

# **Presentation to the Standing Committee on the Economy**

**By Larry Hubich, President**

 *Saskatchewan Federation of Labour*

**June 12, 2007**

*“TILMA is by intent, design and structure no more than an instrument for de-regulation – after all, the entire regime is based on the premise that government regulation is the problem.” (Shrybman 20)*

*“TILMA, like its predecessor, the 1995 Agreement on Internal Trade, cannot be explained as a solution to ‘barriers to trade’ because, by and large, they do not exist. Instead, TILMA is better explained in terms of the creation and codification of investor rights, and legal mechanisms for their enforcement.” (Lee 2)*

## **Introduction**

The Saskatchewan Federation of Labour represents over 93,500 members from 36 affiliated national and international unions. Our affiliate membership belongs to over 700 locals throughout the province. The SFL has a proud history of providing support for union members and for all workers in Saskatchewan. We serve as Saskatchewan's "voice of labour" in speaking on local, provincial, national and international issues. The SFL supports the principles of social unionism; therefore we struggle for social and economic justice for all.

We thank the Standing Committee on the Economy for the opportunity to present our views on matters related to interprovincial trade, including the Agreement on Internal Trade (AIT) and the Trade, Investment and Labour Mobility Agreement (TILMA).

As you are aware from our ongoing TILMA Campaign, the labour movement in this province supports increased trade, investment and labour mobility; however, we are very concerned that becoming signatory to the TILMA will seriously hamper governments' ability to regulate and legislate in the public interest.

## **There is no crisis in internal trade**

In Saskatchewan, interprovincial trade increased significantly between 2000 and 2006: imports rose by 31% and exports by 38%. We are a province heavily dependent on trade both interprovincially and internationally.

Independent economic research suggests that the barriers to internal trade within Canada are largely insignificant.

Brian Copeland<sup>1</sup>'s study concludes that the “economic inefficiency caused by these barriers is small ....about less than one-tenth of one per cent of GDP.”

Mark Lee and Erin Weir<sup>2</sup>'s analysis “The Myth of Interprovincial Trade Barriers,” concludes that with the possible exceptions of Quebec’s prohibition of coloured

---

<sup>1</sup> Brian R. Copeland. (January 1998) “Interprovincial Barriers to Trade: An updated review of the evidence”. Prepared for the BC Ministry of Employment and Investment. p.34.

<sup>2</sup> Erin Weir and Mark Lee. (February 2007). “The Myth of Inter-provincial Trade Barriers and TILMA’s Alleged Economic Benefits”. Canadian Labour Congress, p.3.

margarine and Ontario's restriction on vegetable-oil-based dairy substitutes, "Genuine trade barriers are quite small and exist in only a few areas." They add:

most serious studies conclude that there are few significant obstacles to trade and investment within Canada. There are no customs inspection stations along provincial borders, nor any kind of tariffs on interprovincial trade. Canadians use the same currency and share common legal, financial and economic institutions. Canadians are free to live and work anywhere in the country. The federal government has constitutional power over interprovincial trade and the courts have consistently struck down attempts by provincial governments to obstruct it.

Kathleen Macmillan and Patrick Grady<sup>3</sup> recently reviewed the academic research of the last twenty-five years and conclude that "internal trade barriers have a minimal effect on overall GDP."

Since there are no significant barriers to interprovincial trade, signing TILMA would not significantly affect trade flows (Copeland, 1998, p.4). Saskatchewan runs a trade deficit with both Alberta and B.C.; there is no evidence that any potential increases in interprovincial trade as a result of the TILMA would do anything but exacerbate that deficit.

Constitutional lawyer Steven Shrybman<sup>4</sup> recently produced a legal analysis of the TILMA and points out that neither of two recent Conference Board of Canada reports "offers substantive empirical evidence that significant and unwarranted barriers to internal trade and investment actually exist in Canada."

### **Saskatchewan is signatory to the AIT**

The AIT, designed to facilitate freer trade and increased labour mobility within Canada, and led by the Council of the Federation, has thus far dealt with only 22 disputes involving goods, services, and capital since its signing in 1995. This low number of disputes suggests that barriers to internal trade are not a significant economic emergency.

Since the AIT came into effect in 1995, many pre-existing trade barriers have been addressed. Significant progress in liberalizing procurement practices in the public sector and in the free flow of alcoholic beverages has been made. While some disputes, primarily in the agricultural industry, have yet to be solved, the AIT continues to reduce trade barriers. The AIT is a living document in that various Committees and Provinces are charged with moving aspects of it forward. The Saskatchewan government is currently charged with the responsibility of designing an enforcement mechanism to aid in the resolution of outstanding disputes for example.

---

<sup>3</sup> Kathleen Macmillan and Patrick Grady. (March 2007). "Inter-provincial Barriers to Internal Trade in Goods, Services and Flows of Capital: Policy, Knowledge Gaps and Research Issues". Submitted to Industry Canada and Human Resources and Social Development Canada, p.2.

<sup>4</sup> Steven Shrybman (February 2007) "A Guide to the Trade, Investment, and Labour Mobility Agreement," Prepared for the Ontario Federation of Labour, p.2

There is no crisis in internal trade relations in Canada.

### **There is no crisis in labour mobility**

Four-fifths of employment is not in regulated professions or occupations where regulatory barriers exist<sup>5</sup>. Workers in these jobs are free to move about the country working wherever they choose. For the remaining 20 per cent of workers, several systems are in place to ensure that they can work in the province of their choice.

For example, Chapter 7 of the AIT outlines measures to resolve labour mobility questions. Gary Doer, premier of Manitoba, is leading the Forum of Labour Market Ministers in ensuring that all regulated occupations meet their AIT commitments by April 2009. This effort has been labeled in several places as an “ambitious workplan”.

It should be noted that in the 12 years since the AIT was signed, only 23 labour mobility complaints have been filed. Just two were upheld, both in the field of accountancy. Most have been resolved or withdrawn. As Shrybman concludes, “It is not apparent from the character, number or disposition of these disputes that labour mobility remains a major problem” (2007, p.17). A larger number of complaints have been dealt with informally (Macmillan and Grady, 2007, p.14).

Mutual Recognition Agreements are a key method of reducing barriers, and this approach is working. Macmillan and Grady note that “as of January 2007, 30 of 50 occupations regulated in more than one jurisdiction have MRAs covering most regulating jurisdictions, 16 have MRAs that have been signed by all regulating jurisdictions, and only 4 do not yet have MRAs” (2007, p.10).

The Red Seal program also works well in ensuring labour mobility for many tradesworkers, and for ensuring that high-quality standards are maintained in the training of those workers.

Union members in Saskatchewan do not identify labour mobility as a problem that needs addressing by governments or any other bodies. There is no labour mobility crisis.

### **Estimates of TILMA’s economic benefits are not credible**

The Canadian Federation of Independent Business and the Saskatchewan Party cite Conference Board studies done for the B.C. and Saskatchewan governments about economic benefits of signing on to the TILMA. They cite projections that an estimated \$4.8 billion in new economic activity and the creation of 78,000 new jobs in BC will result. For Saskatchewan, the Conference Board projects that TILMA will add \$291 million and 4,400 jobs to the economy.

---

<sup>5</sup> Patrick Grady and Kathleen Macmillan (March 2007). “Inter-Provincial Barriers to Labour Mobility in Canada: Policy, Knowledge Gaps and Research Issues”. Submitted to Industry Canada and Human Resources and Social Development Canada, p.4.

The methodology and conclusions of both studies have been challenged by several economists, including Lee-Weir, and John F. Helliwell<sup>6</sup> also raises serious doubts about the accuracy of Conference Board projections.

Lee-Weir point out, for example, that the Conference Board does not use standard economic techniques in its BC study. It infers huge benefits from a tiny survey of business organizations and government ministries. The Conference Board “doubles its estimate of TILMA’s benefits through a simple arithmetic error. Even after correcting this error, most of the projected gains are from industries exempt from the final agreement or from industries that barely engage in interprovincial trade.” (2007, p.1-2)

On April 2, 2007, Lee-Weir’s work was validated by Patrick Grady<sup>7</sup>, a former official in the federal Department of Finance who did his own analysis of the Conference Board’s estimates. Grady concludes, after examining the methodology used by the Conference Board, that the estimate is “not credible”:

The Conference Board sent out the survey to 24 organizations, 11 from government ministries and 13 from industry organizations, but only got responses from 10; 6 from government ministries, and 4 from the private sector. And 3 of those that did respond provided no regional detail and 2 no industrial. Needless to say, this small response particularly from the private sector undermines the reliability of the information collected because it means that most of the respondents are likely to have no specific industrial or regional expertise to contribute to the estimate. In addition, it’s not clear from the documentation that the respondents were actually informed of the intended relationship between the ranking and the numerical score later assigned by the Conference Board.

Grady goes on to say:

...the Conference Board estimate appears implausibly high in relation to previous estimates and in relation to BC’s exports to Alberta. Again, the Conference Board must have even thought so themselves as it seemed to have disregarded its estimate of the impact of the TILMA in preparing its latest forecast for the BC economy. And, if even the Conference Board doesn’t believe its own estimate of the impact of the TILMA on BC, those who continue to cite this estimate as evidence of the large magnitude of the benefits to be derived for British Columbia from the TILMA *don't really have a leg to stand on.*” (emphasis added) (2007, p.2)

Economic benefit estimates also appear to be grossly exaggerated in the Conference Board’s Saskatchewan study. Helliwell argues that the economic gain of the TILMA would be “a small fraction of the 0.92% of GDP estimated by the Conference Board”

---

<sup>6</sup> John F. Helliwell. (2007). “Assessing the Impact of Saskatchewan Joining the BC-Alberta Trade, Investment and Labour Mobility Agreement.” Review of Conference Board of Canada’s Report. (1-12).

<sup>7</sup> Patrick Grady. (April 2007). “The Conference Board of Canada’s \$4.8 Billion Estimate of the Impact of the BC-Alberta TILMA is not Credible.” [http://www.global-economics.ca/CB\\_TILMA.htm](http://www.global-economics.ca/CB_TILMA.htm) p.2.

(2007, p.33). Again, the Conference Boards methodology of surveying only a small fraction of Saskatchewan businesses and then using them to score eleven industries, “has no empirical basis, and hence cannot be treated as evidence” (2007, p.33).

Job creation estimates of 4,400 appear to have no empirical basis either. Even if the TILMA did increase trade flows, and increase productivity and therefore GDP, that does not lead to an increase in jobs. Productivity increases imply doing the same work with fewer workers in fact (Helliwell, 2007, p.12).

### **TILMA is an instrument of de-regulation pushed solely by corporate interests**

Who wants TILMA? Organizations such as the Fraser Institute<sup>8</sup>, the Canadian Chamber of Commerce<sup>9</sup>, the C.D. Howe Institute and the Canadian Federation of Independent Business<sup>10</sup> all support the expansion of TILMA to other provinces. Their support appears to be based on Conference Board studies which have been largely discredited, as demonstrated above. All of these organizations are funded by corporate interests.

Since there is no crisis in internal trade barriers, and no crisis in labour mobility, why is the TILMA so favoured by corporate interests? Copeland suggests that “Because trade barriers between the provinces are low, efforts to liberalize those barriers that do exist are likely to have only a small effect on trade flows. Much of the debate is not really about interprovincial trade, but rather about how decentralized the policy regime should be in Canada and how much flexibility governments should have to intervene in markets... These are issues which deserve to be debated on their own merits, without the distraction of misleading claims about a crisis in internal trade.” (1998, p.4)

The TILMA is fundamentally an agreement designed to reduce government regulations, making it cheaper and easier for businesses to access new markets. Those who support a free market economy push trade agreements such as the TILMA in order to bolster corporate profit-making.

### **TILMA is one of the most far-reaching trade agreements yet**

The TILMA is extremely broad in its scope. Measures covered by the agreement are defined as “any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure”. Every measure is covered by the TILMA unless specifically exempted. Trade expert Ellen Gould<sup>11</sup> argues that this “top-down approach to negotiating an agreement is risky because it requires that governments anticipate the full legal jeopardy TILMA poses for all measures they might want to safeguard, now or in the future” (2007, p.4).

---

<sup>8</sup> J.Clemens, M.Palacios, and M. Massé. (July/August 2007). “TILMA: An Extraordinary Achievement for BC and Alberta”. Fraser Forum.

<sup>9</sup> “Chamber urges Saskatchewan to enter deal with Alberta, B.C.”. Regina Sun Community News. April 1, 2007. 4.

<sup>10</sup> “CFIB says pact cuts red tape, but labour strongly criticizes it”. Leader-Post. April 4, 2007.

<sup>11</sup> Ellen Gould. (February 2007). “Asking for Trouble: The Trade, Investment and Labour Mobility Agreement”. Canadian Centre for Policy Alternatives. (1-42).

Gould adds that “TILMA goes beyond requiring that a province treat the goods, services, investors and investments of the other province the same as it normally treats its own. Even government measures that do not discriminate between investors from BC and Alberta can still violate TILMA. The agreement establishes absolute constraints on government, regardless of whether there is a level playing field for companies in either province”(2007, p.5).

Article 5.3 Standards and Regulation states that Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility. The terms ‘restrict’ and ‘impair’ are not defined in the text of the Agreement and have no parallel in international trade law. Marc Lee<sup>12</sup> argues these terms “could be open to a plain language reading that privileges investor rights over the ability of legislatures to pass laws or regulations in the public interest, where they are not explicitly excluded from the agreement”.

### **The Issue of Legitimate Objectives**

Proponents of the TILMA also argue that a government’s ability to regulate is not affected if it can prove that its measures are “legitimate objectives”, a provision found in Article VI.

What proponents do not explain, however, is that the measure must meet a three-part test in order to be considered a legitimate objective that cannot be challenged. This test includes proving that the measure is “not more restrictive ... than necessary”. Lee points out that this sort of language in other international agreements “has been criticized for giving significant leeway to arbitral panels to second-guess whether public interest objectives could have been accomplished differently (2007, p.11). The SFL firmly believes that it is not the role of unelected trade tribunals to decide upon the appropriateness of public policy decisions.

The legitimate objectives tests put governments with potentially offending measures on the defensive, having to prove the negative case that they could not accomplish their objective in a less restrictive manner. At the trade panel level, it will be easy for private investors to suggest possible policy alternatives that would be less trade-restrictive, as in the following example provided by Shrybman:

“an environmental regulation limiting automobile exhaust emissions is not necessarily a measure that would be permitted under Article 6. To establish the right to maintain or establish such a control, the province would have to overcome the daunting challenge of proving a negative – namely to demonstrate, as one AIT dispute panel put it, that *on a balance of probabilities, . . . no other available option would have met the legitimate objective*. If the objective of automobile emission controls is improving urban air quality, alternatives would include doing

---

<sup>12</sup> Marc Lee. (June 2007). “Investor Rights and Canadian Federalism: The Case of TILMA”. Paper for the Canadian Economics Association, Progressive Economics Forum Session V: The State and the Economy. p.12

more to regulate large point sources of air pollution, restricting driving during air quality alerts, or imposing stricter gasoline formulation standards. In each case, examples would be cited of other jurisdictions that have taken these routes. The province wishing to defend automobile exhaust standards must then show it considered each available alternative; assessed its potential adverse impact on trade, investment, and labour mobility; and then chose the option that was least restrictive of these TILMA priorities.” (2007, p.10)

Other trade agreement rulings have defined legitimate objectives very narrowly and this will set a precedent for future trade tribunal rulings. A review of every AIT case that has proceeded under the dispute process found that offending governments consistently fail to meet the necessity test (Gould, 2007, p. 24).

It stands to reason that virtually any government measure can likely be accomplished in a less trade or investment-restrictive manner because all government measures distort the market in some way. As Gould points out, “...by their very nature, government programs and Crown corporations confine private investment within certain limits by providing some services that otherwise might profitably be provided by the private sector. Similarly, government regulations often place limitations on private investment” (2007, p.4).

The reality is that left to its own devices, the market cannot deliver to citizens all that they require for a healthy, secure existence. Government policies, programs, and legislation exist at least partially in order to provide those elements to our communities.

### **Exceptions are weak**

Proponents of the TILMA often point to a list of items exempted from the TILMA under Article V in order to counter arguments about the agreements far-reaching scope. Article 17 makes it quite clear, however, that the exceptions will be reviewed annually “with a view to reducing their scope.” The list of exceptions in the TILMA is meant to shrink over time, not to increase. The annual review of exceptions is designed to ensure that the measure that is in place remains the least restrictive to trade, investment and labour mobility as possible.

We have grave concerns that the TILMA does not define ‘social policy’, the last in the list of exceptions. Considering that the AIT defines social policy quite narrowly, and trade panels rule in favour of the more liberalized interpretation of any clauses, we are very concerned that critical aspects of social policy will be potentially challenged under the TILMA. Under Article 1.2 of the TILMA, “any inconsistency between *any* provision 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 (Shrybman, 2007, p.11). Some areas of social policy at risk could include employment equity programs, pay equity laws, occupational health and safety regulations and so on. Without clear, detailed, and permanent exceptions for important social policy initiatives, it would be highly irresponsible for any government to enter into the TILMA.

Several governing entities that proponents claim would be protected under the TILMA are in fact scheduled to be negotiated into the TILMA by April 1<sup>st</sup>, 2009, including: crown corporations, municipalities, school boards, publicly-funded academic, health and social service entities, financial institutions and financial services.

### **Crown Corporations would be at risk**

Crown Corporations are an important part of Saskatchewan's history and culture. They were created in order to ensure that services in key sectors of our economy could be made available to all Saskatchewan citizens, regardless of where they reside.

Currently our major Crowns are profitable; as the Saskatchewan government rightly reminds us, we have the lowest-cost utility bundle in the country. Saskatchewan citizens support publicly-owned crowns. They are a point of pride for Saskatchewan citizens, and most certainly for the workers who deliver the services. Crown workers earn good wages and benefits, earnings that return to the general revenues of the province in the form of income taxes. Those salaries are spent in our local communities, supporting local businesses.

Crown Corporations are listed as transitional measures, to be negotiated into the TILMA by April 2009. It is therefore false to claim that Crown Corporations are exempt from TILMA, as some proponents imply. Crown Corporations were created to serve the public interest and this kind of public ownership is very much at odds with the aim of the TILMA, which is to maximize private investment opportunities. We are concerned that a party could challenge Saskatchewan on the basis that a particular Crown Corporation is a barrier to private investment, a breach of Article III No Obstacles. A party may launch a challenge under Article 4 Non-Discrimination, arguing that private investors should have access to publicly-owned Crown infrastructure. We predict major pressure would be put on governments, through TILMA challenges or through regulatory chill, to privatize aspects of the Crowns.

Permanent exemptions for crown-related measures can be added only by mutual consent of all parties. If Saskatchewan wanted to try to negotiate exemptions for Crowns, it would be hard-pressed to find consensus from BC and Alberta who do not place the same emphasis on public ownership that Saskatchewan does.

### **Healthcare is not exempt**

The SFL and other critics point out that health care is not exempted from potential TILMA challenges. Our healthcare system is arguably the most important area of governance; it affects the well-being and economic security of all citizens. The SFL strongly supports publicly-funded, publicly-delivered healthcare services for all Saskatchewan residents.

Even without the TILMA, there is currently a great deal of pressure to carve out bits of health services such as nutrition services for example, and to allow private delivery of those services. The reality is that Alberta has allowed for much more privatization of its healthcare system than we have. We are concerned that signing the TILMA would put

further pressure on our system to open itself to this competitive market. For example, Alberta has privatized diagnostic imaging services and Saskatchewan does not; corporations may see opportunities to expand their investment into Saskatchewan in this area and argue that our publicly-subsidized services are restrictions on investment. Healthcare governing entities also do a large amount of bulk purchasing and under the TILMA, they could be restricted in their ability to choose local firms.

Regulations in the delivery of healthcare could also be challenged. Consider the following examples of measures that could be deemed as violations of the TILMA:

- Penalties such as fines that provinces may impose to prevent hospitals from allowing individuals to pay in order to receive preferred status or treatment.
- Restrictions governments may have in place to ensure that standards are being met in private, for-profit surgery clinics.
- Stricter standards which governments may find necessary to regulate private care homes. (Gould, 2007, p. 29)

Whether its for-profit health care facilities, transnational corporations seeking to expand into health care services or health insurance companies wishing to challenge our medicare plan, we need to protect the principles of our health care system and ensure that our health is maintained in the public domain.

### **Municipalities and other governing entities have their powers curtailed**

Municipalities provide a wide range of services to their citizens, including such fundamental services as bylaw enforcement, public transit, building inspections, solid waste disposal, road maintenance, water supply, zoning, and so on.

Local governments are scheduled to be transitioned into the TILMA by April 2009. We do not want to see an agreement such as the TILMA tie the hands of municipalities from encouraging particular aspects of the local economy, through local hiring programs, business subsidies, or other economic development strategies. Municipalities should retain the right to provide targeted tax incentives, grants and loans in order to stimulate local economies.

Lower thresholds for local procurement as laid out in the TILMA will also force municipalities and other governing entities, including Crown Corporations, to tender contracts to outside investors. The SFL believes it should be left to democratically-elected bodies to determine the criteria for their own bulk purchasing. Governing bodies may want to take into consideration several factors when procuring goods including the ability to support local contractors, the quality of goods, ethical purchasing standards, and of course the cost. These decisions should remain with elected bodies.

The City of Saskatoon solicitor<sup>13</sup> recently released an assessment of the TILMA's impact on that municipality. The Saskatchewan Urban Municipalities Association<sup>14</sup> undertook a

---

<sup>13</sup> Saskatoon City Solicitor. Legislative Report No. 2-2007. (February 26, 2007). Section B – Office of the City Solicitor.

similar assessment of how the TILMA could affect urban municipalities across the province. These reports raise major concerns about such issues as land use restriction, signage rules, residential housing standards, downtown enhancements, and business subsidies.

The SFL supports local, democratic decision-making. We do not support signing any trade agreement that threatens the ability of duly elected representatives from governing in the interests of the common good. This includes our local school boards, health districts, library boards, and academic institutions.

### **The TILMA will drive down occupational standards and labour legislation in Saskatchewan**

TILMA by its design and intent, threatens to weaken or drive down professional standards because the signatories are obliged to reconcile any measures that differ among the provinces, but not necessarily to the higher standard. In the area of labour mobility, for example, when there is a discrepancy between two occupational qualifications, the onus is on the province with the higher qualification to justify its higher standard. The TILMA is “likely to weaken training, certification and apprenticeship standards because of the overall pressure TILMA will exert to reduce such standards to a lower common denominator” (Shrybman, 2007, p.20).

The SFL is very concerned that although labour standards are listed as an exception in the TILMA, the AIT accords this exception a lesser scope. Parties could argue in front of a trade panel that certain labour standards restrict their investment rights; the risk is that “TILMA dispute procedures may be invoked to enforce the provisions of both the AIT and TILMA and a complainant would be entitled to cherry-pick those provisions most conducive to its claim” (Shrybman, 2007, p.19).

In Saskatchewan, where we have struggled to build stronger labour standards in areas such as vacation leave, minimum wage and workplace safety. These measures could be considered barriers to investment because they result in costs to businesses. The SFL takes no comfort in the fact that labour standards are included in the list of exceptions, for reasons outlined above. Saskatchewan citizens also enjoy a superior *Human Rights Code* than BC for example. Saskatchewan should not sign an agreement that encourages a race to the bottom, that favours minimizing minor trade and investment barriers over workers’ rights and human rights protection.

In the area of labour relations, Saskatchewan’s *Trade Union Act* could similarly be challenged. Labour relations legislation is not specifically exempted from the TILMA, nor is it included in the list of legitimate objectives contained in the agreement. Workers in Saskatchewan enjoy superior labour legislation than their neighbours in such areas as the process for organizing new union members, and prohibitions against employer threats

---

<sup>14</sup> Sean McEachern. (March 2007). “Report on the Trade, Investment and Labour Mobility Agreement and the Potential Impact on Saskatchewan’s Urban Municipalities”. Saskatchewan Urban Municipalities Association. (1-7).

and intimidation. We are concerned that our more balanced labour relations statutes could be argued to be a barrier to investment and challenged under the TILMA.

One final area in which the TILMA threatens to drive down labour standards involves the use of temporary foreign workers. Foreign workers are perhaps the most vulnerable in our society, facing low wages, unsafe working conditions and human rights abuses in many cases. Businesses bring in temporary foreign workers and must follow the required regulations for doing so; often these involve residency requirements or other certification standards that need to be met. The TILMA will allow challenges to those regulations, because a party could argue they restrict labour mobility and/or investment.

The labour movement is very concerned that the pressure to deregulate the process of certification of foreign workers will lead to an increase on our reliance on temporary foreign workers. This trend places downward pressure on wages and labour standards for all workers. We are also very concerned about the exploitation of foreign workers and the systemic racism that underpins the well-documented practice of worker abuse.

Under the TILMA, there are no minimum standards regarding worker training or certification: “While a TILMA party is prohibited from strengthening its certification requirements unless it can prove that it is entitled to do so under relevant TILMA exceptions, *nothing precludes it from weakening or abandoning such legal or regulatory requirements. The new lowest common denominator may accordingly become the reduced training requirements adopted by a province for the purpose of expediting the certification of foreign workers*” (Shrybman, 2007, p.22, emphasis added).

### **The TILMA creates new investor rights**

The TILMA contains an investor-state dispute resolution mechanism that allows parties, private companies or individuals to challenge signatories and if successful, be awarded up to five million dollars in damages.

“Public interest advocates have condemned such investor rights agreements on the grounds that they are anti-democratic: they artificially constrain the ability of governments to expand public services and to regulate in the public interest, in particular with regard to environmental protection, labour standards and consumer protection. They do this in two fundamental ways: first, by opening up areas of democratic decision-making to challenges through external reviews outside domestic legal systems; and, second, by casting a chill over the process of regulatory decision-making itself, thereby reducing the likelihood of new measures being introduced.” (Lee, 2007, p.2)

Public safety, local and regional economic development, and environmental protection are all legitimate public policy concerns. Governments should not be obliged to prove their legitimacy to unaccountable trade tribunals.

Scott Sinclair<sup>15</sup> has prepared a summary of trade tribunal challenges since the North American Free Trade Agreement (NAFTA) came into effect. Canada has faced 15 challenges. Of these cases:

- 6 were challenges to Canadian environmental protection regulations in which Canada lost 2 with damages awarded.
- 3 involved our natural resources.
- 2 postal services challenges are underway.
- 1 cultural policy challenge was filed.
- 1 agriculture challenge and,
- 2 “other” challenges have been filed.

These cases resulted in \$27 million being awarded to challengers, paid for out of government revenues (2007, p.14).

### **Environmental Challenges**

When we look at the investor-state challenges under Chapter 11 of NAFTA, 13 out of 46 affect environmental regulations, a significant number in our view (Sinclair, 2007, p.14). Three new cases were filed against Canada in 2006. In the most recent Adams Lake, Ontario case, an American company is challenging the government’s decision not to allow a waste dump in an abandoned mine site, claiming it is a restriction on investment.

In an era of mounting concern about global warming and deterioration of our natural environment, it is incumbent on governments to protect their ‘green’ policies and programs from those who would put profits ahead of environmental protections. The SFL believes government must take proactive, legislative steps to reduce carbon emissions, for example. Would this kind of regulation be considered a barrier to investment? We know that in order to substantially reduce our carbon emissions, certain industries may have to be more strictly regulated. While there are plenty of opportunities for profitable, green enterprises, some of the ways in which we do business will need to be altered.

The SFL is concerned that there may be a chilling effect on governments who want to enforce environmental regulations and who want to design progressive environmental laws, but who fear costly foreign investor lawsuits under NAFTA, and potentially under the TILMA. We are also concerned that several areas of environmental measures are not explicitly exempted from the TILMA, including:

- designation and protection of ecological reserves;
- environmental assessments of projects such as ski resorts or chemical plants;
- regulation of air pollution produced by manufacturing plants and automobiles;
- restrictions on particular products like ozone depleting substances or pesticides;

---

<sup>15</sup> Scott Sinclair. (March 2007). “NAFTA Chapter 11 Investor-State Disputes”. Canadian Centre for Policy Alternatives. (1-14).

- regulation of recreation and tourism to protect ecologically sensitive areas. (Gould, 2007, p.30)

The Sierra Legal Defense Fund<sup>16</sup> also did an impact study of the TILMA on the environment. They conclude that a number of potential government measures designed to reduce greenhouse gases will likely breach one of the TILMA's prohibitions, in key areas such as greenhouse gases, endangered species, protected areas, air pollution, urban land use planning, mandatory eco-labelling, soil contamination, and so on. In the critical area of greenhouse gases, they conclude:

Choosing the right combination of GHG reduction measures will be no easy task, and will likely involve some trial and error over the coming decades. It is possible that highly trade- and investment-restrictive measures will prove to be most successful. Granting individuals and business entities the right to challenge each new measure when proposed or implemented, and granting significant effective decision making power to trade panels constituted under TILMA, seems likely to more hinder than aid measures to mitigate global warming. (Ferguson, 2007, p.13)

**TILMA will have a chilling effect on governance**

“TILMA can only result in pressures to deregulate. The requirement to reconcile regulations and standards is subject to enforcement by private investors, who are far more likely to launch complaints over regulations because they are too high rather than because they are too low.” (Gould, 2007, p.5)

If governments have reason to believe that their laws and programs may be subject to TILMA challenges of up to five million dollars, they are under pressure not to implement those laws in the first place. They must also consider the cost of reviewing every potential measure to determine whether or not it fits into the TILMA's regulatory regime. The difficulty of budgeting for potential lawsuits and the preparation of a panel defense could be viewed as expensive and a ‘headache’ not worth risking.

A former B.C. Minister of Education reports that the B.C. Cabinet discussed the possible implications of a TILMA challenge when designing a policy of eliminating junk food from schools. They concluded that they would pursue voluntary agreements with vendors in order to avoid a TILMA challenge that could result from an enforced regulation (Lee, 2007, p.12).

**Conclusion: Regulations have legitimate, public policy rationales**

“It is unacceptable to label differences in approach to environmental protection, regional economic development, resource management, or other legitimate policy issues as ‘internal trade barriers’. Many so-called interprovincial trade barriers result from legitimate public policy choices. It is neither possible nor desirable

---

<sup>16</sup> Keith Ferguson. (March 30, 2007). “TILMA and the Environment: A report on the potential environmental effects of the BC-Alberta Trade, Investment and Labour Mobility Agreement”. Sierra Legal Defence Fund. (1-17).

within a federal system to do away with differences in policy approaches that allow democratically elected governments to respond to local needs and the aspirations of their citizens.” (Lee, 2007, p.10)

We argue that in a nation as vast and diverse as Canada there are bound to be some differences in provincial policies and regulations in response to local realities. Provinces have different geographic realities, natural resource revenues, demographics, and so on. Provincial governments should have the power to design and implement policies and programs that address those realities, without having to answer to corporations or individuals from outside the province. The same principle applies to local governments. Their powers to govern should not be under attack by trade agreements that are designed to liberalize trade and investment at the expense of other important considerations such as the environment, health and safety, and workers’ rights.

It is entirely unnecessary to enter into a deal like the TILMA in order to address minor trade and mobility barriers between provinces. If there are barriers to trade, to investment, or to labour mobility that need to be reviewed, we advocate that a democratic, citizen-engaged process should be undertaken to examine those barriers. We support the Canadian Labour Congress’ proposal that a more sensible process would begin with Saskatchewan businesses compiling publicly-available lists of inter-provincial barriers. Citizens could respond by assessing the economic, social and environmental purposes of these alleged barriers and a balanced decision could be made about reducing those barriers.

The TILMA is an instrument of deregulation and corporate encroachment into the realm of public ownership and delivery of goods and services. The true aim of the TILMA is to create a free market economy and to eliminate government regulations that companies say impede the profits of private corporations. The SFL believes the TILMA represents an open attack on democracy. If Saskatchewan signs the TILMA, we will privilege private, corporate interests over our right to govern ourselves. Let us not hand our democracy over to private interests at the expense of the common good.