

## **Trade, Investment and Labour Mobility Agreement between British Columbia and Alberta**

[MICHAEL LAFFIN](#), [MARIA MORELLATO](#) AND [ROY MILLEN](#)

The Alberta and British Columbia governments entered into the Trade, Investment and Labour Mobility Agreement (TILMA) in April 2006. The authority for these provinces to enter into this agreement is provided by Article 1800 of the Agreement on Internal Trade (AIT), which was negotiated by Canada's federal, provincial and territorial governments and came into force on July 1, 1995. AIT permits its signatories to enter into further arrangements to liberalize trade, investment and labour mobility beyond what is required by the AIT. TILMA was designed to further break down existing barriers to inter-provincial trade and provide businesses and workers in both provinces access to a larger range of opportunities across all sectors of the economy and, presumably, reduce costs to businesses and individuals associated with such barriers. The Alberta and British Columbia governments hope to achieve this goal by streamlining business registration and reporting requirements, enhancing labour mobility, providing non-discriminatory access to government procurement and creating a clear and enforceable dispute resolution mechanism for non-compliance with TILMA. It is a comprehensive agreement that applies to all government measures including legislation, regulations, standards, policies, procedures, and guidelines affecting trade, investment and labour mobility.

TILMA recently came into force on April 1, 2007 and will be fully implemented by the provinces on April 1, 2009 following its two-year transitional phase. During the transitional phase the governments will have the opportunity to bring their measures into conformity with the provisions of TILMA and negotiate to extend the agreement into additional areas. Once TILMA is fully implemented, it will apply to local governments, Crown corporations, academic institutions, school boards, health authorities and financial services.

### **GENERAL FRAMEWORK OF TILMA**

#### **A. General Obligations**

Part II(B) of TILMA sets out the general obligations of the Alberta and British Columbia governments. Both provinces are expected to ensure the measures they adopt do not restrict or impair trade, investment and labour mobility between the provinces. In essence, governments are expected not to discriminate between similar goods, persons, services and investors or investments. The treatment provided by each province is expected to be no less favourable than that given to those situated within its territory or to other non-parties. The provinces are expected to set provincial standards and regulations in a manner that do not restrict or impair trade or investment, or provide subsidies that influence investment, and to reconcile registration and reporting requirements between the provinces. Parties also have an obligation to ensure that all measures covered by TILMA are transparent and readily available for review. These measures endeavour to reduce barriers to efficient and effective competition.

#### **B. Special Provisions**

In addition to these general objectives, TILMA sets out a number of special provisions that have been incorporated for certain areas of the economy in Part II(C). Special provisions elaborate on investment, business subsidies, labour mobility, government procurement, energy, and transportation. Despite

TILMA containing special provisions for certain sectors, it is not intended to affect the overall depth of TILMA's coverage in any other area, since special provisions are only intended to augment and further elaborate upon the general obligations where the parties deemed it advisable. TILMA has been structured so that each of the general obligations and special provisions will apply to all areas of the Alberta and British Columbia economies, unless expressly excepted within the Agreement.

In the area of investment, the special provisions specify that parties will work together to reconcile business registration and reporting requirements such that meeting the requirements of one province will deem them to have met the requirements of the other. With respect to business subsidies, the special provisions will prohibit governments from providing a business subsidy that gives a competitive advantage, induces relocation or distorts investment decisions, unless the subsidy is offered to offset a subsidy that is being provided by a non-party to TILMA. Special provisions relating to labour mobility will require governments to no longer discriminate in employment on the basis of residency and allow workers certified in one province to be recognized as qualified to practice in the other, unless excepted out of the Agreement. Also, while non-discrimination in government procurement is not new, as part of the special provisions, TILMA puts a lower price threshold in place. Subject to certain express exceptions, the government procurement provisions of TILMA will require non-discrimination in the purchase of:

- goods of CAD 10,000 or greater
- services (other than professional services) of CAD 75,000 or greater
- construction of CAD 100,000 or greater.

#### **EXCEPTIONS TO TILMA**

Despite TILMA's apparent broad scope, it contemplates the need to provide exemptions and reservations to limit each governments' obligations under the Agreement for the following:

- legitimate objectives
- transitional measures
- excepted measures.

#### **A. Legitimate Objectives**

The broadest exception provided in TILMA is set out in Article 6 of Part II(B). It allows a party to adopt or maintain a measure that is inconsistent with a provision of TILMA if it can demonstrate: (i) that the purpose of the measure is to achieve a legitimate objective, (ii) that it is not more restrictive to trade, investment or labour mobility than necessary to achieve that objective, and (iii) that the measures are not a disguised restriction to trade. Essentially, a government is required to consider the impact that a measure will have on trade, investment and labour mobility when developing its policies and to ensure that any negative impacts can be justified as necessary for a legitimate objective. The definitions provided in TILMA set out what is considered to be a legitimate objective, including:

- 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 and health services within a province
- affirmative action programs for disadvantaged groups
- prevention or relief of critical shortages of goods essential to a province.

For those standards and regulations that have been adopted to achieve a legitimate objective, parties are expected to work actively to minimize any differences that may exist because of this legitimate objective between provinces.

### **B. Transitional Measures**

TILMA also provides a two-year transitional period to fully implement certain measures covered in Part VI of TILMA. During this two-year period, transitional measures are not subject to the Agreement (including the dispute resolution mechanism), except where expressly stated in Part IV. This period was designed to allow both governments to undertake further considerations and negotiate the extent of coverage of the obligations that each party faces for these measures. The most notable transitional measures relate to Crown corporations, government-owned commercial enterprises, municipalities, municipal organizations, school boards, and publicly-funded academic, health and social service entities. TILMA is designed so that unless parties otherwise agree, all measures that are expressly listed as transitional will expire at the end of the two-year period on April 1, 2009 and be subject to the provisions of the Agreement. This prevents either party from unilaterally amending or defining transitional measures in the interim or preventing the later inclusion into TILMA.

### **C. Excepted Measures**

In addition to achieving legitimate policy objectives and negotiating transitional measures, Part V of TILMA sets out exceptions that are not covered by the general obligations or specific provisions of the Agreement. As such, they will not automatically be phased in at the end of the transitional period and will require the parties to mutually agree to include them upon further negotiation. These exceptions are divided into those that both parties jointly agreed to and those unilaterally excepted by each province. The exceptions agreed to by both provinces exclude laws, regulations, programs, policies and other measures relating to:

- Aboriginal Peoples
- water, and services and investments pertaining to water
- taxation
- revenue generation, including royalties and mark-ups
- regulated rates established for the public good or public interest
- social policy, including labour standards and codes, minimum wages, employment insurance, social assistance benefits and worker's compensation
- disposition of rights, exploration and development and management or conservation of energy or mineral resources
- renewable and alternative energy
- management and disposal of hazardous and waste materials
- disposition of harvesting rights and management and conservation of forests, fish and wildlife.

To supplement these joint exceptions, each province has included additional exceptions to respond to its unique needs and interests. This reflects each jurisdiction's prowess over matters that are essentially specific to that province's jurisdiction. In Alberta, additional exceptions have been made in the area of investment, energy and agriculture, while in British Columbia additional exceptions have been made in energy, transportation and agriculture.

### **DISPUTE RESOLUTION PROCEDURES**

To help ensure that the obligations to reduce inter-provincial trade barriers are fulfilled by both the Alberta and British Columbia governments, Part IV sets out a dispute resolution procedure to hold parties accountable for any impairment or restriction made to trade, investment or labour mobility contrary to the provisions of TILMA. Part IV creates a three-step dispute resolution process:

- dispute avoidance
- consultation
- resolution through an impartial panel (if the other two steps are unsuccessful).

If a complaint reaches the third step, complainants will be able to argue their case before an independent and impartial dispute panel. This dispute panel has the ability to impose a financial penalty on the non-conforming government if that government does not change the offending measure. The maximum award allowed under the dispute resolution mechanism is CAD 5 million and these penalties will only be applied against the provincial government and cannot be awarded if the government changes the offending measure. Parties to a dispute are unable to sue for damages through the courts. Further, to reduce the possibility of frivolous complaints, the dispute panel is able to charge full costs of the dispute resolution process to a losing complainant. Also, only one complaint on a particular matter can be considered at any given time. This will allow a situation to be supported by exceptions of TILMA or corrected to prevent further complaints on the same subject matter. If a monetary award is determined to be appropriate by a dispute resolution panel, a "judicial review" process is available through either the *Commercial Arbitration Act* of British Columbia or the *Arbitration Act* of Alberta. The monetary award determination is suspended during this review process.

### **FURTHER LABOUR CONSIDERATIONS**

With respect to labour, the primary goal of TILMA is to increase the mobility of the workforce between Alberta and British Columbia. As it stands, workers in many occupations are limited in their mobility as transferring from one province to the other requires additional exams and training to be completed. Under TILMA, the completion of the certification or licensing requirements for one province will satisfy those for the other. Likewise if a worker has been internationally trained and subsequently licensed in one of the TILMA provinces, that worker will be considered licensed in the other TILMA province.

The application of TILMA will not be limited to trades, but will include professional occupations, like teachers, engineers, lawyers, architects, dentists, pharmacists, nurses and other regulated occupations, like land agents, occupational therapists and funeral directors. However, for many other professional occupations, TILMA does not yet apply. Part VI of TILMA lists over 60 occupations for which different requirements exist as between the respective British Columbia and Alberta regulatory bodies. Both provinces have committed to working with the applicable regulatory bodies to ensure that these professions have compatible requirements, so as to fall under TILMA, by April 1, 2009. However, while workers are expected to be free to move between the two provinces, TILMA is not expected to affect the labour and employment laws in place in each jurisdiction. For example, labour and employment standards, human rights, minimum wage, and occupational health and safety standards will continue to be within the jurisdiction of each respective legislature. Nevertheless, TILMA does commit each province to work towards reducing existing mobility barriers and restrictions in relation to a significant number of specified occupations.

### **FURTHER ENERGY CONSIDERATIONS**

With respect to energy, TILMA is one of the first internal trade agreements to cover the energy sector. In Article 15, parties have included a special provision for energy and have committed to improving the existing arrangements between provinces to promote enhanced inter-jurisdictional trade in energy. However, despite recognizing the need to remove barriers in the energy sector, this is an area where both provinces are able to rely on the legitimate objectives exception and enumerated exceptions to avoid the application of TILMA for measures taken by government and regulatory bodies.

TILMA acknowledges that there is a need for the conservation and prevention of waste for non-renewable resources and includes it within the definition for "legitimate objective" to allow the imposition of restrictions on trade, investment and labour mobility. However, any action taken under Article 6 of TILMA must be as least restrictive on trade, investment and labour mobility as possible to be justified.

This may make it difficult for governments to adopt more conservative measures under legitimate objectives. To ensure that both the Alberta and British Columbia governments are able to regulate this sector of the economy, an express exception for energy is also provided in Part V that allows parties to adopt any measure for the purpose of (i) licensing, certification, registration, leasing or other disposition of rights to energy or mineral resources, (ii) exploration or development of energy, and (iii) the management and conservation of energy, without having to prove that the limitation is the least restrictive option. The right to adopt any restrictive measures for energy is subject only to the obligation of non-discrimination imposed in Article 4.

The non-discrimination provision requires that all like, directly competitive or substitutable goods, persons, services and investors or investments receive treatment that is no less favourable than the best treatment it accords in like circumstances to those in its own territory or to other non-parties. It also requires that any charges applied are the same as those charged to its own in like circumstances, except that any differences can be justified by an actual cost-of-service differential. The need to apply equal treatment prevents the Alberta and British Columbia governments from imposing any measure they see fit relating to the energy exceptions, without first considering how a measure would impact on trade, investment and labour mobility. However, the use of "in like circumstances" would allow each province to take into account provincial differences that exist regarding their natural resources and existing tenure systems when invoking the exception to regulate the energy sector.

#### **UNWILLINGNESS OF ADDITIONAL PROVINCES TO BECOME SIGNATORIES**

It is the opinion of the governments of Alberta and British Columbia that TILMA can be used as a model to promote internal trade throughout Canada and should be adopted by all provinces and territories to remove barriers restricting trade, investment and labour mobility. Since TILMA has been signed and has come into force, several other provinces have debated whether or not to become a signatory to TILMA and commit themselves to the governmental obligations to reduce internal trade barriers. Despite the consideration that other provinces have given to joining TILMA, no other province has been willing to accept the limitations that joining TILMA could place on its government and regulatory bodies.

The hesitation of other provinces to join TILMA has been apparent recently. After months of debate, Saskatchewan has officially announced that it will not become a signatory to the agreement. Saskatchewan's Government Relations Minister has stated that after consulting with academics, experts and institutions such as the Conference Board of Canada, he has concluded that TILMA is not right for the Saskatchewan government. The Saskatchewan government feels that TILMA's broad coverage of encompassing everything not expressly excluded leaves too many unanswered questions. Specifically, there is no guarantee that the governments of Alberta and British Columbia will agree to any changes at a later date to enable TILMA to accommodate the specific needs of Saskatchewan. The Saskatchewan government's primary concern with TILMA is the ambiguity on how it may affect Crown corporations, since Saskatchewan has the largest number of Crown corporations in relation to other provinces and they substantially contribute to its economy.<sup>1</sup> The Alberta and British Columbia governments also had the opportunity to promote TILMA at the Council of the Federation meeting that was held on August 8-10, 2007.<sup>2</sup> The topics of discussion to be covered by the premiers included standardized accreditation and the issue of labour mobility. Despite the opportunity to discuss TILMA, no apparent advancements came out of this meeting to further TILMA as a Canada-wide agreement due to other provinces' reluctance to join.

---

<sup>1</sup> "Provinces sluggish on free-trade agreement: B.C., Alta." *CBC News* (July 6, 2007) online: [CBC News](http://www.cbc.ca/canada/north/story/2007/07/06/premiers-tilma.html) <http://www.cbc.ca/canada/north/story/2007/07/06/premiers-tilma.html>

<sup>2</sup> "Sask. won't join Alberta-B.C. trade deal" *CBC News* (August 1, 2007) online: [CBC News](http://www.cbc.ca/canada/edmonton/story/2007/08/01/tilma-saskatchewan.html?ref=rss) <http://www.cbc.ca/canada/edmonton/story/2007/08/01/tilma-saskatchewan.html?ref=rss>

## CRITICISMS OF TILMA

Saskatchewan's inability to commit to TILMA highlights many of the general criticisms made regarding TILMA, including ambiguity surrounding how transitional measures will be dealt with prior to April 1, 2009. There is concern that TILMA will lead to deregulation by discouraging governments from regulating private investment or corporate activity for legitimate public policy reasons, because it may lead to complaints being made under the dispute resolution mechanism. In addition, the enforcement regime allows private parties and corporations to unilaterally invoke a complaint that could result in considerable fines, which may exert pressure on governments to weaken public policies, laws or various programs to prevent potential challenges under TILMA. Also, the broad scope of TILMA may result in it affecting areas that have nothing to do with inter-provincial trade, investment or labour mobility because the exceptions could be narrowly defined in the future. Finally, increased mobility between parties of TILMA may result in weakening the training or certification programs within provinces to the lowest standard to ensure compliance with TILMA.

## CONCLUSION

TILMA has only recently come into force and is currently within its two-year transitional phase. The Alberta and British Columbia governments are still working together to negotiate and settle the remaining transitional measures and, as such, many are not subject to the dispute resolution mechanism. It is difficult to assess how TILMA will be interpreted by future panels or how significant an impact the obligations of TILMA will have on a government's ability to regulate various sectors of its economy. While the overall objective of removing trade, investment and labour mobility restrictions between provinces and territories is laudable, it remains to be seen if TILMA will be able to address the criticisms it faces and find ways to accommodate other provincial concerns to become a cohesive internal trade agreement for Canada. If the governments of Alberta and British Columbia are unable to expand TILMA into other Canadian jurisdictions, they still feel that they will mutually benefit from entering into the agreement. By the end of the transitional period, by entering into TILMA, it is hoped that Alberta and British Columbia will have created the second largest single marketplace in Canada that will allow for a less costly flow of goods and services between the provinces and provide seamless access to opportunities in either province for businesses and workers to improve both economies.

For more information on the Trade, Investment and Labour Mobility Agreement, visit [www.tilma.ca](http://www.tilma.ca).

For further information on this matter, please contact:

<a href="mailto:michael.laffin@blakes.com">Michael Laffin</a>	403-260-9692	<a href="mailto:michael.laffin@blakes.com">michael.laffin@blakes.com</a>
<a href="mailto:maria.morellato@blakes.com">Maria Morellato</a>	604-631-3324	<a href="mailto:maria.morellato@blakes.com">maria.morellato@blakes.com</a>
<a href="mailto:roy.millen@blakes.com">Roy Millen</a>	604-631-4220	<a href="mailto:roy.millen@blakes.com">roy.millen@blakes.com</a>

or any member of our [International Trade Group](#) or [Labour & Employment Group](#).

Blakes periodically provides materials on our services and developments in the law to interested persons. To unsubscribe to this e-bulletin, please respond back with unsubscribe in the subject line or contact Blakes Marketing Department at 416-863-3036 or [dorothy.byers@blakes.com](mailto:dorothy.byers@blakes.com). Additional information on our privacy practices may be obtained by contacting us at [privacyofficer@blakes.com](mailto:privacyofficer@blakes.com).

This e-bulletin is for informational purposes only and does not create a lawyer-client relationship. The transmission of this information does not suggest Blakes or any of its lawyers are practising law of any jurisdiction other than Canada. The information provided in this e-bulletin is summary in nature and does not constitute legal advice. We would be pleased to provide additional details or advise about specific situations if desired.

For permission to reprint articles, please contact Blakes Marketing Department at 416-863-2403 or [lynn.spencer@blakes.com](mailto:lynn.spencer@blakes.com).

© 2007 BLAKE, CASSELS & GRAYDON LLP

MONTRÉAL OTTAWA TORONTO CALGARY VANCOUVER NEW YORK CHICAGO LONDON BEIJING

