



Asking for Trouble

The Trade, Investment and Labour Mobility Agreement

By Ellen Gould

In April 2006, the Alberta and BC governments signed a far-reaching agreement – the Trade, Investment and Labour Mobility Agreement (TILMA). Most of the agreement is scheduled to come into effect on April 1, 2007, with additional areas covered by April 1, 2009. TILMA’s purpose, according to the BC government, is “breaking down all of the economic barriers between the two provinces.”

TILMA raises some major questions about democratic governance, both in terms of how the deal was struck, and in potential impacts of the agreement itself on democratic decision-making. In addition to its clear constraints on public policy, TILMA contains many provisions that are open to interpretation. The true meaning of many of these clauses will not be fully understood until the limits are tested by a dispute panel process that enables the parties to the agreement, individuals, and corporations to launch complaints against governments, and to be awarded compensation for violations.

This paper compares the legal language of TILMA to the existing structure of regulations and public enterprises, and finds numerous troubling examples where democratic decision-making could be second-guessed, or over-ruled, by dispute panels. Based on the analysis in this paper, it is recommended that TILMA not be implemented in BC and Alberta, and that other provinces not sign onto the agreement.

TILMA Privileges Private Sector Investment Over Public Interest Objectives

The BC and Alberta governments have chosen to subject all areas within provincial and local government jurisdiction to TILMA and only allow exceptions that are explicitly listed. The “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.

TILMA requires governments not to “restrict” or “impair” trade, investment or labour mobility. Yet, 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.

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.

All provincial governmental entities are covered by TILMA, including municipal governments, school and health boards, Crown corporations, and agencies.

TILMA restricts the use of subsidies and procurement policies that promote local economic development.

TILMA Creates a Deregulatory Framework for Public Interest Regulation

One of TILMA's purposes is to "reconcile" existing and future standards and regulations. TILMA's provisions dealing with regulations are an example of an overall trend to cast regulatory differences as barriers to trade and investment. But TILMA goes beyond addressing "unnecessary paper burden." Once existing regulations are reconciled, no new ones can be established if they restrict or impair investment; consequently, BC and Alberta regulatory policies will tend to be permanently frozen unless a future government withdraws from the agreement.

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.

TILMA's Exemptions and Allowances Are Very Narrow

When it initially enters into force, TILMA will contain some exceptions, including for measures related to water, aboriginal peoples, energy, forestry, and mining. These exceptions are to be reviewed annually "with a view to reducing their scope." Health and education are not specifically exempted, and are among the areas – agriculture, tourism, parks, heritage conservation, consumer protection, land use planning – where the agreement could have major negative impacts.

In a limited number of areas, governments are allowed to adopt or maintain measures that deviate from TILMA rules, but only if they can pass a three-part test: the measure is to achieve a legitimate objective; the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and, the measure is not a disguised restriction to trade, investment or labour mobility.

The list of "legitimate objectives" has significant omissions, including protection of heritage sites, promotion of culture, provision of education, and expansion of the supply of affordable housing. It does not include most of the objectives municipalities pursue to enhance the lives of their residents – e.g., land use planning to keep noisy or high traffic uses out of residential neighbourhoods, green space requirements to provide recreational areas for residents, building height restrictions and sign bylaws to preserve scenic views. The consequences of opening health, education, and social services measures to TILMA challenges are significant.

Some examples of regulations that could be ruled to be TILMA violations if they “impair or restrict” investment:

- Penalties such as fines that provinces may impose to prevent hospitals from allowing individuals to pay in order to be put at the head of waiting lists for surgery or diagnostic tests;
- Restrictions the BC government may consider necessary to regulate the operation of private, for-profit surgery clinics;
- More stringent standards that the BC or Alberta government may impose on private care homes; and
- Differences in BC and Alberta regulation of private schools.

While some environmental measures are exempted from TILMA, significant areas are covered by the agreement:

- Designation and protection of ecological reserves;
- Environmental assessments of projects like ski resorts or chemical plants;
- Regulation of air pollution produced by manufacturing plants and automobiles, such as BC's Air Care program;
- Restrictions on particular products like ozone depleting substances or pesticides; and
- Regulation of recreation and tourism to protect ecologically sensitive areas.

TILMA’s Dispute Process Will Impact Public Policy

Private parties can receive up to \$5 million in compensation over any one violation of TILMA. But TILMA does not limit the number of complaints that can be brought forward against any specific government measure. Thus the potential cost to governments of violating TILMA is much higher than \$5 million.

TILMA’s dispute process will have an impact on public policy development in two fundamental ways: through panel rulings that fine governments up to \$5 million if they are ruled to be in violation of the agreement, and through a “chill” effect whereby governments eliminate measures or decline to introduce new ones to avoid TILMA challenges.

Among the grounds TILMA provides for governments to have to pay monetary awards to private complainants are:

- Government measures that restrict or impair trade, investment or labour mobility;
- Lack of reconciliation of existing regulations and standards that restrict or impair trade, investment or labour mobility;
- Establishment of new regulations and standards that restrict or impair trade, investment or labour mobility;
- Business subsidies that distort investment decisions; and
- Treatment less favourable than the best treatment provided to a province’s own persons, services, and investors or investments in like circumstances.

TILMA Is an Obstacle to Addressing Real Concerns

TILMA is a radical solution to a problem Canadians have not identified, as inter-provincial barriers do not figure anywhere in the list of their concerns. This may be one reason why the public was not consulted in either Alberta or BC before TILMA was signed.

Within the federal system, provinces have very important powers to exercise on behalf of their citizens. TILMA constrains those powers by making commercial interests the paramount consideration in policy making. TILMA coerces governments to disregard demands for higher standards even if these are expressed by the majority of citizens. The agreement restricts the objectives that governments can pursue, and limits the means that can be used to achieve objectives. This erases not only borders, but also the powers of government.

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