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MEMORANDUM

From: L. L. Herman

Date: 1 December 2004

Re: Child Care Services and Canada's Trade Obligations (Sack Goldblatt Mitchell "Opinion")

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1. It is simplistic to claim that a system of private delivery of health and/or child care services in Canada can be attacked under trade agreements as requiring the system to be opened up to any foreign (i.e., U.S.) service providers). The spectre of a trade despite under the NAFTA or the WTO is often used to exploit concerns over the ability of Canada or the Canadian provinces to legislate for the public good.

2. The issue in respect of child care services and the right of private sector participation in the system requires a careful look at the extent and limitations of these trade agreements. As matters stand, there is nothing under the *WTO Agreement* that would allow a foreign State to initiate a dispute under the *General Agreement on Trade in Services* ("GATS") in this area, since the GATS is limited to specific services only and Canada's child care, education and other public services are simply not covered by Canada's obligations under that Agreement.

3. The suggestion that Canada would negotiate away its present reservation covering health care, child care and other social services from GATS obligation in the current Doha Round is without any basis. Those negotiations are far from being concluded and are only now getting underway. Moreover, Canada's negotiating offer in the GATS specifically excludes all health care and "social services", in keeping with long standing governmental policy.

4. As far as the NAFTA is concerned, Canada has filed a reservation to the Services Chapter (Chapter 12) that specifically excludes all "social services established or maintained for a public purpose" and which lists, among others, "social welfare, public education, public training, health and child care". These services are therefore outside the reach of the Agreement.

5. Canada's reservation, in my view, is broad enough the exclude any social service established by any government in Canada for a public purpose, even if there is some role for the private sector in the delivery of that service. The interpretation provisions of the *Vienna Convention on the Law of Treaties* would give this reservation a broad reach in accordance with its ordinary meaning. The suggestion that this reservation would be narrowly interpreted by a NAFTA panel is not tenable.

6. I therefore do not agree with the (unsupported) argument in the Sack Goldblatt paper that this reservation applies only to services provided entirely by the public sector. Whatever the private view of some past U.S. negotiators (which has no legal relevance in any case), it is the wording of the reservation in the NAFTA that governs under the rules in the *Vienna Convention*. I cannot see anything in the wording that would lead to the

conclusion that public services that involve the private sector in some manner would not be covered by Canada's reservation.

7. The reservation covers all "services" established or maintained for a "public purpose". There is nothing in the wording to suggest, directly or indirectly, that a system that permitted partial delivery of public services by private interests would not be included in Canada's reservation. The question is whether it is a "public service", not the vehicle by which that service is provided.

8. Indeed, public health care in Canada is funded through the public purse but delivered through the services of private physicians who are not public employees. Private clinics and diagnosticians are part and parcel of that service. While they are paid under the *Canada Health Act*, they are nonetheless private sector actors. There is no credible argument that this puts Canada's health care system outside the scope of Canada's NAFTA and GATS reservations.

9. There are a host of other examples, too numerous to mention. Garbage collection, snow removal, road maintenance, hospital services, all involve private sector parties that deliver public services and not public sector corporations. In Saskatchewan, public auto insurance is provided through private companies.

10. Therefore, to argue that a child care system must be 100% in the public sector to escape the NAFTA purview is not justified according to the terms of the reservation and the scope of those terms under the normal rules of treaty interpretation.

11. With respect to the Investment Chapter (Chapter 11) of the NAFTA, this is often cited as a Trojan horse that prevents State legislation and regulation in a host of areas because of claims that such regulation could have the effect of "expropriating" the asset of a NAFTA investor.

12. While there is no doubt that the provisions in Chapter 11 have had some unintended consequences, in fact there have been few successful Chapter 11 disputes by foreign investors. Several arbitration cases under Chapter 11 have made it clear that the scope of that Chapter must be narrowly construed and that it does not cover the impact on a foreign-owned asset simply through the act of regulation by governments.

13. These are my preliminary thoughts in reading the Sack Goldblatt piece. Obviously, we would need to examine some of these issues in more detail to arrive at a final view on these issues.

LLH/gdm