

Facing the Facts about TILMA

The Trade, Investment and Labour Mobility Agreement (TILMA) was signed by the Alberta and B.C. governments without public consultation. Now that citizens have been able to see the agreement, they have identified it as a serious threat to democracy and the ability to govern in the public interest. Opposition has been fierce and proponents of TILMA are on the defensive. The B.C. government even released a “Fact or Fiction” backgrounder this January to try to diffuse all the criticism it is getting.

The following rebuttal is designed to help you respond to proponents of TILMA who claim we are ignorant of its details. As you’ll see, the government’s arguments hold no water. The greatest strength of the case against TILMA is that it is entirely based on the wording of the agreement itself.

Fiction: “B.C. and Alberta have reserved the right to supersede the Agreement when they are pursuing a legitimate objective.”

— *B.C. Economic Development Minister Colin Hansen in a November 28, 2006 email to a constituent*

Fact: Nothing in TILMA allows governments to supersede the agreement just because they are pursuing legitimate objectives. Article 6 of TILMA – Legitimate Objectives – allows governments to justify their measures *only* if they can demonstrate to the satisfaction of a dispute panel that: 1) they are pursuing one of the few objectives TILMA defines as legitimate *and*; 2) their measure is not more restrictive than “necessary” to achieve that objective *and*; 3) they are not engaged “in a disguised restriction on trade, investment, or labour mobility.”

Article 6 of TILMA is crystal clear that all three requirements have to be met for governments to justify their measures. In other words, it’s not enough to claim the

pursuit of legitimate objectives, as Hansen suggests. What B.C. and Alberta have created in TILMA’s Article 6 is a next-to-useless defence against challenges rather than a “right to supersede the Agreement.”

The track record for governments attempting to convince trade panels that their measures are “necessary” is resoundingly negative. In the six cases brought to similar panels under the existing Agreement on Internal Trade, when governments have tried to prove what they were doing was necessary, those governments *have lost every time*. Dispute panels have ruled that governments must demonstrate that there was nothing else they could have done to meet their objectives that would have been less restrictive – an almost impossible task.

Fiction: “TILMA does not require harmonization of regulations. Nowhere in the Agreement does it say this.”

— *B.C. Ministry of Economic Development backgrounder on TILMA*

Fact: Article 5.1 of TILMA requires governments to “mutually recognize or otherwise reconcile their existing standards and regulations.” In determining the meaning of “to reconcile,” dispute panels could refer to the Concise Oxford Dictionary where the term is defined as “to harmonize.” Dispute panels could also try to interpret the intent of the negotiators. The Conference Board of Canada study, which the B.C. government frequently cites as proof of the economic benefits of TILMA, talks of the agreement achieving “harmonization” and “deregulation” among the two provinces.

In fact, TILMA’s requirement that governments “mutually recognize” each others’ existing standards and regulations is an even greater threat to the public good than harmonization. Federal Industry Minister Maxime

Bernier explained to a Senate banking committee that TILMA's mutual recognition rules will put regulators in competition with each other to attract business. With mutual recognition, businesses will have the option of choosing which province's regulations they choose to operate under. This is great for the corporate bottom line, because it allows businesses to choose the weaker regulation every time, but from an environmental, public health or consumer protection perspective it means a race to the bottom.

Fiction: "In some areas, the parties have agreed to reconcile or mutually recognize their standards. However, in some areas, Alberta's standards are stricter. In other areas, British Columbia's are stricter. The TILMA does not dictate that only the 'lower' standard will be adopted by both governments."

— B.C. Ministry of Economic Development
backgrounder on TILMA

Fact: TILMA enables private investors to sue governments for up to \$5-million if existing regulations "restrict or impair investment" (Article 3); if regulations are not "reconciled" between the provinces (Article 5.1); and if new regulations are introduced that "restrict or impair investment" (Article 5.3). Since someone is more likely to sue because regulations are too high than if they are too low, TILMA will inevitably result in lower standards.

Article 13.2 of TILMA obligates governments to recognize the qualifications of workers certified by another province without requiring any "additional training or examinations." This means that a province *must* accept that a worker is certified even if his or her certification was based on lower standards in another province. A province is *prohibited* from imposing training and examination requirements on an out-of-province worker whose qualifications are less than what are required in his or her new province. A government will be unlikely to continue to impose heavier certification requirements on its own residents than it

applies to residents from another province. TILMA will effectively push provinces to adopt the lower standard across the board.

Fiction: "If bylaws apply equally to all contractors, there is no discrimination and no complaint under TILMA."

— B.C. Ministry of Economic Development
backgrounder on TILMA

Fact: Articles 4 (Non-discrimination) and 14 (Procurement) of TILMA state that governments cannot provide favourable treatment to local businesses or persons. But TILMA imposes other restrictions on governments – even when they are acting in a totally non-discriminatory way.

Article 3, for example, states that governments cannot "restrict or impair trade... or investment or labour mobility between the Parties." Keep in mind that TILMA's definition of "investment" doesn't just cover financial assets, but also "the establishment, acquisition or expansion of an enterprise." So local government bylaws that limit residential or commercial development violate Article 3 because they restrict the establishment or expansion of a real estate enterprise, even though these bylaws do not discriminate between local and non-local businesses.

Fiction: "TILMA only restricts the use of business subsidies in certain narrow circumstances."

— B.C. Ministry of Economic Development
backgrounder on TILMA

Fact: Article 12.1 of TILMA states that governments "shall not directly or indirectly provide business subsidies" if these subsidies "distort investment decisions." Subsidies are defined not only as grants but also as tax waivers and loans. In direct contrast with what B.C. is claiming, TILMA does not ban business subsidies only in "narrow circumstances" but in virtually *all* circumstances beyond the few specific exceptions listed in

the agreement. As interventions in the free market, government subsidies for regional development, downtown revitalization, or to foster new industries always “distort investment decisions” and are therefore prohibited under TILMA.

Fiction: “No more than one dispute may be lodged on what is essentially the same complaint.”

— *B.C. Ministry of Economic Development
backgrounder on TILMA*

Fact: Article 34.2 states that a person may not challenge “any measure that is already the subject of proceedings.” But there is nothing in the agreement to stop a person filing the same complaint against the same government measure once those proceedings are over. Contrary to what the B.C. government is claiming, this means that repeated complaints against the same government measure are permitted under TILMA. This would put enormous pressure on governments to eliminate those measures or face repeated claims of up to \$5-million in compensation for the same government program or regulation.

Fiction: “Only very serious complaints would go forward through the formal, costly dispute resolution process and would involve either discriminatory measures or measures intended to protect specific commercial interests.”

— *B.C. Ministry of Economic Development
backgrounder on TILMA*

Fact: TILMA has given businesses, investors and other individuals broader, more far-reaching grounds for challenging government programs and regulations than any existing free trade and investment agreement in Canada. Article 3, called “No Obstacles,” clearly states that governments violate the agreement whenever they “restrict or impair trade ... or investment or

labour mobility.” Governments can be acting in a totally non-discriminatory way, within their constitutional authority, lawfully under domestic law, in pursuit of legitimate objectives, and still be in violation of TILMA.

TILMA has eliminated critical safeguards in the existing Agreement on Internal Trade on which it was based. For example, the Agreement on Internal Trade has a screening process that prevents complaints that are “frivolous or vexatious” or intended “to harass.” It also prevents complaints that would lead to the downward harmonization of environmental and consumer protection regulations.

By eliminating these key safeguards, broadening the grounds for complaints and giving complainants the potential to win \$5-million in compensation, the B.C. and Alberta governments have created a litigant’s dream. Gary Mar, Alberta’s minister responsible for TILMA, told a business audience in Richmond, B.C. that, “The TILMA dispute resolution is accessible, cooperative, consultative and enforceable, everything Canadian business asked for.”

Having given business everything they asked for in TILMA’s dispute process, it is naïve to think they will not use it to their advantage.