



Saskatchewan



Notes

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Examining the Implications of TILMA for Saskatchewan

- by Loretta Gerlach

Introduction

What is TILMA, and what would it mean for Saskatchewan?

On April 28, 2006 the governments of Alberta and British Columbia signed the Trade, Investment, and Labour Mobility Agreement (TILMA) scheduled to come into effect April 1, 2007 and with the intention of full implementation and effect by April 1, 2009. This agreement formally commits Alberta and British Columbia to far reaching rules affecting trade, investment and labour mobility. Proponents describe it as a form of economic union between the two provinces; opponents describe it as a bill of rights for corporations.

The TILMA aims to expand upon the 1994 Agreement on Internal Trade (AIT). The first Article reads that where there is an inconsistency between TILMA and the AIT “the provision that is more conducive to liberalized trade, investment and labour mobility prevails between the Parties”.¹ While the AIT has often been criticized by the business community for being an unenforceable political arrangement, TILMA is fundamentally different. TILMA would be binding on governments and would allow individuals and businesses to directly challenge government regulations, and to obtain monetary

awards for agreement violations that negatively affect their investments.

Alberta and B.C. recently tabled their agreement with the federal-provincial Committee of Ministers on Internal Trade and invited other provinces to sign on to it. The Saskatchewan Government is currently investigating the possibility of signing onto TILMA.

There are four main components of TILMA. The first is a commitment to reduce so-called barriers to trade and investment in member provinces. Article 3 of TILMA reads that “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”.² Article 5(3) reads that the “Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility”.³

This means that in principle the parties must engage in fully liberalized trade and investment unless there is a “legitimate objective” to restrict it. Legitimate objectives include items such as protection of the environment, public order, the provision of social services and health services within the province, and consumer protection. However, in order for a Province to utilize a legitimate objectives argument to enact or maintain a restriction that otherwise would violate the agreement, it would face the high

hurdle of having to demonstrate that its purpose was legitimate and could not be achieved through less restrictive means.

The second feature of TILMA is a commitment that member governments will not restrict or prohibit investment. Investment in TILMA is defined very broadly as:

- "a) an enterprise;
- b) financial assets, including money, shares, bonds, debentures, partnership rights, receivables, inventories, capital assets, options and goodwill;
- c) the acquisition of financial assets; or
- d) the establishment, acquisition or expansion of an enterprise".⁴

The Role of the Saskatchewan Government

The Premier of Saskatchewan has made public commitments to engage in public consultations on the implications of Saskatchewan joining TILMA before the government will sign. On December 6, 2006 *The Saskatoon Star Phoenix* reported that according to Government Relations Minister Harry Van Mulligen, a comprehensive review of the agreement is underway and the government intends to decide whether to join TILMA in January, 2007.⁵ While such statements are welcome, their vagueness and the short timeframe raise grave concerns about how substantial they are and in particular whether the government's plans for consultation and analysis match the significance of adopting the comprehensive agreement. Criticisms have arisen in Alberta and British Columbia that there was a dearth of public consultation and awareness prior to the signing of TILMA and that no sectoral analyses have been made public. Nor was there any legislative debate in either province prior to signing. Saskatchewan would be wise to learn from these objections.

With respect to economic analysis, the Provincial Government has commissioned the Conference Board of Canada to undertake an analysis of the economic implications for Saskatchewan to join TILMA. The Conference Board of Canada is a non-profit organization with a self-described mission to

"build leadership capacity for a better Canada by creating and sharing insights on economic trends, public policy and organizational performance".⁶ Unfortunately, its past record of academic quality is overshadowed in this case by a perception of bias in favour of TILMA. In their May 2006 report "*Death by a Thousand Paper Cuts: The Effect of Barriers to Competition on Canadian Productivity*"⁷ the authors make specific policy recommendations that are consistent with TILMA. Maclean's Magazine reports that the Conference Board of Canada will be calling for more "bold steps like TILMA" in a report entitled "Mission Impossible", to be released in January 2007.⁸ While the Saskatchewan government may garner valuable information from its Conference Board contract, the current process cannot legitimately be seen as a substitute for substantial public consultation that TILMA requires.

The Roots of the Problem

TILMA is a broad and comprehensive trade agreement. Its binding commitment to extensive 'liberalization' of trade, investment and labour mobility, coupled with its specific and detailed private dispute settlement mechanism, backed up by enforceable monetary awards, makes it is one of the most far reaching trade and investment agreements ever signed by a government in Canada. There are a number of significant and potential negative impacts that could be faced by citizens of Saskatchewan should the provincial government choose to sign on to the agreement.

The agreement would undermine the authority of local governments—including democratically chosen bodies such as municipal governments, school boards, university boards and health regions—to make democratic decisions in the interests of their constituents. Although there is a two year transitional period before the agreement would fully extend to "municipalities and municipal organizations", as soon as the agreement comes into force, they would be subject to pressure under the agreement for any bylaws they enact that are stricter than their existing ones. Many of the decisions these democratic bodies make – including procurement decisions, zoning requirements and service provision - would be subject to TILMA rules if Saskatchewan were to sign

the agreement. For example, local government would no longer be able to utilize local hiring provisions or local purchasing preferences should they so choose. Local and regional elected bodies are generally the closest to the grassroots and maintaining their decision-making abilities intact is important for democratic governance. Regrettably, to date there has been limited consultation with these elected leaders.

TILMA could also threaten governments' unfettered ability to provide support for rural development specific to the needs of economically depressed or otherwise challenged regions. Such assistance programs could be seen as restricting trade or distorting investment decisions and governments could face challenges to them for being contrary to TILMA rules. Important Saskatchewan-specific programs, such as the Northern Development Fund could be at serious risk.

The relationship between the decisions of TILMA dispute panels and decisions by established provincial judicial bodies is also of concern. A recent decision of the Ontario Court of Appeal upheld that the foreign investor dispute mechanism under the North American Free Trade Agreement, which can supersede judicial decisions, is constitutionally acceptable in Canada. There is no explicit language in TILMA that recognizes a superior authority of the Courts in the provinces. Trade panels generally do not consider other aspects of law even where their rulings impinge upon human rights and other fundamental issues. If panel decisions can in effect trump the decisions of provincial Courts, this would be a matter of significant concern.

As is the case in many trade agreements and disputes, the consequences are often unknown until they are tested through the dispute resolution process. Human rights are one area where there may be unexpected and/or potential negative consequences. Long fought battles for issues like pay equity, employment equity and basic rights against discrimination and harassment would seem to be at odds with the overall goals of TILMA. In the event of disputes involving

these policies, governments would be required to justify them before dispute panellists in terms of the agreement's narrow or undefined exceptions. It is evident that the architects of TILMA were concerned almost exclusively with economic issues. For example, in Part VII (General Definitions), TILMA states that "affirmative action programs for disadvantaged groups" are a legitimate objective for which the parties can make certain decisions that otherwise interfere with TILMA's goals. Unfortunately, affirmative action is largely an American concept. In Canada, employment equity—a distinct process for achieving equality in all aspects of employment—has been the term largely used since Justice Rosalie Silberman Abella, then Commissioner of the Royal Commission on Equality in Employment, coined it in 1984. The TILMA does not specify employment equity as a "legitimate objective".

Need for Further Consultation and Investigation

In order for any government to make such a far-reaching decision to adopt TILMA—and thus to place economic development and policy above democratic processes and human rights—there must be a firm mandate from constituents. As a crucial first step, the Government of Saskatchewan should begin to engage in full, comprehensive public education and consultation.

The Government needs to conduct comprehensive and participatory sectoral analyses of the implications of signing such a radical agreement as TILMA. Government departments should enact their own research and consultation processes with their key stakeholders as well as their research and policy analysts who best know and understand the issues facing and processes followed in those portfolios. These key government departments include but are not limited to Government Relations – Municipal Government, Northern Affairs, Health, Learning, Advanced Education and Employment, Industry and Resources, Agriculture and Food, Liquor and Gaming, Justice, Labour, and each Crown Corporation. For too long departments have

depended on Government Relations to conduct all the research and analyses on trade agreements in areas where trade specialists have little or no expertise. We now need to call on the departments to bring forward their expertise to ensure that a new expansive 'trade' agreement, with its binding rules, cannot trump other issues that are vital to the unique social fabric of Saskatchewan.

There is no good reason for the provinces to rush to a decision on TILMA. Each government has a responsibility to ensure that they have a clear mandate from the citizenry to proceed in such a radical manner. Before proceeding any further on TILMA, the Government of Saskatchewan must assure citizens that it respects responsible governance and is committed to ethics and human rights. The government should demonstrate its commitment to the value of democracy by embarking on comprehensive consultations on TILMA with the people of Saskatchewan.

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² *ibid*

³ *ibid*

⁴ *ibid*

⁵ Woods, James (2006 December 06) "Government May Make Energy Pitch to U.S. President Hopefuls", Saskatoon Star Phoenix.

⁶ From the Conference Board of Canada website, <http://www.conferenceboard.ca/who.htm>; Internet; accessed December 10, 2006

⁷ Available from the Conference Board of Canada at http://www.conferenceboard.ca/cgi-bin/MsmGo.exe?grab_id=0&EXTRA_ARG=&CFGNAME=MsFind.cfg&host_id=42&page_id=3243&query=death%20by%20a%20thousand%20paper%20cuts&hiword=a%20by%20DEATHS%20thousand%20death%20cuts%20THOUSANDS%20PAPERS%20PAPERBASED%20paper%20DEATHLY%20; Internet; accessed December 1, 2006

⁸ Preville, Philip (2006 November 27) "Exclusive Report: How to Fix Canada - On the Brink", MacLean's Magazine

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