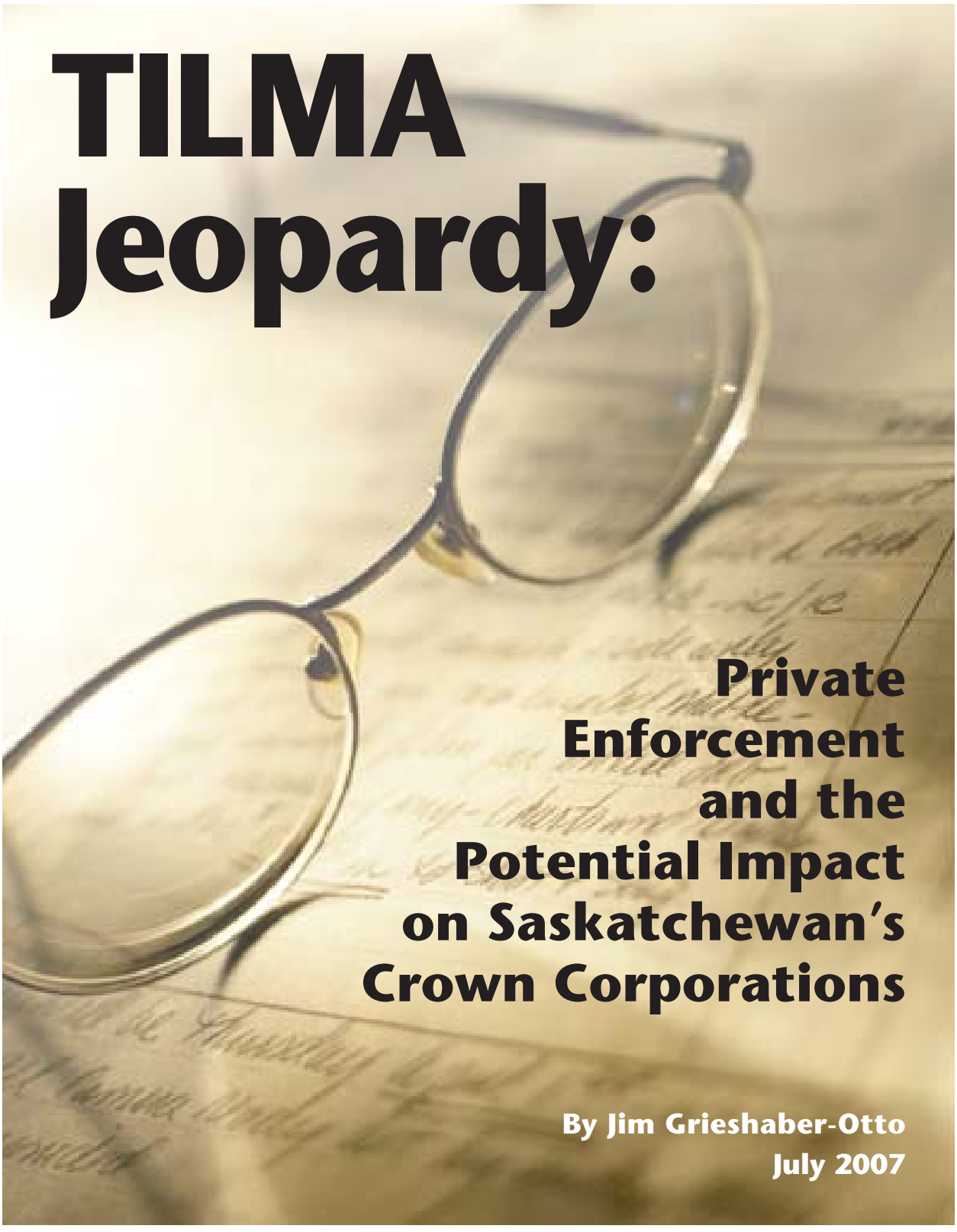

TILMA Jeopardy:

Private Enforcement and the Potential Impact on Saskatchewan's Crown Corporations

By Jim Grieshaber-Otto

July 2007

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About the Author

Jim Grieshaber-Otto is a Research Associate with the Canadian Centre for Policy Alternatives with 15 years experience assessing the impacts of international trade and investment treaties (NAFTA, GATS, bilateral treaties, EC Treaty, proposed FTAA) *on public services* (health care, education, postal services) and public interest regulation (Crown corporations, regulating alcohol and tobacco to improve public health). Recent clients have included: the World Health Organization, Government of Nunavut, Ontario Public Health Association, and Public Services International. He is a frequent presenter at conferences, public meetings and to senior executives and staff of governmental and non-governmental organizations.

Grieshaber-Otto obtained his B.Sc. at the University of British Columbia and the University of Toronto, and his Ph.D. at the University of Reading, England. He is an author of numerous trade-related publications, including:

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- *Facing the Facts: A Guide to the GATS Debate* (2002, with Scott Sinclair); and
- *Perilous Lessons: The Impact of the WTO Services Agreement (GATS) on Canada's Public Education System* (2002, with Matthew Sanger).

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Summary

Saskatchewan citizens face a clear choice. They can opt to join TILMA, or they can maintain and enhance the vital public interest activities of their Crown corporations. They cannot do both.

Signing TILMA would pose two key threats for Saskatchewan.

1

TILMA's private enforcement process threatens democratic governance

It overshadows all other aspects of the agreement and cannot be justified in our form of democracy. TILMA's highly controversial private enfocement process constitutes a separate court system where appointed panelists pass judgment on laws that citizens' elected representatives have enacted in the public interest.

If Saskatchewan signed the agreement, provincial taxpayers could face a flood of expensive private TILMA enforcement suits from B.C. and Alberta-based companies, including from U.S. and other foreign-owned corporations registered in those provinces.

By combining this powerful private enforcement process with broadly-worded rules outlawing government measures that "restrict" trade, investment, or labour mobility, TILMA threatens democratic governance.

2

TILMA would undermine, and could ultimately destroy, Saskatchewan's Crown corporations

Any Saskatchewan government that signed TILMA would be embarking on the destruction of Saskatchewan's vibrant Crown corporations by stealth.

The thrust of TILMA is at odds with Saskatchewan's Crown corporations and their activities. The province's Crowns are designed to address the specific needs of the citizens of Saskatchewan — in part by constraining, directing and, in certain cases, curtailing the operation of market forces in order to ensure universal access to high quality services at affordable rates, or to meet other public interest imperatives. There is an underlying tension between these aims and the basis of TILMA, namely, to promote the unrestricted flow of goods, services and investments throughout member provinces' territories.

TILMA'a broad rules, together with its private enforcement process, would threaten Saskatchewan government's ability to use Crown corporations' to further the public interest.

While signing TILMA would not directly result in the privatization of Crown corporations, it would erode the ability of Crowns to meet Saskatchewan citizens' legitimate expectations. This would undermine public support for Crown Corporations — the essential political foundation upon which they rest.

At minimum, TILMA would give private individuals and corporations a forceful tool to challenge and redirect the activities and regulation of Crown corporations. The agreement's private enforcement process would facilitate investors' efforts to obtain equivalent access to publicly-owned Crown infrastructure and to challenge even the continued existence of Crown corporations in the province.

There would be scant potential for any government to fully shield its vital Crown sector from the agreement when or after it signed the TILMA. Any limited protection that could be obtained initially could not be considered permanent, as the agreement stipulates that TILMA members will review such protections annually to reduce or eliminate them.

Signing TILMA would signal the beginning of the end of Crown corporations as rock-solid instruments of public policy in the province.

Introduction — On the Process of Analyzing TILMA

At the outset, the citizens of Saskatchewan, the Government of Saskatchewan and the Members of the Legislative Assembly should be commended for conducting these public hearings, which include an initial examination of the potential impacts of Saskatchewan joining the B.C.-Alberta Trade, Investment and Labour Mobility Agreement (TILMA).

Far too often, and in many jurisdictions in the world, governments sign and implement far-reaching agreements of this type without adequate — or even *any* — public examination of their likely impacts.

Through these public hearings, the Government and Members of the Saskatchewan Legislature are demonstrating a degree of responsibility and democratic accountability that far exceeds that found now in the governments of B.C. and Alberta. In those provinces, no public hearings were held on TILMA — either before it was signed, or when it came into force on April 1st of this year.

The Saskatchewan legislature should be congratulated for beginning an important exercise in democratic due diligence.

You have set yourselves a very ambitious schedule.

In 1998, when B.C. established a Special Committee of the Legislative Assembly to conduct an examination of the proposed Multilateral Agreement on Investment (MAI) — an agreement which, like TILMA, used NAFTA as a model — the committee required over a year to do its work. It received evidence from 89 expert witness and 361 members of the public in 10 communities. The committee's first report was 194 pages long.

When NAFTA came into effect, Canadian provinces and the U.S. states had two years to determine which provincial and state laws and regulations could and should be protected from just a small subset of that agreement's many rules. The list of the protective reservations that just one state (Oregon) submitted to the U.S. federal government filled a two-inch binder. After Provinces and states were unable to meet the deadline, the U.S., Canada and Mexico agreed to extend the deadline; and then, when that extension proved inadequate, modified the treaty requirements to provide sub-national jurisdictions the maximum possible, but still limited, protection.

This agreement's impact on Saskatchewan merits the same scrutiny as NAFTA's investment chapter and the failed MAI.

TILMA is extraordinarily broad in scope and coverage. It contains complex legal provisions, some of which are unique and untested.

Determining its potential impacts on Saskatchewan is a challenging undertaking that cannot be achieved by relying on general econometric studies or by conducting crude surveys of initial impressions.

This critical task of 'due diligence' requires an understanding and assessment of the text of the agreement itself.

It requires:

- an understanding of the many complex and sometimes confusing legal provisions drawn from international trade law and how appointed dispute panelists may interpret them;

It requires:

- a determination of which of the literally hundreds of Saskatchewan's *existing* laws and regulations, and laws and regulations that may be needed in the future — at the provincial, regional and local level—could be contested as TILMA violations,

It requires:

- an assessment of the types of measures that TILMA could affect in the future, as its reach is extended as mandated in the agreement itself.

In the absence of these analyses, even the most talented and dedicated legislators cannot be expected to ascertain the impact of the TILMA on particular sectors in Saskatchewan, and more generally, on the environment, the economy, and the province's social fabric.

So how could even the most efficient committee members, with the assistance of the most competent staff and officials, with input from an increasingly informed public, possibly assess the potential impact of TILMA on Saskatchewan in a month?

Such a task seems not only incredibly daunting, it seems overwhelming.

As an international trade policy analyst by vocation, I've traveled from British Columbia to try to save you a lot of work and to save Saskatchewan taxpayers a lot of money.

In fact, your report doesn't need to go into a lot of detail. You and your staff don't need to examine all aspects of this complex agreement.

Why not?

Because one fundamental aspect of TILMA overshadows all other aspects of the agreement.

TILMA's Private Enforcement Mechanism

The TILMA incorporates, as its very core, a fundamental feature that cannot be justified in our form of democracy.

This aspect of the TILMA is sometimes played down or even overlooked. For example, the CBC programme "The House" highlighted the agreement when it came into force on April 1st. But the programme failed to even mention this feature of TILMA.

The critical aspect is *TILMA's private enforcement process*.

TILMA incorporates a NAFTA-style private court-like system which, if adopted, would allow B.C.- and Alberta-based individuals and corporations to sidestep Saskatchewan laws and courts to directly challenge local, regional and provincial government practices that those individuals and corporations assert violate the agreement. Appointed dispute panelists — usually lawyers — would issue rulings that would be binding on governments. These appointed panels would also be authorized to direct governments to pay individuals and corporations up to $5 million for TILMA violations — awards that would then be enforceable through Saskatchewan's provincial court system.

In short, the TILMA would set up a highly controversial separate court system where *appointed* panelists would use TILMA rules to pass judgment on laws that citizens' *elected* representatives have enacted in the public interest.

This type of private enforcement process was originally designed to facilitate the settlement of disputes between private parties. Later, this process for settling *corporation-to-corporation* disputes was adapted and used in the NAFTA and many bilateral investment treaties to settle *corporation-to-government* disputes, seemingly without appreciation for the fact that governments are not like corporations … that in a democracy governments exist to act on behalf of the public.

This private enforcement process which is also called investor-to-state dispute settlement process privileges private interests by allowing them to sidestep well-established domestic laws and judicial processes and avoid conventional requirements for transparency and democratic accountability. Under this process, private arbitral tribunals cannot directly overturn established laws, but they can and have awarded large monetary compensation for alleged breaches of agreement rules.

The NAFTA version of this regime has already been shown to be powerful.

As of March of this year, there have been 15 private enforcement claims filed under NAFTA against Canada. Of those cases that have been decided, two were settled out of court, and two were decided against Canada; Canada has paid $27 million in damages. Investors continue to mount new cases.

In the Adams Lake case, initiated last year, a U.S. investor is challenging the decision to halt a highly contentious landfill project that proposed to dispose of Toronto's solid waste in an artificial lake on the site of a former open-pit mine in northern Ontario.

The controversy surrounding private enforcement of investment agreement rules cuts across partisan and ideological lines.

In the United States, the National Conference of State Legislatures are so concerned about the impact of the controversial process on state sovereignty that they recently wrote to the U.S. Trade Representative requesting that state governments be kept out of the new U.S.-Korea FTA.

Once they learn about it, citizens and representatives of diverse political persuasions reject private enforcement for a variety of reasons, including:

- increased financial risk to taxpayers,
- harmful impact on governments ability to regulate in the public interest,
- diminished transparency and democratic accountability, and
- the privileging of private investors over other interests.

It is rare indeed for an elected legislator or government official to defend this controversial process in public.

When the process was examined during extensive public hearings in British Columbia, it received — in the words of the committee's report — "withering criticism" from the public.

I highly recommend that you review this committee's work on the private enforcement process in particular. To the best of my knowledge, it constitutes the most extensive public examination of this critical issue that is available. Both of the committee's two reports would be a very valuable resource in this committee's deliberations on TILMA.

The Committee recommended that this dispute settlement mechanism "which enables a foreign-affiliated investor to bypass the domestic court system and challenge government measures before international arbitral panels — should be eliminated. The use of international commercial arbitration procedures should be limited to their original and proper purpose …"

Private enforcement should be "eliminated".

Unfortunately, it wasn't.

The process remains intact in NAFTA and has proliferated in many bilateral investment agreements.

Regrettably, private enforcement was not only also imported into TILMA … the TILMA version is even more extreme than the NAFTA model.

For example, while NAFTA allows private challenges only under specific treaty rules, TILMA allows private enforcement of *any* of the many provisions of the agreement.

NAFTA only allows genuine investors to initiate challenges. TILMA is broader; it allows any *individual* from a member province to do so.

Significantly, if Saskatchewan adopted TILMA, the province could face private TILMA enforcement suits brought by U.S. and other foreign-owned corporations that are registered in B.C. or Alberta.

TILMA allows for the same measure to be contested repeatedly and for panels to award monetary compensation, serially, to multiple disputants contesting the same government measure.

These variations make TILMA's private enforcement process particularly problematic.

What would it mean for Saskatchewan?

As Professor Helliwell noted, "almost any provincial or municipal programme [could be] subject to attack."

While not writing specifically about Saskatchewan, international trade lawyer Steven Shrybman echoes Helliwell's sentiment. He states that "private claims are likely to proliferate and exert enormous pressure on governments to abandon or weaken a broad and diverse array of public policies, laws, practices, and programs."

Given the extraordinarily broad reach of TILMA rules, it is difficult to conceive of a sector of the economy or society that would be immune from these extreme private enforcement procedures being invoked against government measures that investors deem to be restrictions on investment.

In a nutshell by combining broadly-worded rules outlawing government measures that can be argued to restrict trade, investment, or labour mobility, with a powerful private enforcement mechanism, TILMA threatens democratic governance.

It is critically important that the committee pay particular attention to an examination of the potential impacts of TILMA's private enforcement process.

Together, you may well determine that this feature is so threatening that its existence alone justifies and should result in your committee *unanimously* recommending that the Government of Saskatchewan reject the TILMA … to protect taxpayers from financial jeopardy, to protect public interest regulation, and democratic, accountable policy-making.

Potential Impact on Saskatchewan's Crown Corporations

It is critical to recognize that the ethos, or thrust of TILMA is at odds with Saskatchewan's Crown corporations and their activities.

Your Crowns are designed to address the specific needs of the citizens of Saskatchewan in part by constraining, directing and, in certain cases, curtailing the operation of market forces to ensure universal access to high quality services at affordable rates, or to meet other public interest imperatives.

There is an underlying tension between these aims and the basis of TILMA, namely, to promote the freer flow of goods, services and investments throughout member provinces' territories.

This conflict is explicitly acknowledged in TILMA itself. "Measures of or relating to Crown corporations" are listed as transitional measures that, if it weren't for the listing, would violate the agreement.

TILMA is a "top-down" agreement. This means that the agreement would cover all government activities pertaining to Crown corporations and sectors unless they were specifically exempted.

The agreement contains a general exception, in Article 11(4), for monopolies, but this exception is limited. It would allow governments to create, maintain or regulate monopolies "for the provision of goods or services within its own territory". It would shield government *regulation* of Crown monopolies, but would not shield the *activities* in which such monopolies engage in their own right that are arguably outside their strict statutory monopoly.

More importantly, this exception would provide no protection for the regulation and activities of Crown corporations that are not monopolies.

If adopted, the agreement imposes a freeze, or standstill on all the activities and government regulation of Crown corporations (Art. 23(2)) that extends throughout a two-year transition period. During this time, Crown-related measures are not to be made more inconsistent with the agreement (Art. 9(4)). During the transition period, the full extent of the agreement's coverage of Crowns is to be negotiated (Art. 9(2)) by the ministers of each TILMA member government. (Cf. Art. 17(1)(c) and 9(3)).

Could Saskatchwan negotiate a full exemption for its vital Crown sector if it joined TILMA?

There is scant potential for this.

TILMA does not stipulate that newly-acceding members can re-negotiate the agreement upon entry. On the contrary, new members join "upon acceptance of [TILMA's] terms" (Art. 20).

The agreement does allow for a Ministerial Committee to "approve any amendments to the Agreement" (Art. 17(1)(b)) but the Committee operates by consensus (Art. 18(4) and it seems highly unlikely that B.C. and Alberta would amend the agreement to grant Saskatchewan a general exception for *its* Crown corporations when they didn't do this for their own Crowns and since they are expressly committed to "[eliminating] barriers that restrict or impair … investment" through the agreement. (Part I, Operating Principles).

There is some potential for negotiating protection for a small subset of existing measures pertaining to Crowns, as Alberta and B.C. have done, but a full exemption is very unlikely.

Indeed, the logic of the agreement means that TILMA is likely to intensify pressure for the reduction or elimination of any such protective exceptions in the future. Article 17(1)(b) stipulates that each year TILMA is in force a Ministerial Committee will review protective exceptions to the agreement "with a view to reducing their scope".

In other words, any limited protective exception for Crowns that could be obtained upon accession could not be considered permanent; TILMA would put in place an annual process to review and reduce this and other protective exceptions … to whittle them away or eliminate them.

It is crucial for this committee to understand that any one minister, acting on behalf of Alberta, B.C., Saskatchewan itself, or any other acceding province, could insist on full coverage of Crown corporations and their regulation simply by withholding consensus on new proposals from Saskatchewan to limit the extent of Crown coverage.

When the transitional period ends on April 1, 2009, if ministers of TILMA member governments have not reached unanimous agreement on limiting the extent of Crown coverage, TILMA's main rules, including its private enforcement mechanism, would apply fully to "measures of or relating to Crown corporations, [and] government-owned commercial enterprises." (Cf. Part VI, p. 29; and Arts. 9(1) and 9(2)).

The impact of this could be profound.

Combined with the agreement's broad scope and application, this private enforcement mechanism would at minimum give private individuals and corporations a forceful tool to challenge and redirect the activities and regulation of TILMA members' Crown corporations.

Private enforcement would open the door to individuals and private corporations in other TILMA provinces to challenge the activities of Saskatchewan Crown corporations operating outside their home jurisdiction without themselves being subject to similar suits. This potential is especially important for Saskatchewan, as SGI and SaskTel operate in other provinces that are, or are considering becoming, TILMA members. TILMA suits of this type could impede the ability of these Crowns to generate revenue by operating outside Saskatchewan. Ironically, this aspect of TILMA could have the effect of stifling, rather than promoting, interprovincial commerce in these areas and would also hit Saskatchewan citizens in the pocketbook.

Full TILMA coverage would enable private individuals and corporation to use the private enforcement process to seek equivalent access to publicly-owned Crown infrastructure in

Saskatchewan, since denying this could be construed as a violation of TILMA rules on non-discrimination (Art. 4). Private individuals and corporations could challenge even the continued existence of Crown corporations in the province, claiming they impaired private investment, contrary to Article 3 (No obstacles).

Let me summarize the potential impacts of TILMA on the province's Crowns. If adopted by Saskatchewan, TILMA's binding rules would restrict the activities and regulation of the province's Crown corporations. In particular, it could …

- effectively preclude the *expansion* of existing (non-monopoly) Crown corporations;
- effectively preclude the *creation* of new (non-monopoly) Crown corporations;
- constrain the activities of monopoly Crown corporations;
- expose Saskatchewan to binding disputes brought by private individuals and corporations against *the activities of its Crown corporations* that are alleged to violate the agreement;
- expose Saskatchewan to binding disputes brought by private individuals and corporations against *provincial measures used to regulate the Crown sectors* in the public interest.

For provincial measures found to violate the TILMA, the Province of Saskatchewan would be bound by panel rulings, which could involve retaliatory measures of equivalent economic effect, awards for monetary compensation to aggrieved investors or Parties of up to $5 million in each instance, or both.

By their very nature, Crown corporations are designed specifically to serve the public interest of the citizens of Saskatchewan. In doing so, they necessarily *restrict or impair* the ability of private investors from elsewhere to invest and profit from doing things that are now done by the Crowns in the public interest.

Under TILMA, this is forbidden. Members are required to ensure (and I quote Article 3) "that its measures do not operate to *restrict or impair* … investment … between the Parties."

And yes, Saskatchewan governments traditionally accord the province's Crown corporations treatment more favourable than it provides to private corporations from other provinces … so Saskatchewan's Crowns can do their job of serving the interests of the people of Saskatchewan.

Article 4 of TILMA expressly prohibits this approach, labeling it "discrimination".

Legislators have a clear choice.

You can opt to join TILMA and apply the agreement's rules to Saskatchewan's Crown corporations or you can maintain and enhance the vital public interest activities of Crown corporations in Saskatchewan now and in the future.

You cannot do both.

Saskatchewan is known for being one of the few jurisdictions in North America that retain publicly-owned and operated public entities in key sectors of the economy.

Crown corporations have and continue to be very effective in serving a wide variety of public purposes in the province.

Crown corporations provide:

- public investment,
- public goods and services,
- public employment,
- public revenues, and
- democratic accountability.

They also hold the potential to deal efficiently with new challenges that have arisen and will emerge in the future — think global warming, for example.

Signing TILMA would put these remarkable benefits at risk.

Signing TILMA would signal the beginning of the end of Crown corporations as rock-solid instruments of public policy in Saskatchewan.

TILMA would grant outside investors new, powerful tools to attack Crown corporations directly … to carve off for themselves aspects of Crowns' activities that their accountants judge would be most profitable and their lawyers see to be most vulnerable under TILMA.

Initially at least, the pressure from threatened and actual TILMA litigation would not threaten the public *ownership* of Crowns per se. But it would erode the ability of Crowns to meet the Saskatchewan public's legitimate expectations.

TILMA would thus undermine public support for the public support for Crowns, which is the essential political foundation upon which they rest.

Governments that are intent on avoiding direct accountability for a rising tide of TILMA-related constraints, threats and litigation would benefit from the fact that the most controversial TILMA issues would be out of the hands of elected officials. Decision-making authority pertaining to many Crown corporation and other sensitive public policy issues would have been surrendered to appointed dispute settlement panels that operate not under provincial laws and regulations but according to TILMA rules.

At the same time, under TILMA, such a government would enjoy the ability to deny plausibly, but falsely, the plain truth … that by signing TILMA, that government would in fact be embarking on the destruction of Saskatchewan's vibrant Crown corporations by stealth.

No one should rely upon the agreement's limited protective exceptions to permanently protect the province's Crown corporations from TILMA's onerous rules. While some of these exceptions will be effective, most will only provide governments with political cover, but offer little or no protection from TILMA's rising waters.

Those dikes are riddled with holes.

And please, if Saskatchewan signed on to TILMA, don't think that provincial legislation to protect Crowns from privatization — *The Crown Corporations Public Ownership Act* — would safeguard citizens from the financial jeopardy of private investors' TILMA litigation against Crown corporations.

It wouldn't. That's a myth.

The only durable and effective means of protecting the province's Crown corporations from private challenges under TILMA's far-reaching rules is to ensure that the agreement is not adopted in Saskatchewan.

Conclusion

Saskatchewan has a long history of creating and maintaining publicly-owned enterprises to meet a wide range of public purposes — to improve the economic, social, cultural and environmental conditions of the province's citizens. Crown corporations provide:

- public investment,
- public goods and services,
- public employment
- public revenues, and
- democratic accountability.

Crown corporations also hold great potential for dealing effectively with new challenges, including global warming, that will arise in the future.

Adopting TILMA would undermine Saskatchewan citizens' ability to ensure that their Crown corporations remain vibrant public enterprises that effectively serve the public interest.

There is scant prospect for the Saskatchewan government to fully safeguard Crown corporations from intrusive TILMA rules either before or after signing the agreement.

The most promising approach for safeguarding Saskatchewan's Crown corporations, provincial regulatory ability in the Crown sector — and, more generally, democratic governance in the province — from the substantial threats posed by TILMA is for the Province to refrain from acceding to the agreement in the first place.

Citizens and Committee members interested in a more detailed critical analysis of TILMA are encouraged to read the paper by B.C. researcher Ellen Gould entitled "Asking for Trouble". It's published by the Canadian Centre for Policy Alternatives and is available free online at: *http://policyalternatives.ca/documents/BC_Office_Pubs/bc_2007/bc_ab_tilma_asking_trouble.pdf*.