An Assessment of

THE TRADE and COOPERATION AGREEMENT

between the

ONTARIO and QUEBEC (September 11, 2009)

Prepared for the Council of Canadians and the

Canadian Union of Public Employees

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DRAFT EXECUTIVE SUMMARY

A Broad Political Scheme to Limit the Exercise of Government and Public Authority

The following provides an analysis of The Trade And Cooperation Agreement between the Provinces of Ontario And Quebec (September 11, 2009) [hereinafter the TCA]**.** Under the guise of removing interprovincial barriers to trade, investment and labour mobility, these two provincial governments have agreed to impose sweeping constraints on what otherwise would be the entirely lawful exercise of governmental authority.

The first thing to appreciate about the is that is an agreement entered into by the Ministers of the two provincial governments has no statutory foundation, and has never been put before the legislature for its consideration or approval. In fact the agreement, which was made public only after it was signed on September 11, 2009, went into effect less than three weeks later on October 1, 2009. It was neither preceded nor followed by a government white paper or any other meaningful explanation of why such an agreement was necessary or what it would accomplish.

While the TCA is simply a political arrangement between the McGuinty and Charest governments, it nevertheless empowers private tribunals to impose monetary penalties that will ultimately be paid by the taxpayers of the province, when government, city councils, local school boards or other public bodies take actions that are deemed by these tribunals to offend the broad constraints of this interprovincial scheme. It is no defence to such a challenge that the impugned government action is entirely lawful and proper under the laws of the province and the Constitution.

As the following analysis explains, the essential thrust of Ministers' scheme is to promote policies of de-regulation and privatization that diminish the capacity of present and future governments to exercise their authority to address the social, economic and environmental needs of the province. A summary of its key conclusions are that:

i) **Interprovincial Trade Barriers:** There are no significant obstacles or impediments to interprovincial trade, investment or labour mobility between Ontario and Quebec, and the few irritants that do exist are unlikely to be resolved by the TCA. While the scheme will foster greater interprovincial cooperation, the essential thrust of that common endeavour will be to diminish the right of governments to regulate corporations in the public interest or provide public services;

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ii) **An Agenda For De-regulation:** The TCA's assault on the regulatory capacity of governments and other public bodies is two pronged. The first requires that regulatory initiatives overcome new internal government hurdles before they can be promulgated. The second allows measures that survive the gauntlet of internal review to be challenged before private tribunals invoked by the other province (inevitably at the behest of private interests opposed to the measure);

iii) **Commercial and Investor Rights to be Paramount:** To survive these review processes, government measures must be shown i) to be "least trade restrictive" and ii) to only minimally impair investor rights. By asserting the priority of these commercial objectives the TCA seeks to elevate private and investment interests to paramount status over all other societal values and goals, such as environmental protection, universal health care, and community economic development - in effect turning the priorities of the Constitution and the Charter of Rights and Freedoms upside down;

iv) **No Obstacles:** The most onerous of TCA obligations is the prohibition on existing and future government "measures" that "operate to create an obstacle to trade, investment and labour mobility" unless such measures are exempt under the regime. Because "measure" is defined to mean "any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure," virtually all actions by government may be regarded as offending this broad prohibition. After all, everything that a government does affects the market in some manner, otherwise there would be no need for it to act in the first place. *A priori*, all measures that affect the rights and opportunities of companies and individuals to conduct business, make investments or provide services, are vulnerable to being challenged under the TCA for doing so;

v) **Public Services:** This "no obstacles" requirement also provides a means for assailing public sector services which often formally (the ban on private health care insurance) or informally (public funding and other support for non-profit child care) curtail, or in the parlance of the TCA, "create an obstacle" for, competing private sector services;

vi) **Exceptions:** While the TCA sets out a number of reservations and exceptions, these are unlikely to effectively ameliorate the serious constraints imposed by the regime for two principal reasons. First, the protections afforded by similar exceptions in other trade agreements have been accorded very narrow application by arbitral bodies very much like the tribunals authorized by TCA. Second, the TCA can be readily expanded by the provinces with no more forewarning or public debate than they engaged before entering into the TCA scheme in the first place;

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vii) **Monetary Penalties:** The TCA empowers private arbitral tribunals to determine whether government measures are compliant with the sweeping constraints imposed by the regime. Where a government or other public body refuses to remove an offending measure, the tribunal may impose a monetary penalty of as much as $10 million for each such measure. There is no requirement that any public notice be given of such disputes, and claims to confidentiality by either party must be acceded to by the tribunal by typically conducting proceedings behind closed doors;

viii) **Labour Mobility:** the labour mobility provisions of the TCA require the government and other regulatory bodies, like the College of Social Workers, to certify a worker licensed to a particular trade or profession by the other province regardless of differences in the skills or training that may exist between the two jurisdictions. In addition, residency in the province may not be required as a condition for issuing such certification. In essence, the labour mobility provisions of the TCA are primarily an instrument for labour market deregulation that will increase competition for scarce employment or vocational opportunities while gradually reducing the qualifications of the individuals who are entitled to apply for or take up such occupations;

ix) **Financial Services:** financial services include banking, investment and insurance, and many have come to learn and experience the painful consequences of under-regulation, yet the inclusion of such services in the TCA will undercut efforts to effectively re-regulate this sector. The regulation of insurance services is also critical to maintaining medicare, because to prevent queue jumping, private insurance is not permitted for services provided in the publicly funded system. Yet by banning private insurance for such health care services, medicare laws create an obstacle to private insurance services and investment. While existing measures may be excepted under the TCA, the regime will certainly impede efforts to expand medicare or respond to new challenges;

x) **Transportation:** The transportation chapter of the TCA essentially deals with two issues. The first is regulation, or as we have seen, de-regulation of transportation services, including, in this case, vehicle safety standards. The other is comprised of projects to which the provinces declare a commitment to further study and/or action. Among the latter is the "Continental Gateway" – something akin to a free trade superhighway to the US largely based on increasing the flow of larger and larger tractor trailers. Here too, the TCA engages important questions of public safety and environmental concern and places these firmly in a framework that will isolate these issues from public scrutiny;

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xi) **Public Procurement:** As a general rule, the TCA precludes economic policies that favour local suppliers and workers. Thus opening up procurement markets would preclude the use of public funds to favour local economies or economic development no matter how pressing those needs may be. While the US, Europe, Japan and even China maintain significant "buy local" requirements, the federal government has repeatedly declined to adopt such measures, and now appears to have persuaded the provinces to take a similar stance;

xii) **Agriculture and Food:** The Agriculture and Food provisions of the TCA include a mutual commitment by the provinces to support supply management, which tellingly is an approach to managing the agricultural sector that is the antithesis of free trade and the market model. This commitment has been applauded by producers of supply managed commodities in both provinces. However, other provisions of this Chapter open the door to challenges to "technical measures affecting interprovincial trade in agriculture and food goods". These would include pesticide residue standards, labelling requirements for genetically modified organisms, and organic certification standards;

xiii) **The Environment:** By including the environment and sustainable development as one of six specific commitments, the TCA has empowered private tribunals to second guess policy and law makers as to whether a particular environment law or regulation is "no more trade restrictive than *necessary*" to achieve its goal. In other words, to successfully defend a measure under this test, a province confronts the daunting challenge of proving a negative – namely that there is no other option capable of achieving the objective that would be less restrictive of trade, investment and labour mobility. This "necessity" test is adopted from the NAFTA and WTO trade agreements, and as administered under those regimes has proven almost impossible to satisfy however *bona fide* the purposes of the environmental measure being challenged;

Given these far reaching impacts, it is astonishing that the negotiation of the TCA could have proceeded in such a opaque and unaccountable manner. This is all the more problematic given the serious and obvious constitutional issues raised by the scheme.

In effect, TCA and agreements like it[1] transform the 'constitutional' landscape for provincial government action because its constraints are superimposed over broad areas of public policy and law that would otherwise be duly enacted, and entirely lawful. Under the Constitution, governments have unfettered authority to act, so long as they do so lawfully and in accordance with the Constitution. The TCA purports to add an additional and overarching constraint that

[1] TILMA being the most noteworthy example.

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government actions not reduce or impair the commercial interests of those residing in a neighbouring province. In effect, the TCA turns Canadian constitutional values upside down by making commercial considerations paramount over all other competing public interests, society values and economic priorities.

Finally, the TCA must be understood in the context of the provinces', and in particular Quebec's, larger ambitions to conclude a free trade agreement with the EU. While diversifying Canada's trading relationships is generally a good a thing, we already have free trade with the EU under the WTO. What we don't have is an agreement that would allow large EU-based corporations unfettered access to provincial and local procurement and services markets. These are the two areas of market regulation most necessary to foster community/provincial/Canadian economic development, and for the delivery of universal public services, from water to health care. These are precisely the areas of market access the EU has identified as its priorities in such negotiations, and it is also explicitly seeking an agreement that would directly and legally oblige the provinces to open these markets. Viewed in this light, the TCA seems much more of a device for paving the way to further trade liberalization with the EU than it is a mechanism for addressing non-existent interprovincial trade barriers.

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