



February 8, 2007

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Mr. Larry Hubich  
Saskatchewan Federation of Labour (SFL)  
220 – 2445 13<sup>th</sup> Avenue  
REGINA SK S4P 0W1

Dear Mr. Hubich:

I am writing in response to your recent letters and e-mails to Government Members on the Alberta-British Columbia Trade, Investment and Labour Mobility Agreement (TILMA).

Attached to this letter is the information I have provided to the Government Caucus on the ten statements/questions you posed in your correspondence of December 21, 2006.

With respect to your specific question about which Saskatchewan measures would be affected in the event of provincial accession to that agreement, we are, as you know, conducting a government-wide inquiry designed to answer it. That work is on-going.

Finally, I want to reiterate that the government is committed to public and stakeholder consultations on the TILMA. In the meantime, I would be pleased to receive and review any policy or economic analysis of the TILMA conducted by the SFL.

Sincerely,

A handwritten signature in black ink, appearing to read 'Harry Van Mulligen'.

Harry Van Mulligen  
Minister of Government Relations

Attachment

cc: Premier Lorne Calvert  
Government Caucus  
Lily Stonehouse, Deputy Minister, Government Relations

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## Saskatchewan Federation of Labour: TILMA Questions

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### 1) SFL Statement/Question:

*I understand that a key difference between the Agreement on Internal Trade (AIT) and TILMA is the existence of an enforcement mechanism, and that trade policy bureaucrats in the provincial government feel that the AIT is ineffective due to a lack of compliance mechanisms. In addition, I understand that it is suggested TILMA will not force governments to change potentially offending measures.*

*Under the dispute resolution process of TILMA, however, individuals, companies, and governments would be able to challenge breeches (sic) of TILMA by the Saskatchewan Government and its entities at a dispute panel.*

*What kinds of regulations or programs of government within the Saskatchewan economy currently exist that would constitute contraventions of TILMA?*

### Response:

- The AIT contains, in the case of government-to-government disputes, two panel enforcement mechanisms: (1) moral suasion plus intergovernmental negotiation; and, (2) retaliation by complainant governments for non-compliance by defaulting governments, in the form of suspension of market access by businesses located in the latter's provinces to the equivalent economic effect of the 'economic injury' being caused by non-compliance. In contrast, the only AIT enforcement mechanism available in the case of private-to-government disputes is moral suasion.
- Both the Government of Canada and the Premiers' Council of the Federation – not just Saskatchewan – have concluded that the AIT's panel compliance mechanisms are not working as originally intended, since three-quarters of the AIT's panel rulings over the past decade have not been implemented by defaulting governments. For that reason, they have directed all of Canada's Ministers of Internal Trade to come forward with recommendations on how to strengthen those mechanisms in the AIT. The TILMA model is one of several that are currently under study by Ministers.
- Both the AIT and the TILMA permit individuals, companies and governments to access their dispute resolution mechanisms to challenge other governments' measures that allegedly contravene their provisions. However, the TILMA's dispute resolution provisions represent a significant departure from their current AIT counterparts. Unlike the AIT, for example, the TILMA permits **direct** access by private complainants to dispute panels and, in the event of government non-compliance with panel rulings, it permits those panels to assess 'monetary awards' (viewed variously as financial penalties or compensation for economic injury) against non-compliant governments that are enforceable (binding) because they have the legal status of 'orders of a court'.

- Neither the AIT nor the TILMA can *force* non-compliant governments to change their 'offending' measures, but the TILMA's provision of court-enforceable monetary awards increases the 'price' that those governments would have to pay to keep their offending measures in place.
- The TILMA's intent in providing for such monetary awards appears to be to create a significant disincentive for governments to maintain existing measures or put in place future measures that are inconsistent with the agreement's other provisions.
- One of the purposes of the provincial government's comprehensive internal examination of the TILMA – which is still underway – is to be in a position to answer the last question posed here: namely, precisely which existing Saskatchewan 'measures' (as defined in the TILMA) might constitute contraventions of its obligations and that, as a consequence, could be challenged before a dispute resolution panel if the province acceded to that agreement.

## 2) SFL Statement/Question:

*We are told by the trade bureaucrats that TILMA cannot compel a government to change its regulations – which is technically true. While there is nothing in TILMA that directly forces a government to deregulate, the dispute panel process in which governments can be fined up to \$5 million is obviously a disincentive for governments to create new regulations. TILMA does provide for significant financial compensation for complainants in lieu of said changes. How then is the government going to appropriately budget to pay compensation under panel decisions?*

### Response:

- Part IV of the TILMA sets out its dispute resolution procedures. Whether the complainant is a government or a private person (including companies as 'legal persons'), they both must go through a series of steps that are intended to resolve disputes before they reach the 'last resort' stage of imposing monetary penalties. Those steps include: consultations; mediation or other cooperative instruments; establishment of a panel; implementation of the panel's report (including negotiating settlement in some fashion); a panel compliance process (including the possible assessment of a 'monetary award' for non-compliance); and, upon request, judicial review/enforcement of any such awards.
- TILMA's provision for court-enforced monetary awards following governments' non-compliance with their commitments in the agreement appear intended to act as disincentives to legislative/regulate in ways that contravene those commitments. Therefore, governments planning to sign-on to TILMA should be prepared to live up to their commitments or be similarly prepared to deal with the financial consequences of non-compliance.
- Government Parties to the TILMA will need to budget for relatively unforeseen contingencies such as panel-assessed monetary awards in the same way that it is currently done in the case of lawsuits that are successfully prosecuted against the Crown. The probability of occurrence of TILMA-related financial penalties decreases to the extent that, on signing-on, acceding governments either bring their

existing (and future) 'measures' into full compliance with that agreement's rules and/or, in the process of negotiating accession, they secure the exemptions-from-coverage required to shield them from future challenge in the dispute resolution process.

### 3) SFL Statement/Question:

*Article 34 of TILMA indicates that there is a time limit of two years on a party to initiate dispute panel proceedings. It also indicates that only one proceeding on a subject may occur at any given time. If a measure affects multiple parties, am I to understand that it would be first come-first serve for resolution of a panel? I am concerned that there is no language in TILMA that would prevent more than one party from initiating proceedings against a particular government regulation. Although only one party can have their grievance heard at panel at a time, am I correct in assuming that there is nothing to prevent a separate party from initiating proceedings against the government on the same issue, at a later date within the two-year specified timeline? Should the Government be ordered to pay a fine by the panel, could it end up being fined twice for the same breach (sic) of TILMA?*

### Response:

- Article 34.2 of the TILMA can reasonably be interpreted to mean that, while there cannot be 'parallel' challenges of impugned government measures, both 'serial' challenges of the same measure and 'serial' awards against defaulting governments are permitted.
- Similarly, Article 1706.4 of the AIT says, "The Parties shall make every effort to avoid parallel proceedings regarding the same measure." However, unlike the TILMA, the AIT provides that, "Should multiplicity of proceedings become an issue, any Party can refer the matter to the Committee for consideration and action which could include amendment of the Rules."
- If acceding governments prefer the AIT model in this respect, they can attempt to secure (in their accession negotiations) an amendment to the TILMA to include AIT-like language limiting Parties exposure to 'serial' challenges and/or awards regarding the same measure.
- Even under existing TILMA rules, Parties can limit their liability to 'serial' challenges or awards either through negotiated resolution or by removing or revising the impugned measure to make it consistent with TILMA's obligations.

### 4) SFL Statement/Question:

*There are some exemptions in TILMA as well as potential "legitimate objectives". However, it is my understanding that in order to demonstrate a legitimate objectives reasoning for a decision, a Government or entity needs to demonstrate that the same objective could not be accomplished with a less trade restrictive measure. Can you ensure that each relevant Government department and entity has been educated on the role of legitimate objectives and how this language will impact their operations, legislation, policies and regulations?*

## Response:

- A standing Interdepartmental Trade Policy Committee of senior officials regularly consults on the meaning and implications of trade policy provisions – whether in the TILMA, the AIT or international agreements entered into by Canada. That Committee, which also includes the Crown Investments Corporation (CIC) and the commercial Crowns, is also involved in developing Saskatchewan's negotiating objectives in this area.
- For 'government entities' to which the provincial government has delegated legislative and/or regulatory authority, the normal practice is for lead-departments for such entities in their respective sectors to consult with them, with technical assistance from the Trade Policy Branch (GR) and trade counsel in Justice.
- Because the TILMA, unlike the AIT, is meant to cover all government measures within the scope of coverage of the agreement that are not expressly exempted, the government's challenge in ensuring the appropriate consultation and information-exchange on the TILMA's provisions, including those related to 'legitimate objectives', is substantial and essential.

## 5) SFL Statement/Question:

*Local hiring provisions, local or union preference procurement, and regional economic assistance are all potential violations of TILMA. Can you confirm that the provincial government, the municipalities, local school boards, health regions, or universities, for example, will never wish to hire in favour of local interests? TILMA is being described as an agreement to increase labour mobility, but can we really say that our local governments should not be able to determine at some point in the future whether or not they wish to hire locally? Do you believe that it is in the best interest of our local economies to potentially force governing bodies to hire from outside the province simply because we cannot favour Saskatchewan-based workers or companies? How does this impact the Province's efforts to recruit and maintain hard-to-retain positions such as the Registered Nurse Bursary program?*

## Response:

- Labour mobility is a Charter right of individuals – under the Charter, every Canadian citizen or permanent resident has the right: (a) to move to and take up residence in any province; and, (b) to pursue the gaining of a livelihood in any province.
- These rights are subject to certain provincial regulatory limitations, including those designed to favour local people who are 'socially or economically disadvantaged', but those limitations cannot discriminate among persons **primarily** on the basis of current or previous residence. Differing provincial regulations regarding employment criteria in certain industries and/or occupations are permitted, even though they may constitute practical barriers to personal labour mobility, if they apply to both residents and non-residents alike.

- Article 13 of the TILMA addresses labour mobility. Its intent is to promote 'mutual recognition' of occupational qualification and certification criteria amongst the Parties. It does not prohibit Parties from imposing local licensing and/or registration requirements on non-residents, and it allows Parties to continue to impose otherwise TILMA-inconsistent qualification and certification criteria if they are necessary to achieve a 'legitimate objective', relate to differences in permitted scope-of-practice or apply to occupations not regulated by other Parties.
- In the latter context, the Registered Nurse bursary program would appear to be excluded from TILMA's coverage by the 'health services' exclusion, although that would need to be clarified in any accession negotiations.
- TILMA does, however, prescribe preferential local hiring (i.e. procurement of labour services) by covered government entities under its non-discrimination (Article 4) and procurement provisions (Article 14). But those provisions are also limited in application by the general and specific procurement exclusions listed in Part V of that agreement (which include Aboriginal people and health and social services).
- It is not yet clear if/how preferential local hiring by Crown corporations or the various MASH-sector entities will be addressed under the TILMA since that issue (amongst others) will be the subject of future negotiations between April 1, 2007 and April 1, 2009. It should be recalled, though, that the mandate of those negotiations includes identifying "...any required special provisions, exclusions and transitional provisions".
- Finally, nothing in TILMA prevents those workers from participating in unionized (or non-unionized) occupations/trades in any of the Parties' provinces.

**6) SFL Statement/Question:**

*What would the precise impact of TILMA be on Government entities such as municipalities, school boards, health regions, and post-secondary institutions? Are these entities aware of how TILMA would impact their abilities to govern and regulate their respective areas?*

**Response:**

- TILMA does not yet cover these specific government entities – the agreement's 'precise impact' on them is to be the subject of 'transitional' negotiations ending in April 2009.

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\* TILMA's list of 'legitimate objectives' includes: public security and safety; public order; protection of human, animal or plant life or health; protection of the environment; conservation and prevention of waste of non-renewable or exhaustible resources; consumer protection; protection of the health, safety and well-being of workers; provision of social services and health services within the territory of a Party; affirmative action programs for disadvantaged groups; or prevention or relief of critical shortages of goods essential to a Party. It does not include protection or favouring of the production of an enterprise of a Party.

- Between April 2007 and April 2009, Article 9.4 of the TILMA would effectively 'freeze' the ability of such entities to legislate/regulate in ways that would make any of their existing measures less consistent with the rest of the TILMA's provisions until such time as "...any required special provisions, exclusions and transitional measures" affecting them are agreed.
- In these circumstances, governments wishing to accede to the TILMA would want to ensure that all prospectively covered government entities are fully aware of all of the implications of accession.

## 7) SFL Statement/Question:

*TILMA is signed from an economic perspective and it is concerned only with the issues and matters contained within. If there is a conflict between the purely economic goals of TILMA and a human rights issue that is not covered by the narrow scope of legitimate objectives, how would we guarantee that the human rights perspective of a matter is protected? For example, TILMA exempts affirmative action, but Canada does not use affirmative action, but rather employment equity. Are employment equity programs protected under TILMA? What about Representative Workforce Initiatives, are they protected?*

## Response:

- The purview of the TILMA is explicitly confined to include only such 'economic' issues as trade, investment and labour mobility. Human rights issues as such are typically not referenced in agreements of this kind, but Parties to them are not precluded from doing so in some fashion if they so wish.
- Nothing in such agreements prevents the pursuit of human rights claims through the formal channels created by governments specifically for that purpose. Trade agreements are acts of the Executive – the Crown. The Crown is bound by the various Human Rights Codes in each jurisdiction and cannot contract out of those obligations. For example, *The Saskatchewan Human Rights Code* provides that:
 

44. Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.
- Therefore, in the event of fundamental conflict, human rights – including those equality rights in S. 15 of the Charter – would 'trump' any provisions in any trade agreement, including TILMA.
- Regarding employment equity and representative workforce initiatives, the TILMA as currently formulated does not refer to them explicitly. It does, however, explicitly exclude 'social policy' (along with a non-exhaustive list of examples, several of them labour-related). More definitive protection of such referenced initiatives could be secured by governments wishing to negotiate accession to the TILMA by securing Parties' agreement to include explicit references to them in the agreement's 'exclusions' list.

## 8) SFL Statement/Question:

*Given the recent ruling of the Ontario Court of Appeal on the constitutionality of NAFTA investor-state litigation, and given the comprehensive dispute settlement mechanism in TILMA, what do you think will happen if a judicial decision conflicts with a TILMA panel decision? Can a dispute panel, whose directions are binding, overrule a judicial decision?*

### Response:

- In the above-referenced case, the Appeal Court rejected the claim of the appellants (i.e. Council of Canadians, et al.) that the NAFTA's provision of court-enforced monetary awards in the case of investor-State disputes is unconstitutional.
- The Court ruled that trade tribunals are 'creatures' of trade agreements themselves, and they have only the authority given to them in those agreements. That is, trade tribunals only look at whether the provisions of trade agreements have been breached, and they assess monetary awards only in relation to the breach of those provisions. In essence, the Appeal Court ruled that, since courts and trade tribunals are quite different entities, with separate and distinct functions and jurisdictions, the matters dealt with in trade tribunals – including TILMA panels – do not 'usurp' the constitutional jurisdiction of the courts.
- In the unlikely event that a trade tribunal and a court were asked to rule on the same issue, the law as applied by the court would prevail *but only if it was a matter that fell within the court's jurisdiction.*

## 9) SFL Statement/Question:

*What would happen to region-specific initiatives such as the Northern Development Fund under TILMA rules and harmonization processes?*

### Response:

- Article 12 (Business Subsidies) of the TILMA can reasonably be interpreted to allow for the provision of generally available programs such as the Northern Development Fund. The TILMA's definition of 'business subsidy' does not include generally available infrastructure, assistance to provide generally available infrastructure or subsidies defined as 'non-actionable' (i.e. immune from challenge) under Article 8 of the World Trade Organization (WTO) *Agreement on Subsidies and Countervailing Measures (ASCM)*, which includes, *inter alia*, assistance to disadvantaged regions.
- The TILMA's provisions for exclusion of 'regional economic development' measures appear, however, to be more restrictive than the analogous WTO's provisions cited above, which are also incorporated into the TILMA by reference. If true, those inconsistencies could create dilemmas of interpretation for future dispute panels. In such circumstances, it would be prudent for acceding governments to negotiate, as conditions of accession, either or both the elimination of any such inconsistencies and/or specific exemptions from coverage for certain programs such as Saskatchewan's Northern Development Fund.

## 10)SFL Statement/Question:

*My final question is the most critical to my constituents, the workers of Saskatchewan. TILMA exempts labour standards and codes, minimum wages and workers' compensation. However, would the rights of Saskatchewan citizens under the Trade Union Act be preserved since unionization rights have not been exempted under TILMA? Saskatchewan workers enjoy a superior standard of rights than do their Alberta and British Columbia counterparts. I see no language in TILMA to protect the rights of unionized or unionizing workers and in fact, I see the application of Articles 3 and 5 would lead to the demise of these superior standards of rights.*

### Response:

- The TILMA's provisions include:
  - (a) in Part 1 (Operating Principles), a commitment to "promote...high levels of...labour standards";
  - (b) in Part II (Article 6 – Legitimate Objectives – Definitions), a provision allowing Parties to legislate/regulate in ways that are otherwise inconsistent with TILMA's rules if their primary objectives are the "protection of the health, safety and well-being of workers"; and,
  - (c) in Part V (General Exceptions), exclusion of "social policy" from its coverage.
- Although unionization rights are not explicitly exempted in the existing TILMA, these three TILMA provisions, taken together, make it legitimate for governments wishing to accede to that agreement, and that wish to obtain more clarity in this respect, to negotiate explicit and specific exclusions for measures like Saskatchewan's *Trade Union Act*.