

Understanding TILMA and the threat to Democracy

The B.C. government has touted TILMA as an important means to “removing barriers to interprovincial trade, investment and labour mobility.” However, the economic literature addressing TILMA reveals a strikingly different picture. **By Alex Hemingway**

Having held no public consultations, and preceded by only a few scant press releases, on April 28, 2006, the governments of British Columbia and Alberta announced the signing of a sweeping new accord: the Trade, Investment and Labour Mobility Agreement (TILMA).¹ Though promised as a boon to the economy, a look at the facts leaves the pact seeming more like a cruel April Fools’ joke.

Slippery economics

In a scathing analysis, economists Marc Lee and Erin Weir deconstruct the “bizarre methodology” of a government-sponsored Conference Board report, which outlines TILMA’s alleged economic benefits. Lee and Weir also point out a \$2.4 billion arithmetic error in the Conference Board study, along with the report’s wholesale inclusion of industries exempt from TILMA.²

The Conference Board’s estimates and other government estimates of interprovincial economic barriers appear to be 20 to 80 times higher than those in the scholarly economic

literature. While the Conference Board report claims interprovincial barriers cost the provincial GDP (a measure of the overall size of the economy) an astounding 3.8% annually, the government later downgraded their estimate to 1%.³ However, independent analyses from an array of economists, including the former head of the Canadian Economics Association, go much further, suggesting TILMA “will have almost no effect on interprovincial trade flows” and emphasizing that “interprovincial trade barriers are already very low,” likely less than 0.05% of the GDP.⁴

In fact, even before the introduction of the barrier-reducing Agreement on Internal Trade (AIT) in 1995, a federal government commission acknowledged, “the direct costs of existing interprovincial trade barriers appear to be small” and “not sufficient to justify a call for major reform.”⁵

Since Canada already has the AIT, and interprovincial barriers are “very low,” the question arises: does TILMA have another purpose?

Reducing our sovereignty

TILMA's sweeping scope is perhaps the agreement's most startling characteristic. Under its "No Obstacles" clause, TILMA bars any government measures that "operate to restrict or impair" investment. As analysts have hastened to point out, by their very nature many government measures, such as administering universal public health care, restrict or impair investment.⁶

TILMA is considerably broader in scope than the AIT, as well as the North American Free Trade Agreement (NAFTA), and diminishes even the paltry social protections these prior agreements provide.⁷

Indeed, health care programs are only the tip of the iceberg. "Measures" are defined in TILMA to include "any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure."⁸ The "No Obstacles" clause thus entails extraordinary restrictions on the powers of democratic government. Even prominent supporters of the agreement, such as economist

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Eric Howe, have acknowledged, "Signing TILMA would reduce our sovereignty."⁹

Sweeping rights for investors

Taking a page from NAFTA's most controversial provisions, TILMA allows corporations to seek millions of dollars in damages from governments for violations of the agreement, including measures that "restrict or impair investment." A trade panel, unaccountable to the public, is empowered to rule and decide damages in such disputes.¹⁰

Consider that under NAFTA's procedures (which are actually more protective of government measures than TILMA's), a US chemical company was able to launch a dispute against Canada for banning the gasoline additive MMT, a suspected neurotoxin. The dispute led to the ban's repeal, and the federal government ▶

1 "About TILMA – FAQs." Official TILMA website. <http://www.tilma.ca>

2 i) Lee and Weir, 2007. The myth of interprovincial trade barriers and TILMA's alleged economic benefits. ii) Conference Board of Canada, 2005. An Impact Assessment of the BC/Alberta Trade, Investment and Labour Mobility Agreement.

3 i) Conference Board, 2005. ii) "Twelve Common Misconceptions." Official TILMA website.

4 i) Copeland, 1998. Interprovincial barriers to trade: an updated review of the evidence. ii) Lee and Weir, 2007. iii) Helliwell, 2007. Review of Conference Board of Canada's report: assessing the impact of Saskatchewan joining TILMA. iv) Government of Canada, 1985. Report of the Royal Commission on the Economic Union and Development Prospects for Canada: Volume Three, as cited in Lee and Weir, 2007. v) Canadian Labour Congress, 2007. Submission to the Standing Committee on the Economy, Saskatchewan Legislative Assembly on TILMA's supposed economic benefits.

5 Government of Canada, 1985.

6 i) Government of British Columbia, 2006. Trade, Investment and Labour Mobility Agreement between British Columbia and Alberta.

(Article 3). ii) Shrybman, 2007. An assessment of the Trade, Investment and Labour Mobility Agreement (TILMA) between the Provinces of British Columbia and Alberta. iii) Gould, 2007. Asking for trouble: the Trade, Investment and Labour Mobility Agreement.

7 i) Shrybman, 2007. ii) Gould, 2007.

8 Government of British Columbia, 2006. (Part VII).

9 Howe, 2007. The Economic Impact of the Trade, Investment and Labour Mobility Agreement (TILMA) on Saskatchewan.

10 Government of British Columbia, 2006. (Part IV).

- ▶ paid \$13 million in damages to the plaintiff, Ethyl Corporation. Another \$5 million NAFTA award centered on Canadian toxic waste policy, and there are half a dozen additional cases against the federal government launched under NAFTA, which are currently active.¹¹

Moreover, unlike the AIT and NAFTA, TILMA includes no screening process for frivolous claims. Complaints can be launched over “any matter regarding the interpretation or application of [the] Agreement.” Furthermore, TILMA does nothing to prevent claimants from repeating the same complaint if the offending government measures persist.¹²

Not only are governments and other public institutions subject to massive fines for violations of TILMA, but also the agreement is expected to create “a ‘chill’ effect whereby governments eliminate measures or decline to introduce new ones to avoid TILMA challenges.”¹³

Exceptions, transitions and “legitimate objectives”

While TILMA includes a list of exceptions from the agreement, it’s most notable for its omissions. Exceptions include a few aspects of forestry and fishery policy, water resources, and some social policy areas, among others. Astonishingly, exceptions do not cover, for example, health care, education or many environmental protection measures.¹⁴

A number of areas fall under the category of “transitional measures,” which will be fully

subject to the provisions of TILMA on April 1, 2009, unless the provincial government explicitly intervenes to exempt them. These areas include, among others, “measures of or relating to Crown corporations, government-owned commercial enterprises, municipalities, municipal organizations, school boards, and publicly-funded academic, health and social service entities.” Moreover, even during the transitional period, these institutions are forbidden from “amending or renewing” measures “that would decrease consistency with [TILMA].”¹⁵

The only other way to avoid TILMA’s sweeping prohibition against measures that “operate to restrict or impair investment” is for governments and other public institutions to demonstrate that a given measure is meant to achieve a “legitimate objective,” as defined by the agreement.¹⁶

However, even if a measure qualifies as a legitimate objective, an additional onus is on government to prove that the measure is not more restrictive to investment than “necessary” and is not a “disguised restriction” to investment.¹⁷ Alarming, trade tribunals have ruled that this onus entails demonstrating that “there is no other option capable of achieving the objectives that would be less restrictive of trade, investment and labour mobility.” Thus, governments must prove a negative, which is a very difficult task; so difficult, in fact, that governments have failed in every attempt to

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prove “necessity” under the AIT.¹⁸

So, although protecting the environment and providing health and social services are listed as “legitimate objectives,” they may be extremely difficult to uphold under TILMA because of the additional “necessity” requirement. Remarkably, the agreement ultimately leaves such crucial decisions to an unelected, unaccountable trade panel.

Broad and deep implications

The scope of TILMA is extremely broad and its provisions currently or will soon hold force over an array of public entities, from school boards and hospitals to municipalities and Crown corporations. The implications are potentially far-reaching, and affected institutions, municipalities, for example, have publicly expressed their concerns.¹⁹

Health care and education, however,

represent two particularly important public services that could face serious challenges under TILMA. Unless the government moves to exempt them, health care and education will be fully subject to the agreement in 2009.

Our universal public health care system both prohibits private care for medically necessary procedures and uses public money to fund individuals’ health services, measures that arguably restrict and impair private investment in health care. Indeed, in the words of one legal opinion, “Virtually every element [of] provincial health-care frameworks curtail investment, and many affect interprovincial trade in services and labour mobility.” Consequently, under TILMA, private health care companies could seek millions of dollars in damages and push government policy towards expanding for-profit health care.²⁰ ▶

11 Sinclair, 2007. NAFTA Chapter 11 Investor-State Disputes.

12 i) Government of British Columbia, 2006. (Article 34). ii) Shrybman, 2007. iii) Gould, 2007.

13 Gould, 2007.

14 i) Government of British Columbia, 2006. (Part V). ii) Shrybman, 2007. iii) Gould, 2007.

15 Government of British Columbia, 2006. (Article 9 and Part VI).

16 Ibid. (Article 6).

17 Ibid.

18 i) Shrybman, 2007. ii) Gould, 2007.

19 e.g., City of Regina, 2007. Implications of TILMA on city operations.

20 i) Shrybman, 2007. ii) Gould, 2007.

▶ Similarly, in the realm of post-secondary education, private institutions could claim that the government funding of public universities and colleges clearly puts private institutions at a disadvantage, impairing investments in these entities. Such complaints under TILMA could cost the government millions and ultimately threaten the public education system.

Furthermore, the “procurement” provisions of TILMA require institutions to “post tender notices for all covered procurement” over a certain price threshold. In other words, large purchases must be made through an open bidding process, and, in addition, “discrimination” between vendors is prohibited. This effectively undercuts ethical purchasing and “buy-local” policies, which differentiate between vendors based on social justice concerns and geography.

While these examples provide a small glimpse of the problems, several publicly available studies and legal opinions examine a much broader range of other significant regulatory and policy implications of TILMA, and they are worth seeking out.²²

Conclusions

Consider that there are no tariffs on trade, nor customs inspections, between Canadian provinces, and all citizens are free to live and work anywhere in the country. Indeed, evidence of significant interprovincial economic barriers is simply absent, which brings into question the reasoning behind TILMA. Bearing in mind the assortment of threats posed to democratic

governance, there is ample reason to abandon TILMA as soon as possible.

Nonetheless, there may be a few worthwhile ideas to be gleaned from the arguments of TILMA proponents. Regulatory differences do exist between provinces, and some may be unnecessary. For example, professional requirements in certain fields, such as social work, vary between provinces, sometimes requiring recertification when an individual moves to work in a new province. Need this be the case? Furthermore, one might argue for harmonizing certain business regulations, easing the burden of paperwork involved in cross-provincial operations.

However, as one economic analysis notes, “In fields where provincial governments wish to harmonize their regulations, they can do so by jointly adopting common standards. This process hardly requires a sweeping agreement like TILMA... [which] would achieve harmonization by defining regulatory differences as trade barriers and pushing provincial standards down to the lowest common denominator.”²³

A simple review of the evidence unmasks TILMA as a seriously destructive answer to a largely imagined problem.

²¹ University of Saskatchewan Faculty Association, 2007. The Trade, Investment and Labour Mobility Agreement: what does it mean for post-secondary education?

²² e.g., i) Shrybman, 2007. ii) Gould, 2007. iii) University of Saskatchewan Faculty Association, 2007. iv) City of Regina, 2007.

²³ Canadian Labour Congress, 2007.