

# TILMA AND MUNICIPALITIES

## What is the current status of TILMA?

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<sup>st</sup> of this year. TILMA is authorized by the Agreement on Internal Trade (AIT), which was negotiated by the provinces and the federal government more than a decade ago. However, TILMA substantially expands the scope of the AIT, most importantly by including dispute procedures that may be invoked by private parties and which can give rise to damage awards that will be enforced by Canadian courts.

For the moment, only these two provinces have committed to TILMA. However, as required by the AIT, TILMA extends an invitation to other provinces and the federal government to accede to the Agreement,<sup>i</sup> and this is under consideration by other provinces<sup>ii</sup> which are being actively encouraged to sign on.<sup>iii</sup>

## Does TILMA apply to municipalities?

TILMA applies to *measures of the Parties and their government entities*. Government entities are defined to include regional, local, district or other forms of municipal government; as well as *school boards, publicly-funded academic, health and social service entities*. Under this definition public hospitals, library boards, day care centres, children's aid societies, and virtually all other public

bodies and agencies are subject to TILMA disciplines. The term *measure* is also defined expansively to include: *any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure*.

A report prepared for the Union of British Columbia Municipalities (UBCM) acknowledges the sweeping scope of the regime, and in particular its application to zoning, subdivision and noise bylaws, business regulation and licensing, tax exemption or other bylaws; procurement policies; licensing bylaws and practices; and "voluntary gifting" policies.<sup>iv</sup>

While TILMA provisions formally went into effect on April 1, 2007, certain measures enjoy a partial exemption that ends in April 2009. These include measures relating to municipalities, school boards, and publicly-funded academic, health and social service entities. However, even during the transitional period, these measures must not be amended or renewed in such a manner as to decrease their consistency with TILMA.

Moreover, transitional measures are just that, and contemplate the ultimate and application of TILMA disciplines to all reserved measures, unless the Parties agree otherwise. While additional measures may be added to those exempted, this is possible only by mutual consent of the Parties.

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## How does TILMA limit municipal government authority?

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There is no debate that TILMA imposes a number of constraints on the exercise of municipal government authority. There is controversy, however, about the extent and character of these constraints.<sup>v</sup> Ultimately the interpretation of TILMA rules will be decided by the tribunals authorized by the regime, and by the Courts which may be called upon to review or enforce tribunal awards.

Arguably the most onerous TILMA provisions are those that prohibit existing and future government “measures” that “operate to restrict or impair” trade, investment or labour mobility.<sup>vi</sup> This is because virtually all actions by government may be regarded as offending this broad constraint, for after all, everything that a government does affects the market in some manner. *A priori*, such measures affect the rights and opportunities of companies and individuals to conduct business, make investments or provide services and may, unless exempt, be challenged under TILMA for doing so.

However, the real impact of TILMA arises not simply from the breadth of its application, but more importantly from the effectiveness of its enforcement procedures. Thus, TILMA empowers private parties to claim damages where it is alleged that a *measure* offends TILMA rules, and to have such claims resolved by tribunals under international arbitration rules. Where a municipality, for example, refuses to remove a measure that is found to violate TILMA rules, monetary awards up to \$5 million may be awarded against the province and to the private party.<sup>vii</sup>

To safeguard some measures from challenge, TILMA establishes certain exceptions. Nevertheless, broad areas of public policy and law must conform to TILMA requirements, including many measures relating to the environ-

ment, consumer protection, health care, education, and other social services. Moreover, exempt measures must be annually reviewed “with a view to reducing their scope”.

The government of B.C. claims 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...”<sup>viii</sup> But the plain reading of TILMA’s provisions, as well as the stated purpose of the regime, directly contradict this view. Where TILMA intends to prohibit measures that discriminate against persons or services from the other Party, it says so (Article 4). But articles 3 and 5 include no such qualification and therefore prohibit all measures that restrict or impair investment, trade or labour mobility, whether discriminatory or not. In fact, certain of TILMA’s harmonization requirements<sup>ix</sup> apply to all government measures, even those that do not even incidentally affect trade, investment and labour mobility.

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## Will TILMA affect public services?

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A fundamental contradiction exists between the free-market policies of trade liberalization engendered by TILMA and the policies, law and programs needed to establish and sustain public services that are provided in accordance with non-market principles, such as ensuring universal access or not-for-profit delivery.

Canada has acknowledged this basic conflict and taken steps to exempt health and certain other social services under NAFTA and the WTO. The authors of TILMA have declared no such exception for health and social services. Rather under TILMA, health and social services are reserved only as transitional measures which, as noted, precludes reforms and will expire. In addition, certain municipal services are unlikely to qualify as social services.

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Thus TILMA rules may be invoked to challenge the regulations, programs, and funding arrangements upon which public and social services depend, on the grounds that such measures restrict, impair, or discriminate against private sector service providers. In fact, international investment rules, that are analogous but less expansive than those set out in TILMA, have been invoked on several occasions to either limit the scope of public sector service delivery or to claim damages when governments seek to terminate privatization schemes that fail\*.

Because TILMA provides unprecedented grounds for asserting the interests of private service providers, and a sympathetic forum for doing so, it is likely to become the preferred venue for those seeking to privatize public services. This means that rather than spend years litigating before domestic courts, challenges such as the one mounted by Doctors Chaoulli and Day to Quebec's medicare system, are now likely to proceed under TILMA. Moreover, TILMA offers a real inducement to bring such challenges by offering the prospect of substantial monetary awards.

## **Can municipalities be sued under TILMA?**

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In an effort to alleviate municipal concerns, the BC Ministry of Economic Development has stated 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 process."<sup>xi</sup> While the first of these assertions is true in a narrow sense, what the Ministry neglected 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 fiscal leverage and legislative power *vis-a-vis* local

government to deliver on this commitment. It is not credible to suggest that a municipality could be indifferent to the consequences, if its actions saddle the province with significant liabilities.

Moreover, 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".<sup>xii</sup>

As for the second point, while it is true that only the province can be party to TILMA dispute procedures, conversely, under international arbitration rules a municipal government has no standing as a party to a dispute challenging one or more of its measures. Some municipalities may be less than sanguine about having to rely on a provincial government to defend their measures particularly where they reflect values with which the province does not agree.

## **Does TILMA have any benefits for municipalities?**

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We are aware of no claims that TILMA offers municipal governments any particular gain or advantage. In fact, neither provincial government has provided any substantive rationale for their initiative, nor engaged in any meaningful public policy debate about its merits or costs.

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Rather, both provinces point to reports prepared by the Conference Board of Canada touting the economic gains that are predicted to follow from implementing the regime. But the deficiencies and errors of the macro-economic analysis offered by these reports have now been sharply criticized by experts from both the left and right of centre.<sup>xiii</sup>

However sound or flawed these Conference Board reports may be, they are clearly very thin when it comes to providing 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, the few examples cited by the reports concern the remnants of international trade, investment and services measures that have 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.

As most Canadians will readily recognize, Canada is a society in which they are free to live, work and invest anywhere in the country. There are no customs stations along provincial borders and no tariffs of any kind on interprovincial trade. Moreover, interprovincial trade is a federal responsibility and provincial measures that interfere even indirectly with such trade have been consistently struck down by the courts.

The question that remains 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?

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- <sup>i</sup> AIT Article 1800, TILMA Article 20:1
- <sup>ii</sup> British Columbia and Alberta have been congratulated on their initiative by the Council of the Federation, and by Canadian labour ministers. April Lindgren, *McGuinty keen to join Alberta-B.C. free-trade pact*, CanWest News Service: Wednesday, October 18, 2006. TILMA also invites other Canadian governments to accede to the Agreement, see Article 20.
- <sup>iii</sup> The Conference Board of Canada is actively promoting the TILMA regime and has published two recent reports for this purpose, see *Death by a Thousand Paper Cuts*, 30 November 2006<sup>ii</sup>; and *An Impact Assessment of the BC/Alberta Trade, Investment and Labour Mobility Agreement Prepared for: British Columbia Ministry of Economic Development*, September 2005.
- <sup>iv</sup> Donald Lidstone (Lidstone, Young, Anderson Barristers and Solicitors), Report prepared for the Union of British Columbia Municipalities, April 30, 2007, at p. 9, available at <http://ubcm.fileprosite.com/contentengine/launch.asp?ID=3155&Action=bypass>
- <sup>v</sup> Neither British Columbia nor Alberta has published any substantive material or analysis explaining the rationale for TILMA or the manner in which it was crafted. Neither has there been any parliamentary debate or committee hearings to discuss the merits or substance of the TILMA scheme. However in various public statements and correspondence, the governments have challenged the interpretation offered by various critics of the regime – see for example, letter from Colin Hanson, Minister of Economic Development and Guy Boutelier, Minister of Intergovernmental Relations, to the Executive Director of UBCM, January 31, 2007. For a contrary view, see Ferguson, *TILMA and the Environment*, Sierra Legal Defense Fund, March 30, 2007. Available at [http://www.sierralegal.org/reports/tilma\\_mar302007.pdf](http://www.sierralegal.org/reports/tilma_mar302007.pdf) and Ellen Gould, *Asking for Trouble*, Canadian Centre for Policy Alternatives, February 2007.
- <sup>vi</sup> Articles 3 and 5(3).
- <sup>vii</sup> Article 30(2).
- <sup>viii</sup> Letter from Colin Hanson, Minister of Economic Development and Guy Boutelier, Minister of Intergovernmental Relations, to the Executive Director of UBCM, January 31, 2007.
- <sup>ix</sup> See for example, Articles 5(1),(2) and (5).
- <sup>x</sup> A significant and growing number of such cases have and are being adjudicated by arbitral tribunals empowered by international investment agreements that have provided the model for TILMA dispute procedures. See for example the cases reported on the web site of the International Center for the Settlement of Investment Disputes (ICSID) at, <http://www.worldbank.org/icsid/cases/cases.htm> See also the International Center for Sustainable Development which maintains and excellent service documenting such disputes at, <http://www.iisd.org/investment/itn/archive.asp>
- <sup>xi</sup> Letter from Colin Hanson, Minister of Economic Development and Guy Boutelier, Minister of Intergovernmental Relations, January 31, 2007.
- <sup>xii</sup> See note 4.
- <sup>xiii</sup> Lee and Weir, *the Myth of Interprovincial Trade Barriers and TILMA's Alleged Economic Benefits*, the Canadian Centre for Policy Alternatives, February 2007. Available at [www.policyalternatives.ca](http://www.policyalternatives.ca). See also Helliwell. (Professor Emeritus of Economics, UBC) *Assessing the Impact of Saskatchewan joining the BC-Alberta Trade, Investment and Labour Mobility Agreement*, unpublished report March 2007.