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
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OVERVIEW AND SUMMARY

On the basis of our review, we have come to the following conclusions:

1. 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.

A Potent Instrument for Deregulation

2. Among the more onerous of TILMA obligations is the prohibition on existing and future government "measures" that "operate to restrict or impair" trade, investment or labour mobility, unless such measures are exempt under the regime. Because "measure" is defined to mean "any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure," virtually all actions by government may be regarded as offending these broad constraints. After all, virtually everything that a government does affects the market in some manner, otherwise there would be no need for it to act in the first place. *A priori*, such measures affect the rights and opportunities of companies and individuals to conduct business, make investments or provide services, and therefore, unless exempt, may be challenged under TILMA for doing so.

3. TILMA dispute procedures empower private parties to challenge provincial measures that are alleged to offend TILMA rules. Such disputes are then resolved by tribunals that operate under international arbitration rules, and have authority to award up to $5 million in damages to the private party where a government refuses to remove a measure that violates TILMA rules. Because claims may be unilaterally asserted by individuals and corporations, they are likely to proliferate and create real pressure upon governments and other public bodies, to abandon or weaken policies and laws that are otherwise entirely warranted and lawful.

4. While fashioned as a trade, investment and labour mobility agreement, the majority of government measures subject to TILMA rules have little if anything to do with inter-provincial trade, investment or labour mobility, *per se*. While such measures may indirectly impact investment, trade and labour mobility, these effects are incidental to their primary purpose, which may range from environmental protection to day care regulation.

5. To safeguard certain measures from challenge, TILMA establishes general exceptions, and allows other measures to be defended if they can be proven to be necessary to serve a "legitimate objective". Nevertheless, broad areas of public policy and law must conform to TILMA requirements, including many measures relating to the environment, consumer protection, health care, education, and other social services. Even measures which are exempt must be annually reviewed "with a view to reducing their scope". It would also be easy to over-estimate the safe haven provided by the *legitimate objective* exception which has been interpreted narrowly by other trade tribunals.

Impact on Public Services

6. TILMA not only provides a new instrument for attacking government policy and law, but also for limiting the role and capacity of government to provide, or support, public services. This latter consequence arises from the fundamental contradiction that exists between the free market policies of trade liberalization and those necessary 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.

7. Canada has acknowledged this basic conflict, and has taken steps to exempt health and certain other social services under NAFTA and the WTO. Remarkably, the authors of TILMA have declared no similar exceptions. While existing (but not future) measures relating to health and social services are sheltered from TILMA disciplines for a two-year transitional period, unless the Parties agree otherwise, social services such as health care, child care and education will be entirely exposed to TILMA disciplines on April 1, 2009.

8. Thus, TILMA gives private parties the right to challenge the regulations, programs, and funding arrangements that provide the foundation upon which public and social services depend. 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.

9. Because TILMA provides unprecedented grounds for asserting private interests and a sympathetic forum for doing so, it is likely to become the preferred venue for those seeking to privatize public services. 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. Not only does TILMA offer much broader grounds for launching such attacks, and a far more expeditious route for doing so, it also holds out the prospect of winning substantial monetary awards.

10. Because TILMA establishes a new high-water mark of investor entitlement, these rights can now also be claimed by U.S. and Mexican investors in consequence of NAFTA guarantees of *National Treatment*. Moreover, these rights are bestowed on U.S. and Mexican investors without any reciprocal gains for B.C. or Alberta investors in the U.S. or Mexico.

The following assessment uses health care to illustrate how TILMA dispute procedures may be invoked to challenge the policies, laws and programs upon which social services depend. Examples could have readily been chosen from other areas of policy and law, from environmental protection to local land use controls.

In order to address the various criticisms that have been levelled at the regime by groups such as the Sierra Legal Defence Fund and the Council of Canadians, it may be that Alberta and B.C. rethink their approach and broaden the scope of TILMA exceptions. However, this would still leave the essential de-regulatory architecture of TILMA intact and governments exposed to the resource demands and liabilities associated with TILMA's private enforcement regime. It is important therefore to keep in mind that the policies and laws that may become fodder for TILMA dispute procedures are the lawful actions of provincial governments and public bodies taken in accordance with their mandates to serve the public interest.

While TILMA is presented as necessary to remove barriers to interprovincial trade, investment and labour mobility, little if any evidence is presented that significant, let alone unwarranted, barriers to interprovincial commerce exist. To be sure, in a federal state, differences will exist among provincial policies and laws, but these reflect the political, economic and social priorities of those jurisdictions. It is certainly not apparent that such provincial differences represent more than an occasional nuisance for a minority of businesses and professionals who must be licensed or certified to conduct business and provide services in a province.

Moreover, as most Canadians will readily recognize, in Canada people are free to live, work and invest anywhere in the country. There are no customs stations along provincial borders and no tariffs on interprovincial trade. Moreover, interprovincial trade is a federal responsibility and provincial measures that interfere with trade are struck down by the courts.

Other provinces have now expressed interest in signing onto TILMA. Given the far-reaching implications of this scheme, it would be only prudent for them to engage in a full and public airing of the rationale for such an initiative, together with a detailed and thorough consideration of its costs and impacts.