



**Canadian American Bar Association**

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The Honourable Caroline Mulroney  
Attorney General for the Province of Ontario  
Ministry of the Attorney General  
McMurtry-Scott Building  
720 Bay Street, 11th Floor  
Toronto, ON  
Canada  
M7A 2S9

**Re: *An Act to amend the Liquor Control Act with respect to the termination of a specified agreement (Bill 115)***

Dear Attorney General Mulroney,

I write on behalf of the Canadian American Bar Association (“CABA”) to share CABA’s concerns regarding Bill 115 presently awaiting passage by the Ontario Legislature. Bill 115 purports to unilaterally terminate the 2015 Master Framework Agreement (“MFA”), a duly concluded contract signed by the Province of Ontario with Molson, Labatt, Sleeman and The Beer Store, without provision for compensation and while purporting to deny their rights of action and legal remedies. We are directing this letter to your attention given your unique role in protecting the public interest and upholding the rule of law in the Province.

**I. About CABA**

CABA is an association of American and Canadian lawyers with strong cross-border ties either through citizenship, education, or professional designation. Our members include in-house counsel, attorneys in private practice, government lawyers, law school faculty, and law students. CABA acts as an associational forum and voice for the cross-border legal community and is committed to promoting the rule of law, facilitating cross-border business, and preserving the special relationship between two of the world’s largest and most comprehensive trading partners.

CABA carries out legal and policy research and engages in cross-border advocacy initiatives that further its mission and the interests of its members. CABA also hosts events in New York, Los Angeles, and Toronto; these events include cross-border panels involving judges and other members of the legal community, Continuing Legal Education seminars focusing on cross-border legal issues, and speaking engagements for Canadian and American lawyers pursuing international legal, political, or diplomatic work. CABA is a California non-profit corporation based in New York City.

**II. CABA’s Perspective on Bill 115**

CABA believes that commitment to the rule of law on both sides of the border underpins mutual prosperity and the predictability and stability of cross-border trade. As the Supreme Court of Canada has recognized, the rule of law has at least three aspects. First, that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.” *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 749. Second, that

adherence to the rule of law “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.” *Id.* Third, that “the exercise of all public power must find its ultimate source in a legal rule.” *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 10.

If enacted, Bill 115 risks undermining the rule of law in a number of ways. First, it represents a seemingly arbitrary decision by the government in office to invoke its legislative power to override the law of contract and depart from a legal undertaking by the Government of Ontario relied on by private parties. Second, unlike laws of general application, which do not predetermine precisely whom they will affect, it targets the parties to a specific contract. Third, it expropriates private parties while purporting to deny them any right to compensation and redress in Canadian courts.<sup>1</sup> This last characteristic has few, if any, precedents in Canadian legal history. The norm against expropriation without compensation is a feature of legal systems protective of property rights and the rule of law, and finds expression in the investor protections of international investment treaties. The United States has expressly constitutionalized it in the Fifth Amendment, which states that “No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

While future governments are not bound by the actions of previous ones, as the Minister of Finance, the Honourable Victor Fedeli, has repeatedly stressed, engagements by a province should likewise not be voided merely as a corollary of a change in government. Governments that too readily depart from the legal course set by their predecessors — particularly if they fail to mitigate the resulting harm — risk upsetting the continuity and accountability that is the lifeblood of a functioning legal system. CABA’s concern is not merely that Bill 115 may create uncertainty in the form of political risk for certain U.S. and other investors and impede cross-border trade. More fundamentally, it is that Bill 115 appears to reflect the limited lengths the current Ontario government is willing to go to respect the principles and values underlying the rule of law. It is concerning that Bill 115 represents another instance of governments on both sides of the border disregarding norms that require them to forbear from overriding existing law in the absence of truly compelling reasons and after giving due regard to the rights of the affected parties. This trend is evident in the U.S. government’s recent suspension of certain provisions of NAFTA pursuant to an alleged and unsupported “national security threat” posed by Canada<sup>2</sup> and the Ontario government’s threatened use of the Notwithstanding Clause to override the constitutional guarantees of the *Canadian Charter of Rights and Freedoms* in connection with the reduction of the size of Toronto city council.

In sum, CABA has serious concerns with Bill 115 as it stands. CABA urges the Ontario government, and you in your capacity as Attorney General in particular, to reconsider using Ontario’s legislative powers to disturb the rights of private parties in contracts concluded with the Province and to void their right to all compensation and legal recourse. CABA believes such actions risk eroding public trust in the rule of law and discouraging U.S. and other foreign investment in Canada, as well as placing a chill on cross-border trade.

Yours sincerely,



Ivo Entchev, Esq.  
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Canadian American Bar Association

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<sup>1</sup> It is unlikely that the Province will be able to prevent the investing parties from seeking redress under the anti-expropriation provisions of international investment treaties including but not limited to the North American Free Trade Agreement (“NAFTA”).

<sup>2</sup> CABA delivered submissions to the Canadian government on this topic as part of Canada’s public consultation process, arguing for the restriction of the national security exception in the new trade agreement replacing NAFTA.