



The TILMA Gamble Not Worth Taking

by Murray Dobbin

On April " 2007, the BC-Alberta Trade, Investment and Labour Mobility Agreement (TILMA) will come into force. After it was signed last year, Todd Hirsch of the Canada West Foundation wrote that the agreement could mean an "erasing of the provincial boundary for all purposes except voting and the colour of the licence plate." A closer examination of the agreement, however, reveals what it erases is not so much provincial borders, but instead, much of a government's ability to act in the public interest.

The TILMA imposes a set of restrictions on government that is unparalleled in existing trade and investment agreements. For example, under the TILMA governments cannot: "restrict or impair" trade, investment, or labour mobility, introduce new regulations that do this, or provide business subsidies that "distort investment decisions."

The agreement pairs such radical restrictions with a NAFTA-like enforcement mechanism. The TILMA establishes a whole new avenue for litigation to be taken against governments. It allows private persons, as well as the parties to the agreement, to take their complaints about government to independent dispute panels. These panels are empowered to impose awards of up to \$5 million if governments violate the TILMA even when governments are acting completely consistently with domestic law and within their constitutional authority. No limits are placed on the number of complaints that can be taken on the same issue as long as they are not taken at the same time.

In signing the TILMA, BC and Alberta have given potential litigants a cornucopia of promising grounds with which to sue them. The best route for a complainant may be to take a case under the TILMA's "No Obstacles" article. Any kind of government act—a program, a regulation, a policy, or anything else a government does—can violate this article.

An Agreement on Internal Trade (AIT) panel has already ruled on what it means to impose a "No Obstacles" obligation on governments: "(A)pplying the ordinary dictionary definition of the term, an obstacle to trade is created when a measure impedes trade. It need not restrict or prohibit it entirely; an obstacle is created simply when trade is impeded."

So a "No Obstacles" provision appears to set the bar very low for successful challenges against government. The ramifications of this provision in the AIT, though, are not as serious as they are under the TILMA. Unlike the TILMA, the AIT does not allow complainants to be awarded compensation for violations of the agreement. The AIT has a screening process—not included in the TILMA—that prevents complaints from going forward that are intended "to harass" governments. And the AIT does not apply the "No Obstacles" rule to investment as the TILMA does.

It is hard to think of a government regulation or program that could not fall foul of the TILMA's prohibition on obstacles to investment. When a municipality limits the height of buildings or prohibits commercial development in residential neighbourhoods, it restricts investment. Every service provided by local or provincial governments or Crown corporations restricts private investment

in the service. How many regulations and programs the TILMA will effectively "erase" depends both on how many complaints are successful and how much governments constrain themselves to avoid the TILMA challenges.

But what about differences in provincial regulations that, while causing headaches and costs to business, appear to contribute little to the public good? For example, because of differences in provincial standards, hay once had to be restacked before it was transported across the Alberta/BC border. The BC and Alberta governments, though, have already negotiated a resolution to this particular problem and they have not explained why they need the TILMA to force them to address issues in other areas.

The really intractable interprovincial trade disputes, ones where provinces have been reluctant to comply with Agreement on Internal Trade rulings, centre on certification of accountants and access to dairy markets. None of the cases taken to an AIT panel have involved a dispute between BC and Alberta. Because some governments are unwilling to change their rules in particular sectors, should BC and Alberta expose themselves to litigation in as many areas as they do under the TILMA?

The TILMA is about far more than reconciling regulations between Alberta and BC. And it's also not just about making sure provincial and local government do not "discriminate" in their treatment of companies. Niels Veldhuis of the Fraser Institute made this fundamental error in a January 19 CKNW radio interview when he said that, under the TILMA, if a municipal bylaw "applies equally to all parties, whether in Alberta or BC, then there's no discrimination and therefore the bylaw doesn't have to be changed.'

A government certainly violates the TILMA if it discriminates in favour of local companies. But it also violates the agreement simply by impeding investment, even when it is acting in a non-discriminatory way. In addition, the TILMA requires governments to mutually recognize each other's standards and regulations, a requirement that is over and above the requirement not to discriminate.

As federal Industry Minister Maxime Bernier explained to the Senate banking committee, mutual recognition is better from a market perspective than harmonization because it puts regulators "in competition" for the favour of business. Under mutual recognition, companies doing business in a province can choose between two different standards, and follow the standards where their head office

is located if this is more advantageous to them. The TILMA therefore does not so much make two provinces out of one as it makes them compete in a regulatory race to the bottom.

In the area of labour mobility, the TILMA ironically will likely result in decreased numbers of highly skilled tradespeople. For example, the TILMA prohibits one province from requiring additional training of workers if they have already been licensed by the other province. For example, BC has deregulated a number of its building trades, yet the TILMA would automatically qualify them to work in Alberta where the requirements are higher. Workers and employers will have less incentive to invest in the training needed to develop a highly skilled workforce.

The BC government is citing a study done for it by the Conference Board of Canada to claim that the TILMA will produce \$4.8 billion in annual GDP growth-which amounts to half the value of BC's existing exports to Alberta and over 10 times previous estimates of the cost of interprovincial trade barriers. To come up with this figure, Conference Board researchers assigned a number for what they believed the TILMA's effects would be in each sector of the economy and then translated these numbers into GDP growth-with no justification provided for this methodology. The Conference Board's predictions are also largely based on applying the TILMA to the primary resource sector, even though this is an area the TILMA exempts.

After the TILMA was signed, advocates promoted it as hugely significant. But as public concerns have been raised, government officials are now tending to discount the agreement's impacts. They are pointing to the legitimate objectives clause as preserving their right to regulate for a public purpose. A review of trade cases where governments have tried to defend themselves with similar clauses reveals how little they can be relied upon. Governments not only have to prove their objectives are legitimate but also demonstrate that they have not been "unnecessarily" restrictive-something they have failed to do in almost every case.

The BC government says in its backgrounder to the TILMA that "only serious cases" would go forward. Yet BC and Alberta have created extensive grounds for TILMA cases, eliminated the screening out of frivolous cases, and given business, in the words of Alberta minister Gary Mar, "everything it asked for" in the dispute system. It would seem to be an un-businesslike approach for the two governments to sign a legally binding agreement as broad as the TILMA and then hope that it will not be used against them.