;

ii) impose constraints on the expansion of LabCorp of GDML investments in Ontario;

iii) prohibit Ontario from insisting that GDML source materials or services locally in providing laboratory services in the province; and

iv) expose Ontario to a claim for compensation should it decide to contract-in services that it had previously contracted to GDML.

Recognizing the implications of imposing such constraints on Canadian health care policy and law, Canada has taken steps to protect social programs from the full impact of trade disciplines by negotiating exceptions from certain NAFTA rules.

However, the protection afforded by these reservations and exceptions is qualified and unlikely to apply where health care services, such as hospital laboratory testing, are delivered or provided on a commercial basis. As we know, this is true of a growing number of health care services, including advanced diagnostic and even surgical services.

To illustrate the risks presented by these rules, a US health corporation has recently invoked NAFTA dispute procedures to claim $155 million in damages which it claims to have suffered in consequence of having its plans to build private surgical centres in Canada frustrated by

[11] Under Article 1122 Canada has unilaterally consented to international arbitration of claims arising under the Chapter notwithstanding the absence of any contractual relationship with the foreign investor. While foreign investors must waive their rights to pursue similar claims before domestic courts they need not exhaust domestic remedies before resorting to international dispute resolution [Article 1121].

Canadian health care policies and law.[12] That dispute will not be resolved by Canadian courts, but private international arbitral tribunals that typically operate from the World Bank headquarters in Washington D.C. The profile of NAFTA investment rules is still quite modest, and we suspect that most Canadians would be surprised to learn that important matters of health care policy may now be determined by quasi-judicial bodies operating entirely outside the boundaries of Canadian law and judicial institutions.

Of course, LabCorp already has a substantial investment presence, through GDML and other subsidiaries in the Canadian health sector. Therefore the risks engendered by present EORLA plans are incremental, but may nevertheless be significant if GDML's role is expanded or changes in character. In addition, by corporatizing laboratory services now provided by public hospitals, the EORLA scheme threatens to erode NAFTA safeguards that currently preserve important public policy and regulatory options concerning such services. We will consider these two threats in turn.

Increasing the Risks of Foreign Investor Claims

In identifying the NAFTA risks associated with EORLA scheme, two assessments must be made - the first is legal, the other practical. The legal question concerns whether a particular measure,[13] such as a decision to contract-in certain laboratory services, conforms with rules that generally prohibit measures that favour public sector service providers.

The second question concerns the actual likelihood of a NAFTA claim even where some action by government may be inconsistent with free trade disciplines. The risks here largely depend upon the extent to which the measure affects the vested interests of our trading partners or foreign investors. In an opinion prepared for the Romanow Commission, a senior trade lawyer who represented Canada during the initial free trade negotiations put it this way:

> It is easy to invent NAFTA and WTO worst-case scenarios but the actual impact of these agreements must be assessed realistically. An expansion of the public component of the health care system into new areas, with the resulting exclusion of private interests, would result in NAFTA compensation claims or WTO challenges only if the private economic interests adversely affected were significant. If these interests are non-existent or insignificant, the risk of claims or challenges is negligible.[14]

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[12] *Centurion Health Corporation v. Government of Canada.* A copy of the company's claim can be accessed on the website of the Department of International Trade: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/centurion.aspx?lang=en.

[13] "Measure" is a technical term under NAFTA and the WTO. NAFTA Art. 210 defines "measure" to include any law, regulation, procedure, requirement or practice.

[14] Jon Johnson; *How Will International Trade Agreements Affect Canadian Health Care*? Commission on the Future of Heath Care in Canada, Sept. 2002.

Conversely the presence of significant private or foreign investment interests in a particular sector may create a formidable impediment to establishing new public programs. This is true because NAFTA investment rules effectively entrench private property rights (unlike Canada's Constitution), allowing foreign investors to claim compensation when their businesses are adversely affected by public policy or regulatory initiatives.[15] The result can be observed in New Brunswick's retreat from plans to establish a public auto insurance scheme in the face of threats by the insurance industry to claim compensation under NAFTA if it did so.

In the case of EORLA, present plans foresee an expansion of GDML's role in providing laboratory services. Where the modalities of service delivery remain the same, the increased threat of NAFTA litigation may not be substantial. However, should the character of GDML's role change significantly, present risks could be significantly exacerbated and frustrate efforts by the Ministry of Health to curtail any new role for, or commitments to, GDML under the EORLA scheme .

Eroding the Effectiveness of NAFTA's Reservation for Health Care Services

A related concern arises from the impact of removing the delivery of laboratory services from the public hospital setting and providing them under the auspices of an institution that is to be "fully based on a corporate model of organization". The trade risks associated with this transformation become apparent when one considers the impact of this restructuring on the application of key NAFTA exceptions for health care services.

As noted, Canada has declared a general exception for social services under NAFTA services and investment rules.[16] Under this exception, Canadian governments are entitled to maintain, expand or establish new social services policies and regulations . This is true even where such initiatives restrict the rights of foreign investors or service providers, so long as governments respect the limits of the public policy and legal domain carved out by the reservation.

Thus, by virtue of Canada's reservation, governments may prohibit or restrict foreign investment in the health care sector. Such restrictions would otherwise be prohibited under Articles 1102 (National Treatment) and 1103 (Most Favoured Nation Treatment) for treating foreign investors in a discriminatory fashion. Similarly, governments are permitted to establish performance requirements, such as a requirement that investors source goods and services locally.

It is important, however, to appreciate that Canada's reservation for social services does have significant limits. To begin with, the reservation does not apply to all NAFTA investment and

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[15] David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada,* University of Toronto Law Journal 499 (1996), at pp. 521-523, and *Investment Rules and New Constitutionalism*, 25 Law and Social Inquiry 757 (2000).

[16] Article 1108:3 provides: 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.

services rules, including the provision concerning expropriation[17] which may be invoked to discourage contracting-in health care services if privatization fails to provide touted benefits.

Another limitation arises from the fact that the health care reservation only applies to "social services established or maintained for a public purpose", and the US and Canada have very different views about the meaning of these key but undefined terms. According to the US view:

> The reservation in Annex II U-5 (the US equivalent to Canada's) is intended to cover services which are similar to those provided by a government, such as child care or drug treatment programs. If those services are supplied by a private firm, on a profit or not-for-profit basis, Chapter Eleven and Chapter Twelve apply. [emphasis added][18]

In other words, laboratory services provided by private companies would not be considered a social service. The same may well be true for such services when provided by a corporatized entity such as the one into which EORLA is to morph. Consequently health care policies that sanctioned such private delivery, or that might subsequently apply to such services, would not have the protection afforded by the NAFTA reservation.

For their part Canadian officials have little to say about the US view, suggesting instead that the scope of this reservation "depends largely on how a country's own government, views the situation."[19] But the suggestion that this reservation is essentially self-defining is entirely inconsistent with the approach adopted by the NAFTA parties for defining such exceptions, and is very unlikely to persuade an international trade or investment tribunal.[20]

It remains to be seen which view will prevail when a trade panel or arbitral tribunal convenes to decide the matter. If the protection afforded by this reservation is negated, the policy and regulatory options of governments relating to health care will be significantly constrained.

It is important to point out that the risks here are somewhat independent of GDML's role under EORLA and arise entirely from the transferring of laboratory services from public hospitals to a corporatized regional entity. That being said, this risk is significantly exacerbated if GDML acquires a new and expanded role in providing such services under the EORLA scheme.

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[17] Under NAFTA, expropriation is defined much more broadly than under Canadian law, and as noted by the BC Supreme Court is so expansive as to include "a legitimate rezoning by a municipality or other zoning authority." *The United Mexican States vs. Metalclad Corporation*, 2001 BCSC 664, reasons for judgement of the Honourable Mr. Justice Tysoe, released May 22, 2001 at para. 99.

[18] Correspondence from the USTR, Michael Kantor to the Attorney General for the State of Oregon, Mar. 1996.

[19] See views expressed in correspondence between John Weekes, then Canada's NAFTA coordinator, and the Ontario Deputy Minister of Health, reproduced in *Inside NAFTA*, November 29, 1995, cited in Epps and Flood, p 25, n6.

[20] See for contrast Article 2102 of NAFTA which reserves to the Party's the right *to take any actions that it considers necessary for the protection of its essential security interests* [emphasis added].

In sum:

Once foreign investment in the health care sector is permitted, the rights of such investors become vested under NAFTA, and these include the right to make damage claims where government measures impinge on those investments. The risk of such a claim is proportional to the extent of that foreign investment.

Furthermore, the commercialization of public sector services weakens Canada's claim to the protection afforded by a key NAFTA exception for health care services. This would further expand the potential scope for NAFTA-based claims challenging government health care policies, laws, programs and regulations. Of particular concern are constraints imposed by NAFTA investment rules that may frustrate efforts by the Ministry of Health to reconsider or retreat from its experiment with hospital laboratory services, even if it fails to reduce costs or improve service quality, or both.

Sincerely,

S. Shrybman per lr.

Steven Shrybman

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