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

May, 2007

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On April 28, 2006, Alberta and British Columbia entered into a *Trade, Investment and Labour Mobility Agreement* ("TILMA"), which went into effect on April 1, 2007. The following represents an overview of the potential impact of a TILMA scheme on public policy and law in these two provinces, particularly as it may affect public services.

Our assessment describes the general architecture of TILMA, and examines several key elements of the scheme. Because of the unbridled scope of the regime, we have only touched upon several key elements of the scheme, such as those concerning procurement and subsidies. These warrant further and careful scrutiny, as does the impact of the regime on the many and diverse areas of public policy and law that is subject to the constraints TILMA imposes on the provincial governments and virtually all other public bodies that are established under provincial law.

There is now a growing body of critical literature concerning TILMA including reports by the Canadian Centre for Policy Alternatives, the Sierra Legal Defence Fund, and several municipalities and municipal organizations.[1] We commend these reports to those interested in gaining a better understanding of the regime and its impacts.

THE ORIGINS AND DERIVATION OF TILMA

While TILMA is presented as necessary to remove barriers to inter-provincial trade, investment and labour mobility, little if any evidence is presented that significant, let alone unwarranted, barriers to inter-provincial commerce exist.

Much of the rationale for the regime is provided by the Conference Board of Canada which has produced recent reports promoting the TILMA cause. None of these reports however, offer substantive empirical evidence that significant and unwarranted barriers to internal trade and investment actually exist in Canada. While certain provincial procurement rules and subsidy programs still favour local contractors and hiring practices, most of the examples cited by the reports concern the remnants of international trade, investment and services measures that have

[1] Ellen Gould, *Asking for Trouble, The Trade, Investment and Labour Mobility*, CCPA, February, 2007.
Keith Ferguson, *TILMA and the Environment*, Sierra Legal Defence Fund, March 2007, and see various other reports and legal opinions cited throughout this assessment.

survived free trade, such as foreign ownership limits for Canadian broadcasting companies. Few, if any, of these examples are relevant to Canada's internal market.

While TILMA is an agreement between two Canadian provinces, its origins and impetus can be seen as stemming from the federal government's commitments under NAFTA and the WTO, rather than from the largely unsubstantiated claims of the Conference Board of Canada. For under both international trade regimes, Canada is obliged to ensure provincial adherence to the requirements of these trade treaties.

The importance of provincial compliance arises from the expansion of these trade regimes to encompass policy and law that concern matters reserved to provincial governments under the Constitution. As many will know, the new generation of international trade agreements include disciplines concerning services, investment, and non-tariff barriers which apply to broad areas of domestic policy and law that have little, if anything to do with trade in a conventional sense. In this new environment, everything from local land use restrictions to public health insurance plans can become fodder for international trade disputes or foreign investor claims.

A good deal of this new terrain lies wholly within the provincial constitutional sphere. For Canada's trade liberalization agenda this is problematic, because the federal government has no authority to implement international obligations that pertain to matters reserved to the provinces.[2] Nevertheless, under international law Canada is liable for provincial measures that violate trade rules.

Trade agreements acknowledge this limitation, but require Canada to take steps to address it. For example, NAFTA Article 105:*Extent of Obligations*, provides:

> *The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.*

To reconcile this discrepancy between its international obligations and the limits of its constitutional authority, Canada needed a mechanism that would directly bind the provinces to the international commitments it had undertaken. It took a significant step in this direction when it fostered the federal-provincial Agreement on Internal Trade (AIT). However, the AIT suffered from two principal limitations: 1) it didn't apply to several key areas of policy and law; and 2)

[2] In the Labour Conventions Case - Canada (A-G) v. Ontario (A-G), [1937] A.C. 326 at 347 (P.C.) - the Judicial Committee of the Privy Council held that while the federal government retains the power to make treaties, the power to implement treaties splits according to the division of powers between the national and regional authorities, such that treaties that fall within a provincial area of responsibility must be implemented by the enactment of provincial legislation.

more importantly, it lacked a legally binding dispute regime that would provide a compelling deterrent to non-compliance.[3]

TILMA addresses both of these limitations by greatly enlarging the scope of government actions constrained by the AIT, and by establishing enforcement procedures that may be invoked by private parties and yield damage awards that are enforceable in domestic courts. By providing such a dispute mechanism, TILMA transforms a political arrangement (the AIT) among provinces into legally binding agreement to which the provincial Parties must adhere, on pain of substantial monetary awards if they fail to do so.

However, as noted, TILMA is not presented as a project to complete the federal government's trade liberalization agenda, but rather as an initiative needed to remove inter-provincial barriers to investment, labour mobility and trade. However, little evidence is offered of such barriers by either Alberta or British Columbia. Both provinces simply point to reports of the Conference Board of Canada as offering proof of the need for their initiative. It is beyond the scope of this opinion to assess the validity of the Conference Board's analysis, but we note a cogent critiques of this work recently published by the Canadian Centre for Policy Alternatives and by another respected economist.[4]

As required by AIT Article 1800, TILMA extends an invitation to other provinces and the federal government to accede to the Agreement,[5] and we understand that this is under active consideration by several provinces. Given the far reaching consequences of the regime, it would be reckless in our view for any province to make a commitment to TILMA without engaging in a full and meaningful public debate about the wisdom of doing so.

THE NATURE AND SCOPE OF TILMA OBLIGATIONS

TILMA Imposes Sweeping Constraints on the Actions of Governments and Other Public Bodies

The most important substantive obligations of TILMA are set out in Part II, the key provisions of which impose prohibitions that impinge on a broad diversity of government actions.

Thus, Article 3: *No Obstacles*, provides:

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[3] While the AIT includes dispute resolution provisions, neither the provinces nor the federal government is legally bound to comply with AIT rules.

[4] Marc Lee and Erin Weir, *The Myth of Interprovincial Trade Barriers and TILMA's Alleged Economic Benefits*, CCPA February 2007. See also John F. Helliwell, *Review of Confernce Board of Canada's Report: Assessing the Impact of Saskatchewan Joining TILMA*.

[5] Article 20:1

> *Each Party shall ensure that its measures do not operate to restrict or impair trade between or through the territory of the Parties, or investment or labour mobility between the Parties.* [emphasis added]

Furthermore, under Article 4: *Non Discrimination* each Party must accord the goods, persons, services, investors or investments of the other Party:

> *…. treatment no less favourable than the best treatment it accords, in like circumstances, to its own or those of any non-Party.*

Article 5:3: *Standards and Regulations*, further provides:

> *. . . Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility.* [emphasis added]

The term "measures" is defined to include:

> *. . . any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure;*

Moreover, under Article 2: *Scope and Coverage*, TILMA applies to:

> *measures of the Parties and their government entities that relate to trade, investment and labour mobility;*

where "*government entities*" means a Party's:

> *a) departments, ministries, agencies, boards, councils, committees, commissions and similar agencies of government;*
> *b) Crown Corporations, government-owned commercial enterprises, and other entities that are owned or controlled by the Party through ownership interest;*
> *c) regional, local, district or other forms of municipal government;*
> *d) school boards, publicly-funded academic, health and social service entities; and*
> *e) non-governmental bodies that exercise authority delegated by law.*

Under this definition public hospitals, library boards, day care centres, children's aid societies, regulatory tribunals and other public bodies are subject to TILMA disciplines.

The requirement that government measures *not operate* to restrict or impair trade, investment and labour mobility indicates that it is the *effect*, rather than the *intent* of the measure that matters.[6] For example, an automobile exhaust emission standard may be intended to reduce air

[6] This is consistent with the approach adopted by trade and investment tribunals, that routinely look behind a measure that is facially non-discriminatory, to determine whether it effectively favours local producers, investors or goods, see for example the NAFTA arbitral award in S.D. Myers v. the Government of Canada, http://www.dfait-

pollution, but the effect, or "operation", of such a measure is to restrict or impair the trade of vehicles that fail to meet that standard. Similarly, a provincial subsidy program to a local producer to support the costs of engineering to meet this new standard, operates to impair the investments of manufactures who do not qualify for such subsidies and discriminates against out-of-province producers. Because there is no general TILMA exception for environmental standards,[7] such a pollution standard is subject of challenge under Articles 3, 4 and 5.

Many of TILMA's key terms are undefined and their ultimate scope and effect will be left to the vagaries of TILMA dispute procedures unless the Parties agree to more precise definitions.[8] Notwithstanding this uncertainty, it would be difficult to identify an action by government or other public body that could not be viewed as offending the sweeping constraints imposed by Articles 3,4 and 5. Virually every government action affects the market in some manner, or it would otherwise be unnecessary. Hence, *a priori*, everything a government does affects the rights of some parties to invest, or carry on business, and may, unless exempt, be challenged for offending these TILMA prohibitions.

In addition to these all-encompassing constraints, TILMA incorporates the provisions of the AIT by reference. Article 1.2 provides:

> *In the event of an inconsistency between any provision in Parts II, V and VI of this Agreement and any provision of the Agreement on Internal Trade, the provision that is more conducive to liberalized trade, investment and labour mobility prevails between the Parties. In the event that such a provision of the Agreement on Internal Trade is determined to be more conducive to liberalized trade, investment and labour mobility, that provision is hereby incorporated into and made part of this Agreement.*

Thus, TILMA dispute procedures may be invoked to enforce the provisions of the AIT as well as those of TILMA. Moreover, differences between the exemptions set out by the AIT and TILMA may be exploited to undermine the effectiveness of TILMA safeguards.[9]

TILMA's reach is much broader than that of the AIT, NAFTA or the Agreements of the World Trade Organization. As a general proposition, the constraints imposed by these other trade agreements are more precisely and narrowly defined than are those of TILMA.[10]

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maeci.gc.ca/tna-nac/SDM-en.asp

[7] TILMA's environmental exception is limited to measure relating to solid and hazardous waste management, see Part V.

[8] Under Article 34.4: *"The Parties may, at any time, issue a joint decision declaring their interpretation of this Agreement. All such joint decisions shall be binding on panels and any subsequent decision or award by a panel issued under this Part must be consistent with such joint decisions.*"

[9] See discussion below under the heading *Exceptions.*

In effect, TILMA transforms 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.

TILMA, an inter-provincial agreement with no statutory foundation, adds an additional and overarching constraint that, unless exempt, no government action may reduce or impair the commercial interests of those residing in a neighbouring province. In effect, TILMA also turns Canadian constitutional values on their head by making commercial considerations paramount over all other competing public interests and priorities. This represents an entrenchment of private property rights that Canadian governments explicitly rejected as a feature of the Constitution.

Standard Harmonization

In addition to establishing broad prohibitions on government policy, law and action, TILMA also requires the harmonization of government measures. Article 5:1: *Standards and Regulations*, provides:

> 1. Parties shall mutually recognize or otherwise reconcile their existing standards and regulations that operate to restrict or impair trade, investment or labour mobility.

Articles 5:2 and 5:5 go much further, by imposing obligations that apply across the board to all government measures whether related to trade, investment and labour mobility or not. These Articles provide:

> 2. Parties shall, where appropriate and to the extent practicable, specify standards and regulations in terms of results, performance or competence.
>
> 5. Parties shall cooperate to minimize differences in standards or regulations adopted or maintained to achieve legitimate objectives.

It is possible in theory that TILMA's direction to harmonize standards and regulations could result in the adoption of a higher common standard of regulatory control, but it is far more likely that standards will be reduced to a lower common denominator, or abandoned altogether. The

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[10] For example, NAFTA investment rules (Chapter 11) impose four basic requirements on government; 1) to accord non-discriminatory treatment; 2) to accord fair and equitable treatment; 3) to compensate for expropriation; and 4) to not impose certain performance requirements. In contrast, and in addition to proscribing discriminatory treatment, TILMA prohibits all non-exempt government measures – past, present and future – that "operate to restrict or impair trade … investment or labour mobility… "

various ways in which TILMA rules will operate to encourage a race to the bottom of the regulatory ladder is considered below (see *Privatization*).

THE PRIVATE ENFORCEMENT OF TILMA DISCIPLINES

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, and under which they have no obligation. The architecture of TILMA dispute procedures represents an amalgam of elements taken from the AIT and NAFTA investment rules. 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 monetary damages where these are alleged to have been caused by a failure of the Parties 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 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.

TILMA Includes No Mechanism to Screen Vexatious Claims

Article 25 of TILMA delineates the procedural steps that must be followed by any person who wishes to resolve "any matter regarding the interpretation or application of this Agreement". Article 26 empowers persons to invoke binding arbitration where a Party declines to take up the complaint on its behalf. The various steps in this dispute process are described in the hypothetical case study of a TILMA claim made by the owners of a chain of private medical clinics, which is attached as an appendix to this opinion.

TILMA dispute panels are comprised of individuals appointed from a roster of panellists chosen by the parties. There is no process delineated for the appointment of individuals to the roster, or requirements concerning their qualifications. [11]

Article 27 delineates the authority and procedures of dispute panels, which are to conduct proceedings in accordance with UNCITRAL Arbitration Rules except where modified by the provisions of the TILMA text. However, UNCITRAL rules were established for the purpose of resolving private international disputes arising from commercial relationships, not domestic

[11] Under Art. 34 however, the Parties must establish a code of conduct governing panellists prior to entry into force of the Agreement.

disputes that concern issues of policy and law that are fundamentally public, not private in character. For this reason, UNCITRAL rules are, by design and operation, ill-suited to frame the adjudicative tasks assigned to TILMA dispute panels.[12]

A further problem with the TILMA dispute regime is that unlike the AIT, it includes no screening mechanism to weed out frivolous, harassing or unmeritorious complaints[13]. Under TILMA, the right to invoke formal dispute resolution depends only upon compliance with the procedural requirements of Articles 25 and 26. The only constraint on the right of private parties to invoke formal dispute resolution under the regime arises when the 'home' Party does so on behalf of that private party. [14]

TILMA Includes No Mechanism to Prevent Multiple Claims

In seeking to counter criticism levelled at TILMA,[15] the Minister of Economic Development for the Province of British Columbia has made a number of assertions, including that "As for dispute resolution, no more than one dispute may be lodged on what is essentially the same complaint."[16] The Minister is wrong. In fact, any number of proceedings may be initiated to challenge a particular measure, as long these proceed sequentially rather than at the same time.[17]

Moreover, while only one panel proceeding may take place at a time, there is no limit on the number of contemporaneous complaints which may be made under Article 25. There is nothing to preclude a person from making multiple complaints, or to limit the number of persons who may invoke dispute resolution concerning the same measure.

Once the procedural steps delineated by Article 25 are completed, dispute panel proceedings may be initiated under Article 26. Only at this stage in the process are disputes compelled to proceed

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[12] Howard Mann, *Private Rights, Public Problems, A Guide to NAFTA's Controversial Chapter on Investor Rights*, the International Institute for Sustainable Development, 2001.

[13] AIT Article 1713.

[14] Article 25:3,4,5 and 10.. Under Article 25.3, once a complaint is made to a person's 'home' province about the measures of the other Party, the 'home' government must determine whether to request consultations on the person's behalf within 21 days, and make that request within 7 days thereafter. A failure to meet these deadlines entitles the person making a complaint to request consultations with the other Province, and those consultations shall be completed within 30 days of that request.

[15] See Ellen Gould's comprehensive analysis of TILMA, *Asking for Trouble, The Trade, Investment and Labour Mobility*, CCPA, February, 2007.

[16] See Colin Hansen, Special to the Sun, *Fact, not fiction, needed on TILMA*, December 15, 2006.

[17] Article 34.2

in single file, with each claimant having to wait until the panel proceedings before it are resolved.[18] Thus Article 34:2 provides:

> *A person may not initiate any proceedings under this Part regarding <u>any measure</u> that is already the subject of proceedings under this Part until such time as those ongoing proceedings have been completed.* [emphasis added]

In other words, 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.

One commentator has suggested that because of the two year limitation imposed by TILMA, it is unlikely that more two successful damage claims could be brought with respect to the same measure.[19] Putting aside the significance of damage awards that might, in this scenario total $10 million, we believe this view is incorrect. Surely the rights of an investor with a newly acquired investment will only be deemed to vest as of the date of that acquisition.

TILMA Dispute Procedures Do Not Recognize Third Party Rights

Because of the far reaching public policy implications of potential TILMA disputes, various third parties may have a direct or public interest in the dispute. For example, where the measure at issue was taken by a municipality or local school board, that institution may want to participate in panel proceedings, particularly if it doubts the vigour with which the province will defend its actions. Similarly, trade unions or public interest groups may want to participate in disputes that effect them directly, or engage issues of broad public interest. However, under UNCITRAL arbitration rules, panels have no right to allow for the participation of non-parties, even those whose actions are being directly impugned.[20]

The Minister has sought to make a virtue of this limitation by 'reassuring' municipalities that they are not directly liable to pay a TILMA monetary awards assessed, for example, to compensate a developer for lost profits because of a zoning bylaw. Government entities dependent on provincial funding may not be so sanguine about the consequences of taking or maintaining measures that impose significant resource demands and financial liability on the province.

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[18] Article 34:2.

[19] Donald Lidstone: April 30, 2007 A report prepared for the Union of British Columbia Municipalities, at p. 7. Available at http://ubcm.fileprosite.com/contentengine/launch.asp?ID=3155&Action=bypass

[20] <u>United Parcel Service of America Inc. and the Government of Canada</u>, *Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae*, 17 October 2001 – The Tribunal which was convened under UNCITRAL arbitration rules held that no authority can be found either in those rules, or the text of NAFTA, that would allow the Tribunal to allow the participation of a third Party to the proceedings, regardless of the nature of that parties interests, or the consequences that it might bear following from the Tribunal's decision. Para's 36-43

While TILMA rules do modify the norms of secrecy that are a key feature of the UNCITRAL regime, the need for transparency and the rights of non-parties, which are alien to the regime, are unaddressed.[21]

The Effect and Consequences of TILMA Dispute Panel Awards

The Minister has also made much of the fact that no tribunal may actually require a government to rescind a law or regulation, or to abandon a practice or program.[22] In fact, that is precisely what TILMA rules require. Thus Article 27.12 provides:

> *The final report of the panel is binding on the disputants….*

Article 28: Implementation of Final Report, further provides:

> *(1). Disputants shall, within 30 days of delivery of the final panel report, agree on the resolution of the dispute. Absent any other agreement between the disputants, resolution of the dispute will require compliance with the determinations and recommendations of the Panel.*

While it is true that the panels cannot actually compel provincial legislatures to rescind or abandon their policies, laws, or practices, the distinction the Minister makes is really one of form, not substance. It is simply unrealistic to expect that a government will maintain an offending measure for which it has had to pay damages under Part IV when there is queue of other parties waiting in line to make precisely the same claim.

British Columbia has also made the curious claim that while TILMA provisions authorize panels to make "financial awards" they do not allow for damage claims.[23] We see no plausible distinction between the two, particularly in light of the fact that the quantum of monetary award made by a panel is to reflect:

> *the nature and extent to which the measure has caused economic injury to the complainant and the extent to which that injury would continue should the responding Party continue to be non-compliant;* [24] [emphasis added]

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[21] Howard Mann, see note 11.

[22] Colin Hanson, see note 15.

[23] Ministry of Economic Development: *Fact, not fiction on TILMA*, Jan. 10. 2007.

[24] TILMA Article 30:1(b)

The fact that monetary awards can also compensate for continuing losses that may accrue if the offending measure remains in force, underscores the point previously made about the coercive force that arbitral awards will exert for Parties to abandon such measures, even though a TILMA tribunal has no authority to order a government to do so.

We also note that under Article 29(7), where a panel determines that a provincial government or other public body has not complied with its ruling, it *shall*, not *may*, issue a monetary award to a private party claimant.

TILMA Provides Only for Limited Judicial Oversight

TILMA provides for judicial supervision of panel proceedings by allowing for review of arbitral awards under the commercial arbitration statutes of the two provinces.[25] However, the courts have consistently shown considerable deference to arbitral awards, and have declined to distinguish between true commercial arbitral awards that are essentially private in character, and those arising under investment treaties which engage broad issues of societal and public interest.[26]

For example, the review by the British Columbia Superior Court of a NAFTA arbitral award arising from investor rights, similar to but more narrowly defined than those encapsulated by TILMA, put it this way:

> *The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110. In addition to the more conventional notion of expropriation involving a taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. <u>This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority.</u> <u>However, the definition of expropriation is a question of law with which this Court is not entitled to interfere</u> under the International [Commercial Arbitration Act]. [emphases added]*[27]

[25] TILMA Article 31.

[26] See for example *Rava Innovations Inc. v. International Parkside Products Inc*., 1999 CanLII 6597 (BC S.C.):
> Further, there is no dispute that considerable curial deference is to be given to arbitration awards, this deference arises primarily from the need to preserve the autonomy of the forum selected by the parties. See: Quinette Coal Ltd. v. Nippon Steel Corp. reflex, (1990), 50 B.C.L.R. (2d) 207 (C.A.) and Manufacturers Life Insurance Co. v. BC Gas Inc., (21 January 1998), Vancouver Registry No. A971505, (B.C.S.C.).

and also see: *Canada (Attorney General) v. S.D. Myers Inc.* (F.C.), [2004] 3 F.C. 368 : where the judge accepts the proposition that "judicial deference should be accorded to arbitral awards generally and to international commercial arbitrations in particular."

[27] *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, at para. 99.

While this particular judicial review was carried out pursuant to the provisions of the *International Arbitration Act*, not the *Commercial Arbitration Act* as the courts have indicated, there may be little difference between the two on the key question of judicial oversight.[28] We should also note that TILMA Articles 3 and 5 go far beyond NAFTA Article 1110 in protecting the proprietary interests of investors by allowing compensation for any measure that restricts or impairs their investment. Under NAFTA, the measure must actually be discriminatory or expropriate the investment to be actionable.[29]

Both Alberta and British Columbia have now brought forward legislation which provides for enforcement of TILMA awards by their respective courts[30]. It is beyond the scope of this opinion to provide an analysis of these legislative initiatives, or to assess the lawfulness or constitutional validity of the steps taken by these provinces to make TILMA awards legally enforceable by the superior courts. In our view these actions raise significant and valid legal concerns the merit careful review.

ARE PUBLIC AND SOCIAL SERVICES EXEMPT UNDER TILMA?

To this point we have considered the application of TILMA rules without regard to the exceptions provided for by the regime to safeguard certain measures from challenge. For present purposes we consider the scope and application of these safeguards as they relate to social services, such as health care, child care and education. Following this, we also consider the status of such services in light of TILMA provisions concerning Crown Corporations, subsidies and procurement.

Exceptions

Part V of TILMA sets out several general exceptions that are either jointly agreed to, or unilaterally declared. Many of these are broadly framed, including the following *General Exceptions*:

> *a) Aboriginal peoples;*
>
> *b) Water, and services and investments pertaining to water;*
>
> . . .

[28] Idem.

[29] See NAFTA Atticles 1102, 1103 and 1110.

[30] In British Columbia, this is Bill 17 --- 2007, *Enforcement of Canadian Judgments and Decrees (Trade Investment and Labour Mobility Agreement) Amendment Act*. In Alberta, the reform is set out in Bill 38, *Government Organization Amendment Act, 2007*.

e) Regulated rates established for the public good or public interest; or

f) Social policy, including labour standards and codes, minimum wages, employment insurance, social assistance benefits and worker's compensation.

To begin with, it is important to appreciate that the Parties intend this list to shrink over time. Thus, Article 17.1(b) obligates the Parties to annually review listed exceptions "with a view to reducing their scope". In addition, while some general exceptions are broadly framed, such as measures relating to "water, and services and investments pertaining to water;" others are likely to be interpreted narrowly.

The exception for *Social policy, including labour standards and codes, minimum wages, employment insurance, social assistance benefits and worker's compensation* falls into this latter category. Notwithstanding its characterization as an exception for social policy, no reference is made to health or education services that, by a wide margin, are Canada's most important social programs. True, illustrative lists such as this one are not intended to be exhaustive. Nevertheless, there are several reasons to conclude that the Parties did not intend this exception to apply to health and or social services other than welfare.

First, a similarly worded AIT exception for social policy applies only to labour mobility.[31] As noted, any inconsistency between the provisions of Parts II, V and VI of TILMA and those of the AIT are to be resolved in favour of the one that is more conducive to liberalized trade, investment and labour mobility. Consequently, the more limited scope of the AIT exception may prevail. This arguably means confining the scope of the TILMA social policy exception to matters of labour mobility. However, at the very least, the reconciliation of AIT and TILMA provisions in favour of the most liberalizing approach militates against expanding the scope of the TILMA reservation by reading in an exemption for social services that is not mentioned.

Second, where the TILMA Parties intend to explicitly exempt health and social services, they say so. Thus in Part V, health and social services are explicitly excepted from certain TILMA procurement rules.[32] Similarly, health, education and social service entities are specifically reserved in Part VI: *Transitional Measures*. Neither exception or reservation would be needed if the social policy exemption was intended to apply to such services.

Last but not least, strong support for this view is also found in the explicit reference to health and social services as examples of legitimate objectives within the meaning of Article 6. Therefore, a measure that seeks to achieve a health or social services objective may be permitted where the Party can prove that it also satisfies the other tests delineated by that Article, namely that it is

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[31] AIT, Article 702.

[32] Part V: Government Procurement 2(d).

necessary to achieve that objective, and is not a disguised restriction on trade, investment and labour mobility. In other words, rather than create a broad and unqualified exception for health care and other social services under Part V, the Parties have clearly opted for exempting such measures only where the tests of Article 6 can be satisfied. We consider the problem of meeting the *legitimate objectives* test below.

Transitional Measures

TILMA was signed on April 28, 2006, but pursuant to Article 23, will not enter into force until April, 2007. However, until that time, Article 23.2 provides:

> *Neither Party shall, during the period beginning on the date of execution and ending on the date of entry into force of this Agreement, adopt a measure that would be inconsistent with this Agreement or amend or renew a measure in a manner that would decrease its consistency with this Agreement.*

In other words, Article 23.2 imposes a standstill on policy and law reform which went into effect when the agreement was signed.

While April, 2007 is the date on which TILMA provisions formally go into effect, many measures are reserved from the application of TILMA disciplines for a further two year period under Article 9. Under this Article, measures listed in Part VI are exempt from the substantive disciplines (Part II) and dispute procedures (Part IV) for a period that ends in April, 2009 .

These provisions provide the Parties with more time to delineate the precise boundaries of TILMA's application. Article 9.2 provides:

> *During the transitional period, the Parties shall undertake further consultations and negotiate any required special provisions, exclusions and transitional provisions to determine the extent of coverage of Part II to measures listed in Part VI.*

However, unless the Parties agree otherwise, and with the exception of certain labour mobility measures, the reservation for measures listed in Part VI will expire in April, 2009. While additional measures may be added to those exempted under Article 8, this is possible only by mutual consent of the Parties.

During the transition period the Parties may agree to extend the exemption for certain measures, but the Parties indicate no intention to do so. Instead the transitional period is intended to provide the time needed to:

- *consult with stakeholders and interest groups*
- *make necessary changes to comply with the agreement; and*

- *consult with regulatory bodies to:*

    - *remove unnecessary impediments*
    - *reconcile regulations, where appropriate*
    - *ensure legitimate objectives can still be achieved.*[33]

In effect, TILMA accords both Parties a veto to determine which transitional measures will ultimately be subject to the full array of TILMA disciplines. This may not be problematic when governments share the same political philosophy concerning the proper role for government, as is the case at the moment for British Columbia and Alberta. However, a change of government, or the accession of other governments, may change this equation and leave one or more Parties at the mercy of the jurisdiction that would most vigorously curtail government's role.

With these important limitations in mind, Part VI does include a carve-out for:

> *Measures of or relating to Crown corporations, government-owned commercial enterprises, municipalities, municipal organizations, school boards, and publicly-funded academic, health and social service entities.* [emphasis added]

This reservation provides a temporary haven for existing measures relating to health and social entities, such as health care insurance plans and public hospitals. However, the reservation is limited in both scope and duration, and does not provide the relative security of a Part V exception (as noted, the only general exception for social services is limited to procurement of health and social services).

Transitional measures are just that, and contemplate the ultimate application of TILMA disciplines to all reserved measures. Moreover, under Article 9:4:

> *During the transitional period, Parties shall:*
>
> *a) ensure that no measure listed in Part VI is amended or renewed in a manner that would decrease its consistency with this Agreement; and*
>
> *b) seek to minimize any adverse effects on the other Party or its persons of measures listed in Part VI.*

In the jargon of international trade law, this creates a 'standstill' regime that seriously limits the ability of government to respond to new challenges, or to strengthen the framework of existing policy and law, during the transition period.

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[33] Alberta International, Integovernmental and Aboriginal Relations Presentation to the Council of Canadians, February 7, 2007.

Finally in this regard, many health and social services measures do not relate to "entities", but rather persons, such as the ban on extra billing for insured health care services, or limits on the right of physicians to own private clinics. Such measures are therefore exposed to TILMA constraints and prohibitions as of April 1, 2007.

Legitimate Objectives

Unless a measure is explicitly excepted, it may be challenged under TILMA dispute procedures. Where the measure is found to offend TILMA rules, it may nevertheless be defended if the Party can prove that it meets the requirements of Article 6: *Legitimate Objectives*, which provides:

> *A Party may adopt or maintain a measure that is inconsistent with Articles 3, 4 or 5, or Part II(C) provided that the Party can demonstrate that:*
>
> *a) the purpose of the measure is to achieve a legitimate objective;*
>
> *b) the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and*
>
> *c) the measure is not a disguised restriction to trade, investment or labour mobility.* [emphasis added]

Legitimate objectives are defined by TILMA to include such matters as the *protection of the environment; consumer protection; and the provision of social services and health services.* [34] To those unfamiliar with international trade rulings, these safeguards may appear to be broadly applicable, but analogous reservations established by other trade and investment agreements

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[34] ***legitimate objective*** *means any of the following objectives pursued within a Party:*

a) public security and safety;
b) public order;
c) protection of human, animal or plant life or health;
d) protection of the environment;
e) conservation and prevention of waste of non-renewable or exhaustible resources;
f) consumer protection;
g) protection of the health, safety and well-being of workers;
h) provision of social services and health services within the territory of a Party;
i) affirmative action programs for disadvantaged groups; or
j) prevention or relief of critical shortages of goods essential to a Party

considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification;

"Legitimate objective" does not include protection or favouring of the production of an enterprise of a Party; . . .

have been read very narrowly.[35] Moreover, under TILMA the onus is on the 'offending' government to prove that its measure meets the threefold test set out by Article 6(1).

The nature of this onus was considered by an AIT dispute panel convened to determine a challenge to a ban imposed by the federal government on the use of MMT, a neurotoxic fuel additive.[36] As that tribunal put it, to satisfy similar AIT requirements concerning the 'necessity' of the measure at issue:

> *The onus is on the Respondent to demonstrate, on balance of probabilities, that it has met these requirements, and to demonstrate that no other available option would have met the legitimate objective.*[37][emphasis added]

In other words, to successfully defend a measure under Article 6, 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.

Consider the problem this requirement would create for a government seeking to defend its health care insurance plan from a TILMA challenge analogous to the one mounted by Drs. Chaoulli and Day[38] to Quebec's restriction on private payment or insurance for necessary health care services.

The *Chaoulli* Case Under TILMA

As many will know, in the *Chaoulli* case, the Supreme Court of Canada (by a bare majority) held that Quebec's ban on private insurance for necessary health care services was inconsistent with the *Quebec Charter of Human Rights and Freedoms*. The case dealt a blow to medicare, and set the stage for reforms to Quebec law that erode the principles of the *Canada Health Act* and open the door to two-tiered care.

By comparison with mounting a constitutional challenge, TILMA provides a much more promising venue for asserting claims similar to the one mounted by Dr. Chaoulli. To begin with, Dr. Chaoulli faced the challenge of having to establish that Quebec's ban deprived his patients of their right to life, liberty and security of the person, and did so in manner that offended principles

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[35] Franck, Susan. *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*?, U.C. Davis Journal of International Law and Policy, Vol. 12, No. 47, 2005, pps. 55 and 58.

[36] The case is also notorious because of a related NAFTA investor challenge by Ethyl Corporation, the manufacturer of MMT, to which the federal government capitulated after losing the AIT challenge.

[37] Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the *Manganese-Based Fuel Additives Act* June 12, 1998, at pp. 11

[38] Dr. Day is now the president of the Canadian Medical Association, at the time he intervened to support Dr. Chaoulli, he did so on behalf of the private hospital he operates in British Columbia.

of fundamental justice. Under TILMA, he need only have shown that such a ban restricted or impaired investor rights, which a ban on private insurance clearly does. The onus would then shift to the responding government to show that its measure was permitted under Article 6: *Legitimate Objectives*.

If the objective is to ensure universal access to health service, and assuming the arguable point that universal service would be considered a legitimate objective, as defined by TILMA,[39] it would still be necessary for the responding government to show that: it had considered all of the available options for achieving this objective; assessed their respective impacts on trade, investment, and labour mobility; and then chose the option that was least restrictive of these TILMA priorities. It is no defence against a TILMA claim to show that the impugned measure is effective, fair, non-discriminatory and established in good faith.

The responding government will certainly be confronted with examples of other jurisdictions that have taken a different approach. There is, of course, more than one way to achieve the goal of universal access to health care, and the approach adopted by a particular jurisdiction will reflect the unique social, economic and political circumstances of that place. A particular feature, such as the role of private insurers, cannot be viewed in isolation from the complex matrix of law, funding arrangements and programs that frame the health care systems of a particular jurisdiction. But this is precisely what a responding government must do in the context of a TILMA challenge.[40]

The resource demands of having to meet such a evidentiary burden are formidable, and it is easy to see how TILMA claims, which are easy to bring, and often just as easy to prove, could soon overwhelm the capacity of government to defend its policies and laws before TILMA dispute panels.

It is also important to appreciate how ill-equipped these panels may be to judge the complex issues of public policy, law, and administration that would be engendered by a such a challenge. As noted, tribunal members are chosen by the Parties and are likely to share their enthusiasm for the liberalization agenda TILMA was established to further. This bias is in fact apparent from the record of dispute bodies analogous to those empowered by TILMA, including panels operating under the AIT and NAFTA.[41]

Moreover, unlike the judges who determined Dr. Chaoulli's claim, TILMA adjudicators need have no judicial experience, and certainly lack judicial independence. Even if they were qualified

[39] "Legitimate Objective" is defined to include the "provision of social services and health services.." However there are several ways in which such services may be provided, the medicare model of providing universal access to publicly funded services is only one. It is arguable therefore that a province would fact the challenge of having to establish that medicare was in fact a legitimate objective.

[41] See for example, draft paper by Ellen Gould, *Asking for Trouble - The Trade, Investment, and Labour Mobility Agreement*, which cites all six cases to proceed under the AIT dispute process, wherein governments were found by the tribunal to have failed to meet the necessity test, at p. 16.

to do so, they have no authority under international arbitration rules to consider the questions before them in light of Canadian constitutional norms, including those of the *Charter of Rights and Freedoms*.

Of course, as the *Chaoulli* case points out, Canadian judicial proceedings and constitutional values can be used to assert private interests at the expense of the greater public good.[42] Nevertheless, by providing a more expeditious and sympathetic forum for asserting challenges analogous to the one mounted by Dr. Chaoulli, TILMA will significantly increase pressure on governments to abandon, or turn a blind eye to violations of, existing health care insurance laws upon which publicly funded health care depends.

While it would be unreasonable to simply dismiss the potential of Article 6 to create a safe haven for certain government measures, it would be easy to overestimate the ameliorative effect this exception will have on the broadly framed and far-reaching constraints of the TILMA regime.

Crown Corporations

As noted, Crown Corporations and other government owned enterprises and entities are specifically included under TILMA, and unless exempt are subject to the constraints imposed by the regime.[43] However, measures of, or relating to, these government entities are listed as transitional measures under Part VI. Therefore, the extent to which such measures will ultimately be subject to TILMA disciplines has yet to be determined.

Because the very existence of publicly owned entities might be regarded as infringing investor rights, Article 11(4), explicitly preserves the right of government to establish and maintain such entities by stipulating that:

> *Nothing in this Agreement shall be construed to prevent a Party from maintaining, designating, or regulating a monopoly for the provision of goods or services within its own territory.*

Nevertheless, while institutions such as provincial health insurance plans, energy corporations, and municipal utilities are permitted under TILMA, their activities, business practices and conduct will be exposed to TILMA rules and dispute procedures unless, during the transition period, the Parties agree otherwise. Moreover, as the *UPS v. Canada* case (which is described below) illustrates, government measures relating to the operations and conduct of the monopoly, while permitted, must still comply with TILMA disciplines.

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[42] The judgement of the narrow majority of Supreme Court judges in Chaoulli has been widely and soundly criticized as inconsistent with the Court's approach to similar questions.

[43] Part VII: *General Definitions*, "Government entity".

As the UPS case also illustrates, the day to day business practices of a publicly owned entity often mirror those of any other business entity. However, under TILMA, what is a routine competitive business practice for an investor-owned company may be assailed as an infringement of investor rights when carried out by a publicly owned entity.

The potential impacts of TILMA disciplines on publicly owned entities is considered further under the heading *privatization* below. That assessment indicates that while TILMA reserves the right of the Parties to establish public corporations, the application of TILMA rules is likely to make maintaining these institutions very difficult over the longer term.

Subsidies

TILMA imposes a broad constraint on the use of business subsidies. Article 12: *Business Subsidies* directs that:

> *1. Parties shall not directly or indirectly provide business subsidies that:*
>
> *a) provide an advantage to an enterprise that results in material injury to a competing enterprise of the other Party;*
>
> *b) entice or assist the relocation of an enterprise from the other Party; or*
>
> *c) otherwise distort investment decisions*
>
> *unless such subsidy is to offset a subsidy being offered by a non-Party or a government entity not subject to this Article.*

Certain subsidies are excepted under Part V, including "assistance" for academic research and to non-profit organizations. Business subsidies are also defined to exclude certain forms of infrastructure support and subsidies that are non-actionable under Article 8 of the World Trade Organization *Agreement on Subsidies and Countervailing Measures.*[44]

The impact of these constraints on government policy and law related to economic development is beyond the scope of this opinion to assess. Because the definition of "business subsidy" is limited to measures that confer a benefit on a specific non-government entity, and because assistance to non-profit organizations is excepted, TILMA subsidy rules may have little direct impact on public funding for social services or infrastructure.

This leaves the question of whether grants, loans, debt guarantees and other forms of assistance for public services, might nevertheless be considered government measures. Given the explicit treatment of such government actions in relation to business, and the fact that "measure" does

[44] The effectiveness of this reference to Article 8 of the SCM is problematic because the provision was time-limited and expired at the end of 1999.

not refer to any form of financial or related assistance, funding for public sector services may be exempt under TILMA. On the other hand, such government assistance could easily be considered to fall within the scope of a government *program* which is included in the definition of "measure".

Given the private right of action established by TILMA, it would be imprudent to leave this question to the vagaries of dispute resolution under the regime. Accordingly, if in fact the Parties intend to except government funding, tax and other measures concerning public and social services, TILMA should be amended to say so. On the other hand, if this is not their intention, it would be reasonable to expect a flood of claims by private health care service providers and others seeking access to the public funding now predominantly allocated to public and not-for-profit entities, such as public hospitals.

Government Procurement

The extent to which TILMA rules curtail government procurement measures is also important for evaluating the impact of the regime on health and social services. As governments adopt competitive bidding systems for various health care services, procurement rules will play a much more important role in determining how, on what terms, and to which entities contracts will be awarded.

In this regard, Article 14: *Procurement* provides:

> *1. Further to Articles 3 and 4, Parties will provide open and non-discriminatory access to procurements of their government entities where the procurement value is:*
>
> > *a) $10,000 or greater for goods;*
> >
> > *b) $75,000 or greater for services; or*
> >
> > *c) $100,000 or greater for construction.*
>
> . . .
>
> *3. Parties shall ensure that procuring government entities post tender notices for all covered procurement through an electronic tendering system or systems provided by the Party. Additional means of providing notices may be used.*

However, Article 14.4 further provides that until such time as an effective bid protest mechanism is established, TILMA dispute panels may not make monetary awards concerning procurement measures.

Most importantly for present purposes, Part V includes the following exception:

> *Articles 3, 4 and 14 do not apply in the circumstances listed below in paragraph 2 provided that procurement procedures are not used by the procuring Party to avoid competition, discriminate between suppliers, or protect its suppliers.*
>
> *2. Procurements:*
>
> . . .
>
> *d) of health services and social services;*

The qualification that such measures not be used to avoid competition, discriminate between suppliers, or protect its suppliers, provides significant scope for litigation, particularly where procurement practices do discriminate among suppliers for environmental or social reasons, or to favour local or not-for-profit providers. As noted, the Parties are committed to reducing the scope of Part V exceptions, so these exceptions may not endure.

The question of procurement warrants more thorough treatment than it is accorded here. In terms of the impact of TILMA procurement rules on health and social services, for the time being, the fact that monetary damages may not be claimed where governments decline to correct non-compliant procurement practices will ameliorate the risks associated with procurement measures.

TILMA AS AN INSTRUMENT FOR DE-REGULATION

TILMA may be regarded, first and foremost, as an instrument for promoting de-regulation. After all, the essential premise and unquestioned assumption of TILMA is that government action *is* the problem. As we have seen, Articles 3 and 5 prohibit government and public policy, law and action in the broadest sense. Little more is required to demonstrate the overarching preoccupation of the regime with de-regulation. However, if this might still be in doubt, the following aspects of the regime underscore its de-regulatory effects.

First, TILMA establishes no minimum threshold for government regulation, and allows no right to challenge a government for failing, for example, to provide child care services, or protect public health. On the other hand, a government that takes such steps is vulnerable to challenge and monetary sanctions for doing so. For a government seeking to avoid such political and financial liability, the safe course is to weaken or abandon regulatory controls.

Second, unless exempt, the onus to prove that a government measure is necessary to achieve a legitimate public purpose rests with government, rather than with the person or company challenging the measure to show that it is not. Given the onerous requirements of such proof, allocating the onus in this matter tilts the playing field decidedly in favour of the challenging party.

Third, the AIT contains a screening process to weed out frivolous and vexatious claims.[45] TILMA fails to incorporate these provisions, making such claims more likely. Exposing governments to countless resource-intensive claims will create considerable pressure for them to resile from existing and avoid new regulatory initiatives.

Fourth, AIT provisions that explicitly directed the parties to adopt higher, not lower, standards were also not incorporated into TILMA, notwithstanding the requirement that the Parties reconcile their standards and regulations.[46] It is true that Article 5:4 stipulates that:

> *Parties shall continue to work toward the enhancement of sustainable development, consumer and environmental protection, and health, safety and labour standards and the effectiveness of measures relating thereto*

However, this direction is largely hortatory and does not, as AIT provisions do, explicitly warn the Parties away from a race to the bottom of the regulatory ladder. Thus AIT Article 1508.2 states:

> *In harmonizing environmental measures, the Parties shall maintain and endeavour to strengthen existing levels of environmental protection.* ***The Parties shall not****, through such harmonization, lower the levels of environmental protection.*.[emphasis added]

Fifth, under Article 5.1, *Parties are required to "<u>mutually recognize</u> or otherwise reconcile their existing standards and regulations.*.". Article 5.5 goes even further by requiring the parties to minimize differences in standards and regulations including those that have no relationship, imputed or otherwise, to trade, investment and labour mobility. While nothing explicitly requires downward harmonization, this is clearly the default option unless both Parties agree to the higher standard. This is because it would be untenable for a government to maintain higher regulatory standards for its own residents than it is permitted to expect of those from a TILMA neighbour with lower standards. Unless it can persuade that neighbour to raise its standards, with all of the notoriety and exposure to complaints that is likely to entail, the only realistic option is to lower its own standards to a new common denominator.

Sixth, as noted, while Part V exceptions allow governments to maintain certain measures that may restrict or impair investment, trade and labour mobility rights, Article 17.1(b) mandates the Parties to review these exceptions annually "with a view to reducing their scope."

Finally, the unpredictable nature of TILMA dispute procedures reinforce these chilling affects. For under UNCITRAL rules, a TILMA panel need not follow the ruling of another panel on the same issue. This means that unless the Parties issue joint decisions under Article 34.4 to endorse or refute every decision of a dispute panel, future and identical cases may decided differently.

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[45] AIT Article 1713

[46] Article 5.1

This poses a serious dilemma for governments wishing to chart a safe course through the TILMA minefield. In fact, the only truly safe course is for governments and public bodies to simply resile from all actions that might provoke a TILMA claim.

TILMA AS AN INSTRUMENT FOR PRIVATIZATION

Public services depend upon a framework of policies, laws, institutions and funding arrangements that restrict the rights of private investors and service providers to ensure public interest goals such as universal access, or not-for-profit delivery. But as we have seen TILMA seeks to minimize the capacity of governments to regulate or otherwise intervene in the market. For example, the first principle of international trade law, *National Treatment* (incorporated in principle by Article 4 of TILMA), obligates governments to accord "no less favourable" treatment to foreign investors and services than is provided to their domestic counterparts.

By failing to distinguish between private and public sector service suppliers, the trade regimes provide little latitude for policies, programs and regulations that may explicitly or effectively favour the latter, and are essential for maintaining the public service. In fact, as noted, the very existence of public sector service monopolies may be regarded as a barrier to service providers from another jurisdiction.

Canada has acknowledged this fundamental contradiction between the free market policies of trade liberalization and those necessary to preserve the capacity of governments to provide or fund public services, by declaring various exceptions for such measures under international trade agreements.[47]

Even so, such reservations are often qualified and likely to be given narrow application if the record of relevant trade disputes is any guide. Thus, notwithstanding NAFTA's general exception for social services, it is widely acknowledged that NAFTA rules still pose a substantial impediment to the development of such services. The right of private enforcement is singled out as being particularly problematic in this regard.

An opinion prepared by one of Canada's leading trade lawyers, at the request of the Romanow Commission, put it is this way:

> *The single provision in all the trade liberalizing agreements that has the most negative potential impact on Canada's public health care is NAFTA Article 1110 (Expropriation*

[47] The right to expand or establish new social programs is one that Canada did reserve under NAFTA. In this regard, Canada's reservation for "social services" provides that:

> *Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and* ***child care***. [emphasis added][47]

> *and Compensation). If this provision and the accompanying investor/state dispute settlement procedures had existed in the 1960s, the public health care system in its present form would never have come into existence.*[48]

Remarkably, TILMA resiles even from the standard of protection afforded health care services under NAFTA and the GATs. As noted, with the exception of procurement, it declares no general exception for health and social services. It is true that measures of, or relating to, health and social service entities are reserved as transitional measures, but in addition to being limited in scope, and locking in the status quo, TILMA rules will apply fully to such measures a little over two years from now unless the Parties agree otherwise.

It may be argued in response to this concern that no provision of TILMA directly challenges the right of governments to choose or maintain public services. While this is true, TILMA does provide the tools for assailing the underlying policies, programs, and regulatory and funding arrangements upon which health and social services depend. In a sense, the pro-privatization bias of TILMA is woven into the fabric of this regime rather than encapsulated by one provision.

One way to illustrate this point is to note the cases that have invoked TILMA-like rules to either promote and consolidate privatization.[49] A NAFTA challenge concerning Canadian postal services is an example.

UPS v. Canada

This case involves a NAFTA claim for more than $250 million by United Parcel Services Inc. (UPS) concerning Canadian postal policies, customs regulations, the business practices of Canada Post, and a Canadian cultural program to support to Canadian publishers.[50] As is true under TILMA at the provincial level, NAFTA investment rules not only bind the federal government but also federal crown corporations.

UPS argues that both Canada and Canada Post are in breach of their respective NAFTA obligations by failing to accord UPS access to Canada Post's letter-mail infrastructure, which Canada Post uses to support its own package and courier businesses but which it does not make available to private courier companies. As a publicly owned entity, Canada Post has a limited monopoly with respect to the delivery of letter mail, and an obligation to make its services

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[48] How Will International Trade Agreements Affect Canadian Health Care? Discussion Paper No. 22 (Saskatoon: Commission on the Future of Health Care in Canada, 2002) at 14

[49] Vivendi and other transnational corporations are increasingly invoking the dispute provisions of bi-lateral investment treaties to claim damages from governments where privatization schemes sour. These cases are reviewed in an excellent bulletin published by the International Institute for Sustainable Development. See Investment Treaty News, http://www.iisd.org/investment/itn/

[50] United Parcel Service of America, Inc. ("UPS") v. Government of Canada, http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp

universally available. Nevertheless, UPS argues that it is being treated in a discriminatory fashion prohibited under NAFTA, and claims access to Canada Post facilities and services to collect, process and deliver UPS products.

After several years of preliminary motions and disputes over access to confidential documents, the case was argued in December 2005 and a decision is currently pending. The UPS investor-State claim represents the first attempt to use NAFTA investment rules to curtail competition by a public sector service provider. The case has broad implications for other public services, for it is not difficult to see how the UPS argument might be used to gain access to other public infrastructure, such as the right to operate a private MRI machine in a public hospital, or a day-care business in a public school.

The extent to which TILMA rules will bind provincial Crown Corporations is still being negotiated. However, as noted, the default option would subject such public entities to the full force of TILMA disciplines, which are far more expansive than those set out in NAFTA.

The Use of TILMA Dispute Procedures to Challenge Health Care Measures

As noted, TILMA rules are far more expansive than those enlisted by UPS and other corporations to claim damages under NAFTA or other investment treaties. We have already noted how the *Chaoulli* case might play out in the TILMA context, but there are many other measures that the promoters of health care privatization might target.

The essential framework of medicare is set out by the *Canada Health Act*, but the delivery of health care services is a provincial responsibility, and each province has established its own polices, laws and programs for meeting the requirements of the *Canada Health Act*. Virtually every element of these provincial health care frameworks curtail investment, and many affect inter-provincial trade in services and labour mobility. Examples of such measures would include those that:

- proscribe the sale of certain services (eg. private payment or insurance for necessary health services);
- regulate the billing practices of health care providers (single payer tariffs for publicly funded services);
- limit the manner in which certain services may be delivered (surgical services that may only be provided in public hospitals);
- regulate the licensing of private clinics and hospitals, and impose certain ownership restrictions related thereto;
- provide funding to certain service providers (public hospitals) but not others (private clinics); or

- require provincial certification for radiologists, nurses, doctors and other health care professionals.

It is readily apparent that each of these government measures effect private interests, from those of insurance companies and the owners of private clinics, to individual service providers. Because TILMA establishes no general exemption for health care services, each is vulnerable to challenge under the Agreement's dispute regime (see case study attached).

MUNICIPALITIES UNDER TILMA

TILMA applies to all government entities, which are defined to include regional, local, district or other forms of municipal government. The same is true for various public entities that operate at the local level, including school boards, public health departments and municipal utilities. There is no general exception for municipal government measures, however several exceptions and transitional measures apply to all government entities, including municipalities. Several of these, such as rules concerning procurement, social policy and water, have already been noted.

In addition to these exceptions, a general carve-out is established as a transitional safeguard for:

> *Measures of or relating to Crown corporations, government-owned commercial enterprises, municipalities, municipal organizations, school boards, and publicly-funded academic, health and social service entities.*

Under Article 9, these measures are exempt from TILMA's most onerous obligations for a two year period ending on April 1, 2009.[51] However as previously noted, this reservation is qualified and imposes a standstill that precludes municipalities from establishing new measures during this transition period that would not be in conformity with TILMA disciplines. It is impossible at this juncture to know whether the Parties will agree to ongoing reservations for municipal or local government measures. If not, TILMA will impose sweeping constraints on the permissible exercise of local government authority, as it does on the actions of provincial governments and other government entities.

At first instance it is important to note that TILMA goes much further than the AIT in ensuring adherence by local governments to trade liberalization policies. Under the AIT, the obligations of municipalities are confined to particular areas of policy and law, notably measures relating to procurement and transportation.[52] Even so, several provinces have declared reservations to safeguard regulations such as those pertaining to taxi licenses and programs related to public

[51] Article 9:1 provides: *With the exception of this Article and Articles 13(4), (5) and (6), measures listed in Part VI are not subject to Parts II and IV during the transitional period, except as otherwise provided in Part VI.*

[52] See AIT Articles 502.4 (Labour Mobility), Article 703 (Procurement), and Article 1404 (Transportation).

transportation.[53] By comparison, all TILMA disciplines apply to municipal governments unless such measures are explicitly excepted. Therefore, unless significant carve-outs are established, a broad array of local government measures, from land-use controls to municipal services, would have to comply with TILMA rules.

In an effort to calm concerns about the impact of TILMA on local governments, the Province of British Columbia has published a backgrounder purporting to correct some "misconceptions circulating" about TILMA. As noted, this document contains several errors and misstatements, some of which are repeated in a letter from two BC Ministers to the Union of British Columbia Municipalities and the Alberta Urban Municipalities Association.[54] We have pointed out some of these errors, but should address two other misstatements that are specifically addressed to municipal governments.

The first is the Minister's claim that TILMA is not "intended to constrain local governments' ability to establish or maintain bona fide, non-discriminatory measures such as zoning bylaws, height restrictions ….." [55]

The claim here is that Articles 3 and 5(3) are intended only to apply to discriminatory measures that specifically target the "flow of investment" – but not only is this contention entirely unsupported by the plain and ordinary meaning of these provisions, it is without any support in the substantial body of jurisprudence that has interpreted the rights of foreign investors under agreements closely analogous to TILMA.[56] In any event, a municipality that established such a measure would not only be acting outside its mandate, but trenching on federal constitutional authority as well, so there is no need for TILMA to prohibit such measures.

Where TILMA does intend to constrain measures that discriminate against persons, services and investors and investments of the other party, it clearly says so – see Article 4. Articles 3 and 5(3), on the other hand, impose constraints on the exercise of government and municipal authority regardless of whether the impugned measure is discriminatory.

The second is the claim is that: "Municipalities are not required to defend their own measures or pay monetary awards. Only the provincial governments can be subject to the dispute settlement

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[53] See AIT, App. 1410.1.

[54] Letter from Colin Hanson, Minister of Economic Development and Guy Boutelier, Minister of Intergovernmental Relations, January 31, 2007.

[55] British Columbia, *Fact not fiction, on TILMA*, Ministry of Economic Development Jan. 10, 2007.

[56] See for example the Metalclad, Ethyl, Methanex cases brought under NAFTA investment rules, which may be accessed at the Department of International Trade web site: http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp. Also see a large and growing number of investor claims that arise for municipal and provincial regulation of water and sewer concessions which can be accessed at http://www.worldbank.org/icsid/cases/cases.htm.

process."[57] While this assertion is true in a narrow sense, what the Ministry neglects to say is that the province is obligated under TILMA to ensure that municipalities comply with the requirements of the regime. As municipal officials will know, the province has considerable leverage *vis-a-vis* local government to deliver on this commitment. Indeed, as pointed out by a staff report to Vancouver City Council,[58] the province can, for this purpose:

- impose TILMA-related conditions in relation to grants;
- use existing or new legislation to supersede or reject a local government measure; and/or
- seek indemnity from a municipality that contravenes a TILMA provision that results in the Province having to pay a monetary penalty.

In fact, when the Union of British Columbia Municipalities asked the province for assurance that it would not seek to be indemnified by "a municipality that takes valid measures under its statutory and common law authority but … the measures are found under the dispute resolution mechanism to trigger a monetary award against the Province", TILMA negotiators responded that "Given the hypothetical nature of the proposed situation . . . it is impossible to answer the question definitively".[59]

Other TILMA provisions also constrain the exercise of municipal government authority. For instance, Article 4 of TILMA provides that each party must accord the other party treatment no less favourable than the best treatment it accords, in like circumstances, to its own citizens or those of any non-party. As acknowledged by the UBCM opinion, this requirement applies to zoning, subdivision, or other regulatory bylaws; tax, fee or charge bylaws; business regulation and licensing; and "assistance" whether under partnering agreements or otherwise.

Under Article 5, municipalities must work to reconcile, for example, differences in standards and regulations, investment, business subsidies, labour mobility and procurement of professional services. We have already described how these and other TILMA provisions will operate to encourage a race to the bottom of the regulatory ladder. A report prepared by the Director of Finance for the City of Burnaby BC, arrives at the same conclusion.[60]

Even if these pressures are resisted, as reported to Council by the City Solicitor for Saskatoon, there is "a fundamental problem in trying to reconcile local choice with the TILMA concept of

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[57] See note 54.

[58] City of Vancouver, Administrative Report, May 14, 2007. Author Karen Levitt, RTS No. 6751

[59] See note 4.

[60] Director of Finance for the City of Burnaby, to the City Manager, January 31, 2007.

standardization and harmonization."[61] As the Solicitor's opinion points that, this has very practical consequences for the City because TILMA rules either prohibit or impede a variety of measures that have made Saskatoon a viable and vital community, such as measures:

- that provide enhancements for attracting certain businesses to the downtown core;
- that provide business subsidies or incentives to encourage housing and business development projects; and
- to establish leading standards, such as residential housing standards, or those to limit smoking.

The opinions prepared by and for municipalities and municipal associations identify a number of other problems with TILMA, including its impractically low threshold for procurement disciplines. Most importantly however, the UBCM report notes that the essential point municipal governments must be cognizant of is this: " It is the scheme of TILMA that a local government may take valid measures under its statutory and common law authority but the measures nonetheless may be found to contravene TILMA and therefore trigger a complaint against the Province."

Finally in this regard, as noted by City of Vancouver report, there are significant administrative costs imposed by TILMA on municipalities, including the costs of:

- preparing for the TILMA over the next two years, including taking part in the transition period negotiations to ensure appropriate municipal exclusions, reviewing new/amended measures to assess compliance with the TILMA,
- complying with TILMA on an ongoing basis, e.g., reviewing all new or amended measures to ensure compliance with TILMA,
- responding to allegations of contraventions, and/or
- increased administrative costs associated with tendering at the significantly-lowered tendering thresholds.

The question for municipalities is this: in light of its dubious rationale, and uncertain but significant costs, is there a plausible claim that TILMA represents an exercise of provincial executive power that municipalities should support or accede to?

[61] Theresa Dust, Q.C. City Solicitor, Response to Inquiry by Councillor C. Clark, February 20, 2007.

CONCLUSION

Given the sweeping scope of TILMA disciplines and the onerous consequences that follow from non-compliance, it is apparent that a detailed and comprehensive analysis of the regime is warranted. However, there is little to indicate that either of the TILMA Parties carried out that assessment before committing to the regime. Certainly neither has chosen to share such an assessment, if in fact one has been carried out. The TILMA initiative has proceeded with little, if any, effort to facilitate informed public debate.

Fortunately, independent assessments of the regime are now being carried out. We note as well a telling critique recently published by the CCPA, exposing the serious methodological failings of a report by the Conference Board of Canada that is held out as making the case for TILMA.

We trust that this opinion will shed more light on the consequence of this inter-provincial agreement. We would certainly welcome a response to our analysis by either or both of the provincial governments that have authored the initiative.

Appendix "A"

The Anatomy of a TILMA Claim by the Owners of a Private Health Care Clinic Franchise

The owners of a private clinic franchise based in British Columbia want to establish operations in Ontario. Ontario has signed on to TILMA, the transitional period has ended, and health care service measures may be defended only where Ontario can prove they are necessary to meet a legitimate objective. The owners plan to provide certain general and diagnostic services and propose to charge an annual block fee of $2700.00 to cover the cost of taking client medical histories and of providing various enhanced or uninsured services. The clinic promises 24 hour service and prompt scheduling of appointments. The clinic also plans to provide on-site MRI and colonoscopy services because significant wait times for both services exist in the public system.

Not long after making their plan public, the company is advised by the provincial government that its block fee billing scheme will not be permitted because it creates a second tier of health care service available only to those who can afford it. Moreover, the province will not provide public funding for the MRI services or allow the clinic to charge privately for them. While the province will fund colonoscopy services, the clinic will not be permitted to charge a facility fee for providing such services. Finally, the clinic is advised that the local public hospital will not refer patients to the clinic because of its plans to co-mingle publicly funded and privately paid-for services.

Under TILMA Article 25:1, the clinic owners write to the BC government asking it to initiate consultations with Ontario for the purpose of persuading it to remove its objections because they violate TILMA rules, including the general prohibition against all measures that restrict or impair investment.

BC is swamped with TlLMA complaints, and in any event knows that Ontario won't back down. When three weeks pass without the clinic owners receiving a response from BC, under Article 25.5, it contacts Ontario directly to request consultations. As required by Article 25.6, the company lists the measures that it alleges violate TILMA rules, as follows:

1. s.17(1)(b) of the *Ontario Commitment to the Future of Medicare Act* (CFMA) which limits the purposes for which block fees may be used;

2. s. 18(2) of the CFMA which prevents the clinic from only serving those who buy memberships;

3. s. 10(3) of the CFMA that prohibits a physician from accepting payment services rendered to an insured person except from the Ontario Hospital Insurance Plan;

4. s. 1 (1) of the *Medicine Act* which defines various acts of professional misconduct for the purposes of clause 51 (1) (c) of the *Health Professions Procedural Code*, including the receiving fees in order to be available to provide services on a 24 hour basis;

5. s. 22 of the *Private Hospitals Act* (PHA) that prevents from PHG from operating a private hospital;

6. s. 6(1) of the *Independent Health Facilities Act* which prohibits private clinics from operating unless approved by the province, or limits the types of services that may be provided in such facilities;

7. s. 27(3) of the *Regulated Health Professions Act* that regulates the location and operation of MRI machines; and

8. any actions taken by a public hospital or the *College of Physicians and Surgeons* that restrict or impair the ability of the private clinic to operate in accordance with its business plan.

The clinic group alleges that any and all of these measures offend Articles 3, 4 and 5 of TILMA. It is unable to persuade Ontario, and after 30 days pass, the clinic proceeds, as it is entitled to do, to arbitration under s. 26. A dispute panel is convened.

No Third Party Interventions are Allowed

Because of the direct potential impact on the College of Physicians and Surgeons, and the public interest implications for medicare, both the College and the Ontario Health Coalition seek standing to participate in the proceeding. The tribunal holds that it has no authority under UNICTRAL arbitration rules to admit third parties to the case, but offers to receive a 20 page *amicus* brief from both the College and the Coalition. However, neither would-be intervener will be allowed access the company's evidence, which it claims is confidential business information.

The Restriction and Impairment of the Clinic's Business Plans

Several of the measures are found to restrict or impair the business plans of the private clinic, contrary to Articles 3 and 5 of TILMA. The province's unwillingness to fund MRI services, or to pay a facility fee for colonoscopy services, are held to be a breach Article 4, because they discriminate in favour of public sector service providers.

The Legitimate Objectives Test

A *prima facie* case of non-compliance having been established, Ontario is called upon to prove that the impugned measures may be maintained under Article 6: *Legitimate Objectives.* In the face of evidence that the clinic is licensed to operate in BC, Ontario fails to establish that its measures are necessary to achieve the health care service which recognized as a legitimate

objective under TILMA. The panel finds that in any event, under Article 5:1 Ontario is obliged to recognize BC standards which allow the clinic to operate according to its business plan.

Panel Finds Restriction and Impairment

Under Article 28, Ontario then has 30 days to agree with the proprietors of the clinic, on how to resolve the dispute. Failing such agreement, the province and other the College must comply with the determinations and recommendations of the panel. In the *Chaoulli* case, no time limit was placed on the Province of Quebec to bring its laws into accord with the Supreme Court's determination that its ban on private insurance, when coupled with long wait times, was unconstitutional. As problematic as the Supreme Court of Canada's decision was, it nevertheless understood the difficulties of re-engineering a key element of the province's health care insurance scheme. No such latitude is allowed under the tight time-lines delineated by TILMA.

Ontario's failure to remove the offending measures within one month of the panel ruling entitles the clinic to have a panel determine whether to make a monetary award because of the province's default. In this regard TILMA offers little guidance, other than to indicate that damages may be forward looking and consider "… the nature and extent to which the measure has caused economic injury to the complainant and the extent to which that injury would continue should the responding Party continue to be non-compliant …" [62]

Damage Assessment Phase

The only limitation imposed on the quantum of damages that may be awarded by a panel provides that: "In no circumstances shall a monetary award exceed $5 million with respect to any one matter under consideration." It is unclear whether "one matter" will be interpreted to mean the dispute and all measures encompassed by it, or be read to allow an investor to recover as much as $5 million in damages for each impugned measure. The owners of the clinic claim $40 million, $5 million or each measure that was found to be in breach of TILMA rules. The panel holds that it is limited to awarding $5 million because all measures relate to the same matter, but awards this full amount.

The Next Case

Because of the company's success, another clinic operator invokes TILMA rules to pursue a similar complaint. Instead of making one request for consultations, it initiates 8 different complaints in the hope of circumventing the limit on monetary awards. Recognizing the inevitability of losing this case, Ontario seeks BC's agreement for an exemption that would allow it to maintain the integrity of health care regulatory system. BC declines. The potential for an endless succession of similar claims persuades Ontario to abandon its offending health care services measures.

[62] Article 30:1(b)