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GUIDE to the TRADE, INVESTMENT AND LABOUR MOBILITY AGREEMENT (TILMA)

prepared for the
ONTARIO FEDERATION OF LABOUR

by
SACK GOLDBLATT MITCHELL

February 2007

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February 14, 2007

Mr. Wayne Samuelson
President
Ontario Federation of Labour
15 Gervais Drive
Suite 202
Toronto, Ontario
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Dear Mr. Samuelson:

Re: Trade, Investment and Labour Mobility Agreement

You have asked for a review of the *Trade, Investment and Labour Mobility Agreement* ("TILMA") between Alberta and British Columbia because of the interest in, and support for, the Agreement that has since been expressed by Ontario[1] and because of concerns raised as to its potential impact on Governmental initiatives, particularly as these affect labour.

As the following assessment indicates, TILMA represents a dramatic expansion of the 'trade' liberalization agenda that has framed Canadian policy towards both international and internal 'trade' for several years. As we know, by including rules on investment and services, the NAFTA and WTO Agreements impose severe constraints on a very broad sphere of domestic policy and law that has little if anything to do with trade in any conventional sense.

TILMA is explicitly authorized by the Agreement on Internal Trade ("AIT"), which was negotiated by the provinces and the federal government more than a decade ago. TILMA substantially expands the scope of the AIT, and most importantly includes a dispute procedure that may be invoked by private parties, and which can give rise to damage awards that will be enforced by Canadian courts.

While it is beyond the scope of this opinion to assess the validity of the reasons offered for proceeding with the TILMA scheme, we should indicate that we could not find, in the limited pronouncements by Alberta and British Columbia that serve as the policy foundation for TILMA, any plausible rationale for the project. As most Canadians will readily recognize,

[1] British Columbia and Alberta have been congratulated on their initiative by the Council of the Federation, and by Canadian labour ministers. April Lindgren, *McGuinty keen to join Alberta-B.C. free-trade pact*, CanWest News Service: Wednesday, October 18, 2006. TILMA also invites other Canadian governments to accede to the Agreement, see Article 20.

Canada is a free society in which they are free to live, work and invest anywhere in the country. There are no customs stations along provincial borders and no tariffs of any kind on inter-provincial trade. Moreover, inter-provincial trade is a federal responsibility and provincial measures that interfere even indirectly with such trade have been consistently struck down by the courts.

Nevertheless, the Conference Board of Canada has produced two recent reports promoting the TILMA cause. Neither report offers substantive empirical evidence that significant and unwarranted barriers to internal trade and investment actually exist in Canada. While certain provincial procurement rules and subsidy programs still favour local contractors and hiring practices, most of the examples cited by the reports concern the remnants of international trade, investment and services measures that have survived free trade, such as foreign ownership limits for Canadian broadcasting companies. Few, if any, of these examples are relevant to Canada's internal market. However, the support of the Conference Board of Canada obviously represents a formidable impetus for expanding the regime to other provinces.

Please find our opinion attached. We trust that it will be of assistance in exposing the far reaching and overwhelmingly adverse impacts this regime would have on the capacity of present and future Ontario governments to perform the essential functions of governance in the public interest.

Sincerely,

Steven Shrybman

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Summary Opinion

We have carried out an assessment of TILMA that provides an overview of the scheme, and considers its labour mobility in some detail. Certain important elements of the scheme, such as those concerning procurement and subsidies, certainly warrant careful scrutiny, but are not assessed here.

On the basis of our review, we have come to the following conclusions:

1. By prohibiting government actions that *impair or restrict* trade, investment or labour mobility, TILMA imposes a serious constraint on government policy, law and action unless explicitly excepted from the application of the regime. By doing so, the Agreement exposes a vast array of government policies, laws and programs to private complaints, including claims for damages. In simple terms, TILMA is first and foremost a formidable instrument for de-regulation.

2. The overwhelming majority of government measures that are subject to TILMA have little if anything to do with inter-provincial trade, investment or labour mobility, *per s*. Rather, these measures, which run the gamut from environmental controls to health care insurance plans, were established to serve broad public or societal purposes and apply equally to persons or companies whatever their respective province of origin. While such measures may impact investment, trade and labour mobility, these effects are indirect or tangential to their essential purpose. Nevertheless, because of these indirect effects, they may challenged for offending TILMA prohibitions.

3. The most important provisions of TILMA are those that establish an enforcement regime that may be invoked by private parties. Under Part IV, claims may be made by the other province, or its "persons", for damages where it is alleged that a government or public body has failed to comply with TILMA requirements. Because private claims may be unilaterally asserted by countless individuals and corporations, they are likely to proliferate and exert considerable pressure on governments to abandon or weaken a broad and diverse array of public policies, laws, practices, and programs.

4. It is also highly problematic that TILMA expands the scope of foreign investor rights that can be asserted under NAFTA. Moreover, these rights are bestowed on US and Mexican investors without any reciprocal gains for BC or Alberta investors in the US or Mexico. TILMA establishes a new high-water mark of investor entitlement that can now also be claimed by US and Mexican investors in consequence of NAFTA guarantees of *National Treatment*.

5. Labour standards and related measures are explicitly included as general exceptions to TILMA. However, because of the more limited scope accorded this exception in the AIT, there is a risk that this exception will be limited to the labour mobility provisions of TILMA. This would allow companies to challenge measures, such as a ban on the use

of replacement workers or any other labour standard, as impairing or restricting their trade and investment rights.

6. In effect, TILMA creates a three-tiered approach to labour mobility that treats professionals and white collar workers more favourably than blue collar workers unless certified under the *Red Seal Program* which creates significant mobility rights quite independently of TILMA. It is also unclear that significant and unwarranted impediments to labour mobility still exist in Canada given the progress made over recent years to remove them. However, to the extent that such impediments remain, these are most likely to be faced by workers in the compulsory trades that are not *Red Seal* certified, and for these workers TILMA will be of little assistance.

7. Whatever mobility gains TILMA may deliver, these are likely to come at the expense of weakening training, certification and apprenticeship standards because of the overall pressure that TILMA will exert to reduce such standards to a lower common denominator. We are aware of no evidence that reducing the skills and training required by teachers, nurses, gas fitters, investment brokers, and many other professional and skilled workers is consistent with protecting the public interest. While it is possible that some workers in regulated occupations might benefit from TILMA, we believe that remaining impediments to labour mobility are better addressed through expanding current *Mutual Recognition Agreements* among regulatory agencies, and the *Red Seal Program.*

8. Finally on the question of labour mobility, TILMA must be seen as complimentary to present federal and provincial initiatives to bring temporary foreign workers to Canada in ever increasing numbers. In this context TILMA can be seen as a tool for weakening current training, licensing and certification standards that may currently constrain the inflow of such foreign workers. It is also likely to assist companies employing such workers by according their workers mobility rights once certification is acquired in any TILMA jurisdiction.

When taken together, the likely impacts of TILMA represent a fundamental assault on the capacity of present and future governments in BC and Alberta to serve the public interest. We have also been unable to find a credible rationale for TILMA, other than one that espouses the cause of wholesale de-regulation.[2] When considered in light of the lack of public consultation that preceded it, TILMA represents a reckless betrayal of the public interest and responsible government. Clearly Ontario and other provinces should reject the invitation of British Columbia and Alberta to join the TILMA club.

[2] Supra notes 3 and 4.

A Legal Opinion Concerning the Potential Impact of Ontario Entering Into a Trade Investment and Labour Mobility Agreement

On April 28, 2006, Alberta and British Columbia entered into a *Trade, Investment and Labour Mobility Agreement* ("TILMA"). Ontario and other provinces have since expressed support for the scheme[3] and are being encouraged to sign on.[4] The following represents an overview of the potential impact of a TILMA scheme on public policy and law in Ontario, particularly as these concern labour.

Our assessment describes the general architecture of TILMA, and examines several key elements of the scheme. As requested, we have provided a more in-depth critique of TILMA's labour mobility provisions. Certain other matters, including TILMA rules concerning procurement and subsidies, certainly warrant careful scrutiny, but are not assessed here.

I. The Nature and Scope of TILMA Obligations

TILMA is established pursuant to Article 1800 of the AIT, which permits its signatories to enter into additional arrangements to liberalize trade, investment and labour mobility beyond the level required by the AIT. TILMA achieves these liberalization objectives by substantially expanding the AIT framework in two key respects: first, by greatly enlarging the scope of government actions constrained by the AIT regime; and second, by establishing enforcement procedures that transform the AIT from a political agreement among governments into a regime that is legally enforceable, including by way of private actions for damages not only by the signatory Governments but by individuals and corporations on their own behalf.

TILMA's dispute procedures, which are adapted from those set out in Chapter Eleven of NAFTA, are considered in greater detail further below. However, it is important to note here that these procedures may be enlisted to not only enforce the provisions of TILMA, but those of the AIT as well. This is because Article 1.2 provides:

> *In the event of an inconsistency between any provision in Parts II, V and VI of this Agreement and any provision of the Agreement on Internal Trade, the provision that is more conducive to liberalized trade, investment and labour mobility prevails between the Parties. In the event that such a provision of the Agreement on Internal Trade is determined to be more conducive to liberalized trade, investment and labour mobility, that provision is hereby incorporated into and made part of this Agreement.*

[3] British Columbia and Alberta have been congratulated on their initiative by the Council of the Federation, and by Canadian labour ministers. April Lindgren, *McGuinty keen to join Alberta-B.C. free-trade pact*, CanWest News Service: Wednesday, October 18, 2006. TILMA also invites other Canadian governments to accede to the Agreement, see Article 20.

[4] The Conference Board of Canada is actively promoting the TILMA regime and has published two recent reports for this purpose, see *Death by a Thousand Paper Cuts*, 30 November 2006"; and *An Impact Assessment of the BC/Alberta Trade, Investment and Labour Mobility Agreement Prepared for: British Columbia Ministry of Economic Development*, September 2005.

TILMA's reach is not only much broader than that of the AIT, but this is true in relation to international trade agreements as well. As we know, agreements such as NAFTA and the *General Agreement on Trade and Services* (the "GATS"), impose significant constraints on a diverse array of public policies, programs and laws that are largely unrelated to international trade in any conventional sense. The essential thrust of these regimes is to discourage government regulation of private investment and corporate conduct, however justified or necessary such public controls may be for achieving non-commercial public policy objectives such as environmental protection and health care. This same agenda for de-regulation has been translated to the domestic sphere by the AIT, which seeks to impose similar but more direct constraints on provincial governments, because in Canada, sub-national governments are not formally bound by Canada's international trade obligations.

For instance, NAFTA investment rules impose four basic constraints on government regulation concerning investment. These are: 1) to accord foreign investors and their investments non-discriminatory treatment; 2) to accord foreign investors fair and equitable treatment; 3) to compensate foreign investors when their investments are expropriated, and 4) to not impose certain performance requirements, such as the obligation to procure goods and services locally as a condition of foreign investment.[5] In contrast, and in addition to proscribing discriminatory treatment, TILMA prohibits all non-exempt government measures – past, present and future – that "operate to restrict or impair trade … investment or labour mobility… "

Thus, Article 3: *No Obstacles*, provides:

> *Each Party shall ensure that its measures do not operate to restrict or impair trade between or through the territory of the Parties, or investment or labour mobility between the Parties.*

Article 5: *Standards and Regulations*, further provides:

> *. . . Parties shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility.*

The term "measures" is defined to include:

> *. . . any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure;*

Finally in this regard, under Article 2: *Scope and Coverage*, TILMA applies to:

> *measures of the Parties and their government entities that relate to trade, investment and labour mobility;*

where "*government entities*" means a Party's:

[5] These are set out in Articles 1102, 1103, 1105, 1106 and 1110.

> *a) departments, ministries, agencies, boards, councils, committees, commissions and similar agencies of government;*
> *b) Crown Corporations, government-owned commercial enterprises, and other entities that are owned or controlled by the Party through ownership interest;*
> *c) regional, local, district or other forms of municipal government;*
> *d) school boards, publicly-funded academic, health and social service entities; and*
> *e) non-governmental bodies that exercise authority delegated by law.*

Under this definition such institutions as public hospitals, library boards, day care centres, children's aid societies, and certainly all regulatory tribunals are subject to TILMA disciplines.

Moreover, no effort is made to define or limit the key terms of these sweeping prohibitions, and many of the terms and provisions are unique to TILMA, so there is no jurisprudence to indicate their scope. That question, and many others, will be left to the exigencies of dispute resolution unless the Parties agree to more precise definitions.[6]

Notwithstanding this uncertainty, it is difficult to conceive of a direction for de-regulation that would be more explicit or all encompassing than TILMA's. It is true that various exceptions included in TILMA will work to rein in these otherwise unbridled prohibitions, and these are considered below. However, putting aside these moderating influences for the moment, it is apparent that few if any government actions, whether legislative or programmatic, would be safe from a complaint that it interferes with trade, investment or labour mobility. After all, virtually every government action affects the market in some manner, otherwise there would be no need for them. *A priori,* such measures affect the rights and opportunities of companies and individuals to conduct business, make investments, or provide services.

II. Exceptions and Reservations

In response to the criticism that TILMA is overly broad in its reach, its defenders may point to the exceptions and qualifications that are included in the Agreement. While these exceptions are significant, many government measures, including those concerning environmental protection and health care, are exposed to TILMA constraints and dispute procedures. Exceptions and reservations fall into three categories - legitimate objectives, excepted measures, and transitional measures – these are considered next.

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[6] Under Article 34.4: *"The Parties may, at any time, issue a joint decision declaring their interpretation of this Agreement. All such joint decisions shall be binding on panels and any subsequent decision or award by a panel issued under this Part must be consistent with such joint decisions*."

Legitimate Objectives

The most broadly framed TILMA exception is set out in Article 6: *Legitimate Objectives*, which authorizes measures that are inconsistent with the key obligations. Article 6 provides in part:

> *A Party may adopt or maintain a measure that is inconsistent with Articles 3, 4 or 5, or Part II(C) provided that the Party can demonstrate that:*
>
> *a) the purpose of the measure is to achieve a legitimate objective;*
>
> *b) the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and*
>
> *c) the measure is not a disguised restriction to trade, investment or labour mobility.* [emphasis added]

Legitimate objectives are further defined by TILMA to include such matters as the *protection of the environment; consumer protection; and the protection of the health, safety and well-being of workers*[7]. To those unfamiliar with international trade rulings, these safeguards may appear to be broadly applicable, but analogous reservations established by other trade and investment agreements have been read very narrowly.[8] Moreover, under TILMA the onus is on the 'offending' government, from the outset, to prove that its measure meets the three fold test set out by Article 6:1.

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[7] ***legitimate objective*** *means any of the following objectives pursued within a Party:*

a) public security and safety;
b) public order;
c) protection of human, animal or plant life or health;
d) protection of the environment;
e) conservation and prevention of waste of non-renewable or exhaustible resources;
f) consumer protection;
g) protection of the health, safety and well-being of workers;
h) provision of social services and health services within the territory of a Party;
i) affirmative action programs for disadvantaged groups; or
j) prevention or relief of critical shortages of goods essential to a Party

considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification;

"Legitimate objective" does not include protection or favouring of the production of an enterprise of a Party; . . .

[8] Franck, Susan. *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*?, U.C. Davis Journal of International Law and Policy, Vol. 12, No. 47, 2005, pps. 55 and 58.

For example, an environmental regulation limiting automobile exhaust emissions is not necessarily a measure that would be permitted under Article 6. To establish the right to maintain or establish such a control, the province would have to overcome the daunting challenge of proving a negative – namely to demonstrate, as one AIT dispute panel put it, that *on a balance of probabilities, . . . no other available option would have met the legitimate objective*[9].

If the objective of automobile emission controls is improving urban air quality, alternatives would include doing more to regulate large point sources of air pollution, restricting driving during air quality alerts, or imposing stricter gasoline formulation standards. In each case, examples would be cited of other jurisdictions that have taken these routes. The province wishing to defend automobile exhaust standards must then show it considered each available alternative; assessed its potential adverse impact on trade, investment, and labour mobility; and then chose the option that was least restrictive of these TILMA priorities.

It will be far easier to establish that a government measure impaired or restricted investment, trade or labour mobility, than it will to establish that any such measure satisfies the three pronged test of Article 6. Moreover, dispute panels are entitled to second-guess the government Party on these questions, and because tribunal members are chosen by the Parties, they are likely to share their enthusiasm for de-regulation. This bias is in fact apparent from the record of dispute bodies analogous to those empowered by TILMA, including panels operating under the AIT and NAFTA.[10] The likelihood of confronting an unreceptive panel only exacerbates the already daunting challenges of defending against a TILMA challenge and may discourage government from proceeding with a new regulatory initiative in the first place.

While it would be unreasonable to simply dismiss the potential of Article 6 to create a safe haven for certain government measures, it would be easy to overestimate the ameliorative effect this exception will have on the broadly framed and far reaching constraints of the TILMA regime.

Exceptions

Part V of TILMA sets out various exceptions that are either jointly agreed to, or unilaterally declared. Many of these are broadly framed, including the following *General Exceptions*:

a) Aboriginal peoples;

b) Water, and services and investments pertaining to water;

c) Subject to Article 12, taxation and associated compliance mechanisms;

[9] Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the *Manganese-Based Fuel Additives Act* June 12, 1998

[10] See for example, draft paper by Ellen Gould, *Asking for Trouble - The Trade, Investment, and Labour Mobility Agreemen*t, which cites all six cases to proceed under the AIT dispute process, wherein governments were found by the tribunal to have failed to meet the necessity test, at p. 16.

> *d) Subject to Articles 4 and 12, other revenue generation, including royalties and mark-ups, and associated compliance mechanisms;*
>
> *e) Regulated rates established for the public good or public interest; or*
>
> *f) Social policy, including labour standards and codes, minimum wages, employment insurance, social assistance benefits and worker's compensation.*

To begin with, it is important to appreciate that the Parties intend this list shrink over time. Thus Article 17.1(b) obligates the Parties to annually review listed exceptions "with a view to reducing their scope". In addition, while some general exceptions are broadly framed, such as measures relating to "water, and services and investments pertaining to water;" others are likely to be interpreted more narrowly than one might suppose.

For example, the exception for *Social policy, including labour standards and codes, minimum wages, employment insurance, social assistance benefits and worker's compensation.* No reference is made here to health or education services, which are by a wide margin Canada's most important social programs. True illustrative lists such as this one are not intended to be exhaustive. Nevertheless, because of the treatment accorded health and education elsewhere in TILMA,[11] in our view these measures are not covered by TILMA's social policy exception, and may only be defended under Article 6: *Legitimate Objectives* – the difficulties of doing so have already been described.

Labour Standards and Codes

There is also a risk that the "social policy" exemption will be given narrower application than its inclusion in Part V suggests. This is because a similar AIT exemption applies only to the labour mobility chapter of that agreement, whereas under TILMA it is presented as a general exception to the entire agreement. The only other AIT reference to labour standards calls upon the Parties to *recognize the need to take into account the importance of environmental objectives, consumer protection and labour standards.*[12]

Under TILMA Article 1:2, any inconsistency between *any* provision of Parts II, V and VI of TILMA and those of the AIT are to be resolved in favour of the one that is more conducive to liberalized trade, investment and labour mobility. While investor rights are more narrowly defined under the AIT, the wording of Article 1:2 invites the argument that the narrower AIT social policy exception should prevail. There are arguments to counter this view, but it would be imprudent, particularly given the character of TILMA dispute procedures, to discount this risk.

[11] For example, measures relating to health, education and social service entities are specifically listed in Part VI as transition measures. This would not be necessary if the social policy exemption was intended to apply to such services.

[12] AIT Article 101.3 (e)

It is, of course, easy to see how labour rights can be cast as impairing or restricting trade and investment in addition to labour mobility. Restrictions on the right to use replacement workers during a labour dispute is an obvious example, and one relevant in the TILMA context because this labour right is a feature of BC but not Alberta law.

Thus where a strike occurs in BC, Alberta workers would not be entitled to assert labour mobility rights under TILMA to replace striking workers because of the exception for such labour standards that is a feature of both the AIT and TILMA. However, if the narrower AIT exemption for labour standards is deemed to apply to a claim made under TILMA concerning *investment* or *trade*, companies would have the right to challenge a restriction on replacement workers on the grounds that BC standards restrict or impair their *investment* and *trading rights*.

The risk of such a challenge is greatest where discrepancies exist between the labour laws of one province and those of another, such as is common when it comes to minimum wage protection, pay equity and collective bargaining rights. This is true not only because of the prohibition on measures that restrict or impair investment and trade, but because the Parties are obliged under Article 5 to reconcile such discrepancies. However, in our view, *any* labour standard is vulnerable to a challenge under the broadly framed prohibition of Article 3 insofar as it impairs or restricts trade and investment interests if the social policy exemption is deemed to apply only to labour mobility matters.

Transitional Measures

TILMA was signed on April 28, 2006, but pursuant to Article 23, will not enter into force until April, 2007. However until that time, Article 23.2 provides:

> *Neither Party shall, during the period beginning on the date of execution and ending on the date of entry into force of this Agreement, adopt a measure that would be inconsistent with this Agreement or amend or renew a measure in a manner that would decrease its consistency with this Agreement.*

In other words, Article 23.2 imposes a standstill on policy and law reform which went into effect when the agreement was signed in April, 2006. While April, 2007 is the date on which many TILMA provisions formally go into effect, others are reserved for a further two year period under Article 9, which provides that measures listed in Part VI are to be exempt from the substantive disciplines (Part II) and dispute procedures (Part IV) for a period that ends in April, 2009 .

Part VI is clearly designed to provide the Parties with more time to delineate the precise boundaries of TILMA's application. Article 9.2 provides:

> *During the transitional period, the Parties shall undertake further consultations and negotiate any required special provisions, exclusions and transitional provisions to determine the extent of coverage of Part II to measures listed in Part VI.*

Under Article 9 neither Party may add to amend listed measures, unless that is to decrease its consistency with the Agreement", or simply remove the measure from those listed in Part VI.

However, unless the Parties agree otherwise, and with the exception of certain labour mobility measures (see discussion below), the reservation for measures listed in Part VI will expire in April 2009. While additional measures may be added to those exempted under Article 8, that is possible only by mutual consent of the Parties. Thus unless the negotiations authorized under Article 9.2 result in such consent, the protection afforded by listing transitional measures, with the exception of those listed under the heading labour mobility, will expire in April 2009. In effect, TILMA accords both Parties a veto that can be used to prevent the other Party from unilaterally amending or defining the list of measures that it will exempt under the regime, unless that is to simply remove a measure from those listed in Part VI.

III. Labour Mobility Under TILMA

TILMA's private enforcement regime provides some workers with a new tool for removing certain obstacles to seeking employment in another TILMA jurisdiction. However, when it comes to labour mobility, TILMA may be akin to a '0-sum' game where every benefit comes at an equivalent cost. Thus an Alberta teacher with four years training, who can assert entitlement to a teaching a position in BC that otherwise requires an additional year of training, arguably does so at the expense of BC's higher certification standards and their consequent impact on the quality of education BC students receive.

In addition to the downward pressure on standards, given the adverse affects of TILMA on the capacity of governments to serve the public interest, including the interests of working people, marginal labour mobility gains would not seem to be a reasonable trade-off.

In any event, for reasons that follow, it is not clear that significant labour mobility gains will in fact follow from TILMA. Where these may materialize – professionals, and others working in regulated occupations will be the main beneficiaries. TILMA is of no benefit to most Canadian workers who have always been free to seek and take up employment wherever they can find it in Canada, and is only slightly more relevant to tradespersons who already benefit from programs that exist independently of TILMA.

Labour Mobility Under the AIT

To begin with, it is not apparent that an Agreement such as TILMA is needed to address whatever remaining, and unwarranted impediments to labour mobility may still exist in Canada. It is important in this regard to appreciate that significant efforts to facilitate greater labour mobility in Canada have been underway for some time and remain ongoing.

In fact, several federal-provincial bodies have mandates to address labour mobility issues, including the *Forum of Labour Market Ministers* (FLMM) which was established in 1983 to facilitate inter-jurisdictional discussion and cooperation on labour market issues. Among its key roles, the FLMM has responsibility for implementing the Labour Mobility chapter of the AIT,

the purpose of which: "…. *is to enable any worker qualified for an occupation in the territory of a Party to be granted access to employment opportunities in that occupation in the territory of any other Party, as provided in this Chapter*."

To this end, Chapter 7 of the AIT targets three main barriers that prevent or limit the interprovincial movement of workers: residency requirements; practices related to occupational licensing, certification and registration; and differences in occupational standards.

Detailed guidelines for complying with these AIT requirements were developed and have been kept up to date. In addition, the *Labour Mobility Coordinating Group* (LMCG) of the FLMM monitors and reports on progress with implementation of AIT rules concerning labour mobility. The primary focus of LMCG reports has been on 50 regulated occupations, many of which are the subject of *Mutual Recognition Agreements* among provincial regulatory bodies for recognizing each others qualified workers.

Mobility in the trades, on the other hand, is primarily being addressed through a parallel process – the *Red Seal Program,* which allows qualified tradespeople to practise their trade in any province or territory without having to write additional examinations. As described below, the distinction between regulated occupations and the compulsory trades[13] is one that is maintained by TILMA.

In May 2005, the LMCG released the results of a survey it had conducted of occupational regulatory bodies, concluding that while further efforts were warranted, important progress has been made in removing barriers to labour mobility across Canada[14]. That survey indicated that approximately 80% of the regulatory bodies had by then entered into *Mutual Recognition Agreements*[15] and that the credentials of approximately 65% of qualified workers are being recognized under these agreements.[16]

The LMCG recommended that certain additional steps be taken to remove remaining impediments to labour mobility. The LMCG's advice was subsequently considered in the *Council of the Federation Workplan on Internal Trade* (January 2006) which noted the Minister's interest in having the FLMM develop an action plan with specific targets and timelines. The lead jurisdiction for acting on the Council's resolution is Ontario.

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[13] Compulsory trades are those for which workers are required to be certified or trained under the supervision of a certified worker.

[14] Forum of Labour Market Ministers, *Report of Survey Results: Inter-provincial Labour Mobility in Canada* 2004/05; May 18, 2005.

[15] Idem, p. 9.

[16] The LMCG report indicates that this average is being brought down by a high volume of applications in 2 unspecified occupations, where registration rates are anomalously low.

In September, 2006, the question of labour mobility was also considered at the Annual Meeting of the *Federal-Provincial-Territorial Committee of Ministers on Internal Trade*. The Ministers emerged from that meeting having set an ambitious agenda for improving labour mobility that was announced this way:

> *. . . Ministers and Premier Doer announced that by April 1, 2009, Canadians will be able to work anywhere in Canada without restrictions on labour mobility. While previous efforts have resulted in progress, today's announcement will result in full compliance by all regulatory bodies.*[17]

The Ministers also noted the direction of the Council of the Federation that the FLMM "consider improvements to AIT labour mobility provisions by reviewing elements of the recently concluded *Quebec-Ontario Cooperation Agreement* on construction labour mobility, as well as the *Trade, Investment and Labour Mobility Agreement* recently signed by Alberta and British Columbia ." The internal trade ministers indicated their support for this approach and agreed to consider TILMA "with a view to identifying elements that could be imported within the AIT."

The *Quebec-Ontario Cooperation Agreement*[18] referred to by the Ministers arose from the latest efforts by Ontario and Quebec to resolve their long-standing differences with respect to construction industry services and labour mobility. As described in the Premier of Ontario's communique:

> *The Ontario - Québec construction labour mobility agreement will significantly enhance the mobility of construction workers between the two provinces, while respecting the regulatory systems already in place with regard to this industry. Amongst other things, it broadens the range of activities and circumstances giving Ontario workers access to Québec's construction market. It introduces simplified and abbreviated mechanisms for dispute resolution and for resolving complaints of harassment. Finally, the agreement modifies the mandate of the Bilateral Coordinating Committee, so that it can propose certain updates, as the agreement evolves.*
>
> *It also provides that contractors from both provinces shall be equally entitled to bid on construction contracts of certain Crown Corporations, including liquor and lottery corporations as well as electrical utilities of both provinces. With respect to procurement, the agreement restores access for Québec contractors to the construction contracts of Ontario's public sector.*

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[17] Annual Meeting of the Federal-Provincial-Territorial Committee of Ministers on Internal Trade Halifax, Nova Scotia - September 7, 2006 Federal-Provincial/Territorial Conference of Ministers Responsible for Internal Trade Progress achieved on an action plan to improve internal trade.

[18] *Agreement on Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry* (2006), http://www.labour.gov.on.ca/english/about/pdf/oq_agreement.pdf

This inter-provincial agreement contains dispute procedures that require a province to respond quickly to complaints of non-compliance or harassment, but ultimately leaves such complaints to be resolved by the responsible ministers, not the courts or arbitral tribunals. While the dispute procedures of the AIT are more formal, these too leave the ultimate decision to the responsible ministers.

It is apparent that labour mobility issues have been given considerable attention by Canadian governments and that significant progress has been made to address the problem. Unfortunately there is little information in the reports we have noted about the nature of remaining barriers to labour mobility, or whether good reasons exist for leaving these in place. For example, as acknowledged by Ontario, one of the impediments to construction industry mobility between Ontario and Quebec was the fact that all construction workers in Quebec must belong to a union.[19] Health and public safety issues, such as those concerning crane operators and gas fitters, may also present a sound reason for maintaining strict provincial control, even where these vary from province to province.

In assessing the need for additional mechanisms for addressing labour mobility issues it is important to be mindful of the fact that only 20 percent of Canadian workers are employed in regulated occupations or trades. Most of these people are either professionals, skilled technicians, or work in compulsory trades.

A better sense of the nature of contentious mobility problems is provided by considering the disputes that have arisen under Chapter 7 of the AIT. The AIT web site documents 23 such complaints from 1996 to 2006. These related to the following professions, occupations and trades (the government noted in brackets was the one that had established the impugned measure):

Paramedic Licensing (Alta.)
Federal Hiring Practices (Can.)
Hairstylist Licensing (NS)
Practical Nurse Licensing (Ont)
Hunting Guide licensing (Nfld)
Denturist Licensing (Ont.)
Public Accounting (Que.)
Construction Worker Mobility Canada (Que. Ont.)
Hunting Guide Licensing (Nfld.)
Hunting Guide Licensing (N.B.)
Public Accounting (Ont.)
Opticians Registration Criteria (B.C.)
Public Accounting (Ont.)

[19] Ontario Quebec Construction Labour Mobility Agreement Marks Inter-provincial Co-operation, Backgrounder, June 2006

Denturists Licensing (Nfld.)
Dental Assistant licensing (Man.)
Medical Services Residency Requirements (Sask.)
Embalmer Licensing (Sask.)
Insured Medical Services Restrictions (Ont.)
Municipal Fee Differentials (Alta.)
Chartered Accountant Licensing (Sask.)
Emergency Medical Technicians Licensing (Ont.)
Residency Requirements (B.C.) [20]

Of these 23 disputes, two were upheld, 5 are ongoing, and most of the others have either been withdrawn or resolved. It is not apparent from the character, number or disposition of these disputes that labour mobility remains a major problem. If, on the other hand, serious and unjustified impediments to labour mobility do remain in Canada, there is little evidence to suggest that this problem is widespread.

Furthermore, while many have criticized the ineffectiveness of the AIT dispute process, it is not apparent that it has failed to resolve labour mobility disputes when they have come forward, except perhaps in the field of accountancy.[21] Nor is it evident from progress to date that continued efforts with *Mutual Recognition Agreements* and the *Red Seal Program* will fail to remove remaining and unwarranted impediments.

For these reasons, one should be skeptical about the broad claims being made concerning the seriousness of the labour mobility problem, or about the need for TILMA or like agreements to address them. With this qualification, we turn to the labour mobility provisions of TILMA.

Labour Mobility Rights Under TILMA

To begin with, TILMA deals with the issue of labour standards and codes quite independently from the questions of training, licensing and certification. It is clear in this regard that the exception for labour standards and codes set out in Part V is not intended to include certification and related regulatory requirements which are primarily addressed by Article 13 (labour mobility) and Part VI (concerning transition measures).

Article 13 of TILMA provides:

> *1. Subject to paragraphs 4 and 5, any worker* ***certified for an occupation*** *by a regulatory authority of a Party shall be recognized as* ***qualified to practice*** *that occupation by the other Party.*
>
> *2. For greater certainty, requirements imposed on workers to* ***obtain a license*** *or to register with a Party or one of its regulatory authorities prior to commencing work*

[20] http://www.ait-aci.ca/index_en/dispute.htm

[21] http://www.ait-aci.ca/index_en/dispute.htm

> *within the territory of that Party shall be deemed to be consistent with paragraph 1* ***provided that no material additional training or examinations are required*** *as part of that registration procedure and such registrations are processed on a timely basis.*
>
> *3. Any* ***worker certified to practice a trade under the Red Seal Program*** *shall be recognized as qualified to practice that trade in both Parties.*
>
> *4. Existing occupation-related measures determined by the Parties to be inconsistent with Part II will be listed in Part VI prior to the entry into force of this Agreement.*
>
> *5. A Party may subsequently add to the list referred to in paragraph 4 any occupation-related measure considered to be inconsistent with Part II where that measure:*
>
> *a) is necessary to achieve a legitimate objective;*
>
> *b) regulates an occupation that is not regulated by the other Party; or*
>
> *c) relates to a difference between the Parties in the permitted scope of practice of an occupation.*
>
> *6. Parties shall work to reconcile any measures listed in Part VI pursuant to paragraphs 4 and 5 and to increase their consistency with Part II.*
>
> *7. Further to Article 7, each Party shall ensure that any requirements imposed on workers to register with a regulatory authority prior to commencing work are published on that regulatory authority's website or through a readily available website of the Party.* [Emphasis added]

Pursuant to Article 13, unless listed under Part VI (transitional measures), and with the exception of certain modest licensing requirements, an individual certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to practice that occupation by the other Party. The same recognition is to be accorded workers certified to practice a trade under the *Red Seal Program*.

The clear directions of Articles 13.1 through 13.3 go significantly beyond the labour mobility requirements of the AIT, which provided provincial governments with more latitude for maintaining their own licensing, certification and registration requirements, so long as these related, for example, to the competence of the worker seeking the right to practice a particular occupation or trade.[22] However, the labour mobility provisions of the AIT, which are far more detailed than those of TILMA, also engender obligations that are not spelled out by TILMA, such as the prohibition on residency requirements.[23] As noted, TILMA dispute procedures may

[22] AIT article 707.1

[23] AIT Article 706.1

be invoked to enforce the provisions of both AIT and TILMA and a complainant would be entitled to cherry-pick those provisions most conducive to its claim.

Returning to TILMA: under Article 13 there are significant differences between the treatment of an *occupation* certified by a regulatory authority on the one hand, and a *trade* certified under the *Red Seal Program* on the other. For instance, only the rights of a worker certified under 13.1 (re occupations) are subject to the listing reservation of 13.4. No such limitation is imposed on a worker certified to practice a *Red Seal* trade under 13.3. More importantly, unless certified to a *Red Seal* trade, a person working in a compulsory trade is not entitled to the mobility rights accorded those certified to practice an occupation, and may in fact have no mobility rights under TILMA.[24]

In effect, TILMA creates a three-tiered approach to labour mobility that treats professionals and white collar workers more favourably than blue collar workers unless such workers are certified to a *Red Seal* trade. Of course the *Red Seal Program* creates significant mobility rights quite independently of TILMA. Nevertheless, it is possible that nurses, teachers, paramedics, and other occupation certified workers may benefit from TILMA to the extent that significant impediments to mobility are not already and effectively addressed by *Mutual Recognition Agreements* or other measures.

However, the realization of these putative benefits will depend upon the fate of certain mobility controls which have been listed to Part VI, effectively exempting them. Thus under Article 13(4), a Party is free to list occupation-related measures that are inconsistent with TILMA to Part VI (transitional measures).

Unlike other transitional measures, those listed as exceptions to the Agreement's labour mobility requirements will endure beyond the transition period, unless there is agreement to remove or modify them. Thus, Article 9(1): *Rules Relating to Transitional Measures* provides:

> *1. With the exception of this Article and Articles 13(4), (5) and (6), measures listed in Part VI are not subject to Parts II and IV during the transitional period, except as otherwise provided in Part VI.*

In fact, several dozen occupations have been reserved under Part VI, but subject to this proviso:

> *With the exception of Article 9 and Articles 13(4), (5) and (6), Parts II and IV do not apply to the following measures until such time as the Parties agree pursuant to efforts under Article 13(6):*

Article 13(6), reproduced above, calls upon the Parties to reconcile any non-conforming measures listed under Part VI, but imposes no time limit for doing so. Thus unlike other Part VI

[24] The argument might be made that such a tradesperson would have recourse under Articles 3 and 4 of TILMA, but would certainly confront the counter argument that the general obligations of Articles 3 and 4 are superceded by the more specific provisions of TILMA dealing with the issue of labour mobility.

reservations, those listed pursuant to Article 13 (5) and (6) endure until the parties agree otherwise. This treatment of labour mobility reservations listed under Part VI is the opposite of that accorded other transitional measures which, as noted, effectively expire at the end of the transition period unless the Parties agree otherwise.

To a Lower Common Denominator

Pursuant to Article 13.6, the Parties are obliged to work to reconcile any measures listed to Part VI in order to increase their consistency with Part VI. Therefore, measures listed to Part VI should still be considered temporary reservations rather than permanent exceptions. We understand that the government of British Columbia is in fact aggressively seeking the elimination of Part VI reservations it has listed.

Moreover, it is reasonable to expect significant pressure to reconcile such measures in favour of a lower common denominator of government regulation, because in many ways TILMA is by intent, design and structure no more than an instrument for de-regulation - after all, the entire regime is based on the premise that government regulation is the problem. This pressure to weaken or even abandon regulatory controls is also apparent from the dynamics created by Part VI.

For example, and as noted, British Columbia requires five years of teacher education, but Alberta only four. Recognizing that its additional training requirement is inconsistent with Part II, BC has listed this measure to Part VI. Because it has the higher regulatory standard, it is the BC measure, not Alberta's weaker requirement that is listed. Consequently the focus of reconciliation efforts under Article 13(4) is on BC to justify its higher standard, not on Alberta to explain why its teachers receive less training.

We understand that in fact the provincial government of British Columbia is seeking the elimination of this reservation and has called upon the British Columbia College of Teachers to justify why BC's approach to teacher training should not be reduced to a 4 year regime.

The pressure that TILMA creates to reduce regulatory standards to the lowest common denominator was recently described by the Executive Vice-President of the Canadian Institute of Chartered Accountants in testimony before the Standing Senate Committee on Banking, Trade and Commerce:

> *Although we support the merits of trying to enhance labour mobility, we bring to your attention the important need to recognize that provisions such as article 13.1 of TILMA could lead inevitably to the risk that standards of qualification for professionals are thereby reduced to the lowest level prevailing in the country.*
>
> *As provincial standards for regulation of professions are not uniform to begin with, this provision essentially makes the lowest of the standards that may exist in Canada acceptable as the base of qualification — essentially a race to the bottom, if you will. We*

> *do not believe that this is consistent with the obligation of legislators and governments nor of the professions themselves to ensure that the public is protected.*[25]

Given the broad prohibition on regulatory intervention set out by Articles 3 and 5.3, it is inevitable that various efforts for reconciling or harmonizing provincial standards (see Articles 5.1, 5.5, 11.1 and 13.6) will create real pressure to reduce standards and regulations to the lowest common denominator, or abandon them altogether. If further evidence of TILMA's de-regulatory intent is needed, it can be found in the fact that it fails to incorporate AIT provisions intended to moderate the "race to the bottom" effect of trade liberalization. [26]

Foreign Workers

A related issue concerns the question of foreign workers in Canada and the certification and mobility rights they may acquire under TILMA. In reviewing TILMA, the Conference Board of Canada has made a point of commenting on the failure of certain governments to eliminate residency-based policies regarding occupational mobility, specifically in relation to "the general skilled labour shortage in Canada"[27].

Further in this regard, we understand that the Conservative government has recently announced an initiative under the Temporary Foreign Worker Program (TFWP) to make it easier for employers to hire workers from abroad by reducing or eliminating regulatory requirements that must be met before such workers may be brought to Canada[28]. Trade unions have raised a number of concerns about this initiative, and about government's failure to address, in relation to foreign workers now in Canada, long-outstanding complaints about the violation of workers' rights, and poor or abusive working conditions.[29]

Trade unions have, in this regard, drawn a key distinction between *labour shortages* and *skills shortages*. According to this analysis, *labour shortages* tend to be claimed by employers who see access to foreign workers as an opportunity to avoid providing decent working conditions and wages to Canadian workers. Moreover the vulnerable position of foreign workers allows employers to further reduce wages and working conditions, which consequently creates negative pressure on the wages and working conditions for all workers. On the other hand, *skills*

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[25] Nigel Byars, Proceedings before the Standing Committee on November 23, 2006 http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/bank-e/11evb-e.htm?Language=E&Parl=39&Ses=1&comm_id=3

[26] See AIT, Article 1508.2 and Annex 807.1, both of which indicate that harmonization should not be to lower levels of environmental and consumer protection, respectively.

[27] Supra note 3.

[28] Government of Canada, http://www.hrsdc.gc.ca/en/gateways/nav/top_nav/program/fw.shtml

[29] Draft Canadian Labour Congress paper; *A workers' perspective on the increasing use of migrant labour in Canad*a, January, 2007

shortages in certain sectors and regions do exist in Canada, and according to the Canadian Labour Congress, are largely due to inadequate labour force development by employers and governments over the past decade.

It is beyond the scope of this opinion to consider these issues, other than to flag the fact that TILMA is likely to undercut efforts to maintain or strengthen Canadian apprenticeship, training and certification requirements. For as we have seen, such standards are subject to the de-regulatory pressures that TILMA generates to reduce standards to a lower common denominator. TILMA dispute procedures may also be invoked by companies to challenge residency and other certification requirements that now limit the ease with which they may bring temporary foreign workers to Canada. In addition, once such a worker is certified for a vocation in one TILMA jurisdiction, mobility rights under the regime would be established.

It is important to appreciate that nothing in TILMA establishes minimum standards with respect to worker training or certification. Thus while a TILMA party is prohibited from strengthening its certification requirements unless it can prove that it is entitled to do so under relevant TILMA exceptions, nothing precludes it from weakening or abandoning such legal or regulatory requirements. The new lowest common denominator may accordingly become the reduced training requirements adopted by a province for the purpose of expediting the certification of foreign workers.

Effective Recourse for Those Denied Mobility Rights

It is beyond the scope of this opinion to assess whether meaningful impediments to labour mobility exist between Alberta and British Columbia, and if so whether these will be addressed or have been excepted under TILMA. For Ontario workers, the potential effects of TILMA on labour mobility would depend upon the precise terms and exemptions that Ontario and other provinces might negotiate as a condition of their participation in the scheme. But as noted, mobility rights are a two-way street, and where Ontario maintains higher licensing or certification standards than other jurisdictions, entering into TILMA will create new pressures to reduce or eliminate them.

For the sake of argument, we may assume that TILMA engenders labour mobility rights for some Ontario workers they do not now enjoy under the *Red Seal Program* or the numerous *Mutual Recognition Agreements* negotiated among many regulatory bodies. The next question then is whether TILMA will provide an effective means for asserting these rights, and this brings us to the dispute procedures which represent the most important feature of the TILMA regime.

IV. Dispute Resolution - TILMA'S Private Enforcement Regime

The establishment of TILMA represents a radical departure from Canadian legal norms by according private parties the right to directly enforce an inter-provincial agreement which they are neither party to nor owe any obligations under. The architecture of TILMA dispute procedures represents an amalgam of elements taken from the AIT and NAFTA investment

rules. Under both of these regimes, individuals, as well as the Parties themselves, are entitled to invoke dispute procedures. However, by far the most significant feature of TILMA's dispute procedures is borrowed from Chapter Eleven of NAFTA, which entitles foreign investors to claim monetary damages where these are alleged to have been caused by a failure of the Parties to comply with their obligations under the Agreement.

The dispute resolution provisions of TILMA are set out in Part VI, and as noted may be invoked by a "*person of a Party*". Under TILMA a "*person*" is "*a natural person or an enterprise of a Party*" and an "*enterprise*" is an "*entity constituted, established, organized or registered under the applicable laws of a Party, whether privately owned or governmentally owned, including any corporation, trust, partnership, cooperative, sole proprietorship, joint-venture or other form of association, for the purpose of economic gain.*"

Article 25 of TILMA delineates the procedural steps that must be followed by any person who wishes to resolve "any matter regarding the interpretation or application of this Agreement". Article 26 empowers persons to invoke binding arbitration where a Party declines to take up the complaint on its behalf.

Unlike the AIT, which establishes a screening mechanism to weed out frivolous, harassing or unmeritorious complaints, under TILMA the right to invoke formal dispute resolution depends only upon complying with the procedural requirements of Articles 25 and 26, unless the measure at issue is otherwise exempt from dispute resolution, but even that question can be litigated.

In certain respects, TILMA does address some of the more egregious features of NAFTA dispute procedures. Thus under TILMA there is an obligation to exhaust available remedies before invoking the extraordinary dispute procedures of the regime. There is also a limit on the quantum of damages that may be assessed, and an attempt to contain the number of claims that may be asserted at one time to challenge a particular measure.

In seeking to counter criticism that has been levelled at TILMA the Minister of Economic Development for the Province of British Columbia asserted that "As for dispute resolution, no more than one dispute may be lodged on what is essentially the same complaint."[30] The Minister is wrong. In fact, any number of proceedings may be initiated to challenge a particular measure, as long these proceed sequentially rather than at the same time.[31]

Moreover, while only one panel proceeding may take place at the same time, there is no limit on the number of complaints which may be made under Article 25. Under Article 25.3, once a complaint is made to a person's 'home' province about the measures of the other Party, the 'home' government must determine whether to request consultations on the person's behalf

[30] See Colin Hansen, Special to the Sun, *Fact, not fiction, needed on TILMA*, December 15, 2006.

[31] Article 34.2

within 21 days, and make that request within 7 days thereafter. A failure to meet these deadlines entitles the person making a complaint to request consultations with the other Province, and those consultations shall be completed within 30 days of that request.[32] There is nothing to preclude a person from making numerous complaints, nor to limit the number of persons who may invoke this complaint procedure at the same time.

Once these steps in the process are completed, a claim for damages may be made under Article 26. Only at this stage in the process are disputes compelled to proceed in single file, with each claimant having to wait until the panel proceedings before it are resolved.

While the Minister has made much of the fact that no tribunal may actually require a government to rescind a law or regulation, or to abandon a practice or program, the distinction he makes is one of form, not substance, because it is entirely unrealistic to expect that a government will maintain an offending measure for which it has had to pay damages under Part IV when there is queue of other parties waiting in line to make precisely the same claim.

Moreover, while 5 million dollars is not an insignificant sum, it is quite likely that cases involving substantially higher claims will be made. Consider, for example, a case where a company plans to establish a new enterprise such as a mine, and must satisfy a number of regulatory measures including environmental assessment planning, species habitat protection, air pollution controls, mine tailing management, road construction, waste water control, and solid waste management. Some of these measures are exempt under TILMA; the majority are not. Moreover with respect to any particular matter, such as environmental assessment planning, there may be more than one measure that applies.

It is likely that a company that invokes TILMA in an attempt to remove, weaken or avoid the application of regulatory controls will seek to impugn all measures that will apply to its undertaking, if only to establish bargaining leverage with regulatory officials that often have considerable discretion in the approvals process. In this scenario, the company will be entitled to claim to as much as $5 million in damages for each impugned measure. Thus it is quite possible that claims for several multiples of $5 million will be brought forward.[33]

It is entirely reasonable to expect that companies and their lawyers will have a field day with the right to make such claims. Successful claimants will likely be awarded their legal costs in addition to any monetary award. The human and fiscal resource implications for governments are staggering.

[32] Articles 25.4 and 25.10.

[33] Article 30:2 imposes a $5 million cap "with respect top any one matter under consideration". It is not clear how this limitation will be interpreted when more than one measure is challenged. Moreover nothing precludes multiple claims, each targeting distinct measures.

V. International Commercial Arbitration Was Not Designed and is Ill-Equipped to Resolve Disputes About Matters that are in Essence, Public not Private

With few modifications, panel proceedings are conducted in accordance with UNCITRAL Arbitration rules [34] which were formulated to resolve international disputes arising from commercial relationships. As acknowledged by a NAFTA tribunal operating under UNCITRAL rules, "[s]uch proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties." [35] Yet under TILMA this framework of private international commercial arbitration is similarly enlisted for a purpose it was never intended and is ill-equipped to serve - namely, to resolve disputes brought by individuals and companies concerning government policies, programs and law that have broad public implications and which often affect many in society. International commercial arbitration is a problematic model for resolving such disputes for several reasons.

To begin with, private international commercial arbitration lacks the independence of and procedural safeguards applicable in domestic courts. Panel members are handpicked by the Parties, the appointments process entirely lacks transparency and there is no requisite training or qualification delineated by TILMA for those appointed to the roster of panellists. This lack of independence raises questions about the objectivity of panel members, and the potential for self-interest to influence the approach taken by adjudicators to the issues that come before them.

Also unlike courts, TILMA dispute panels are free to interpret the provisions of TILMA as they see fit, ignoring the views of other tribunals that may have been called upon to resolve similar or identical issues. The same deficiency plagues the NAFTA arbitral regime and the result has been inconsistent and contradictory rulings that undermine certainty, and confound policy and law-makers seeking to chart a safe course through a minefield of ill-defined, broadly worded, and largely unprecedented rules about domestic trade, investment and services. Commenting on these problems in the NAFTA context, Justice Peppal of the Ontario Superior Court described the process this way:[36]

> *…[A]rguably there are deficiencies in Chapter 11. Although improvements have been made, the procedure lacks total transparency. The principle of stare decisis is inapplicable and decisions lack predictability. There is no consistent mechanism for review of the decisions of the tribunals. Very broad definitions have been given in some cases to key terms such as "measure", "investment" and "a measure tantamount to*

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[34] Arbitration Rules of the United Nations Commission on International Trade Law Adopted. UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in *ad hoc* arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.

[35] *UPS v. Canada*, *supra*, at para. 70

[36] *R. v. Council of Canadians*, 2005 CanLII 28426 (ON S.C.) at para. 31

> *expropriation". There is no necessary privity between an investor and a respondent and the only meaningful restraint on an investor is the cost of the arbitration.*

Defenders of these private enforcement procedures will point to TILMA provisions which attempt to rein in the discretion of dispute panels. It is true that the Parties have retained the right to issue joint decisions declaring their interpretation of TILMA, which are to be binding on panels.[37] But this is true under NAFTA, where it has not proven to be a reliable safeguard against tribunal excesses, in part because of a lack of consensus among the Parties. To work, the Parties must be in agreement about the question of interpretation at issue, and consensus about the meaning of TILMA provisions may prove elusive.

Another moderating influence may be the courts, which are empowered to review panel decisions but only where monetary awards are made. However, in our view it would be imprudent in our view to put too much faith in this judicial oversight as the courts have consistently adopted a deferential approach to such arbitral awards even where the issues in dispute raise broad questions of public concern.[38]

While joint decisions and judicial review may ameliorate the unpredictability of the process, the essential deficiencies of the commercial arbitral model remain, as will its corrosive influence on a broad spectrum of public policy, programs, practices and law that will remain vulnerable to TILMA claims.

VI. TILMA's Chilling Effects on Public Policy, Law and Action

Another important consequence of empowering individuals and companies to invoke dispute resolution under TILMA is that doing so negates the political, strategic and economic constraints that may temper a province's inclination to seek recourse to formal dispute resolution. Provinces will have an incentive to seek a balanced interpretation of TILMA rules because they must also observe them. Private parties, on the other hand, have no obligations under TILMA, and are therefore free of the moderating influence of having reciprocal obligations.[39]

The notoriety, cost, and potential liability associated with complaints and potential damage awards are likely to produce a "chill" over the development of domestic policy and law. Moreover, the inclination of governments to engage in self-censorship to avoid such risks is accentuated because the parameters of TILMA obligations are ill-defined, often unprecedented,

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[37] Article 33(4).

[38] The *United Mexican States v. Metalclad Corporation*, BCSC, 2001 and *Quintette Coal Ltd. v. Nippon Steel Corp* (B.C.C.A.) [1990] B.C.J. No. 2241

[39] Indeed, while over 35 NAFTA investor state claims have been initiated, not one state-to-state dispute has been brought concerning these investment rules - http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp.

and at the mercy of panel interpretations that may reject the views of other panels on the same question.

In fact, the threat of investor-state litigation under NAFTA investment rules continues to exert a chilling influence over such diverse public policy initiatives as plain packaging regulations for cigarettes, public automobile insurance, and even the future of Medicare. As pointed out by a prominent Canadian trade lawyer in a report prepared for the Romanow Commission, investor-state claims are now an obstacle to expanding the publicly funded health care system.[40] TILMA is likely to have similar effects and for the same reasons.

VII. The Rights of US and Mexican Investors Under TILMA

One of the most problematic features of TILMA is the new rights it indirectly accords foreign investors. These rights arise under NAFTA provisions that require provincial governments to accord *National Treatment* to the investors, service providers and investments of the NAFTA Parties.

For example, Article 1102 of NAFTA[41] defines the obligation to provide National Treatment in this manner:

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment accorded by a Party under paragraphs 1 and 2 means,* ***with respect to a state or province****,* ***treatment no less favorable than the most favorable treatment accorded, in like circumstances****, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. …* [emphasis added]

[40] David Schneiderman, *Investment Rules and the New Constitutionalism*, Law and Social Inquiry, Journal of the American Bar Foundation, Volume 25, Number 3, Summer 2000, pp. 757-787; Jon R. Johnson, *How Will International Trade Agreements Affect Canadian Health Care?* The Commission on the Future of Health Care in Canada: Discussion Paper No. 22.

[41] Similar *National Treatment* obligations are defined by Articles 301and 1202 with regard to trade in goods, and services respectively.

Under TILMA, the most favourable treatment accorded by British Columbia is to persons and companies from Alberta (and vice versa), and in consequence of the province's *National Treatment* obligations, it is this standard of treatment to which US and Mexican investors are now entitled. Moreover, these substantial new rights are bestowed on foreign investors without any reciprocal rights being acquired by their Canadian counterparts**.**

Thus by entering into TILMA, both Alberta and British Columbia have not only created a new standard of most favourable treatment for the investors of the other province, but also for all US and Mexican persons and companies that can satisfy NAFTA's modest threshold for qualifying as a foreign investor in Canada. This new standard of entitlement not only includes the substantive rights of the TILMA regime, but also the right to invoke dispute resolution under Part IV.

The authors of the AIT anticipated this problem and delineated a procedure for dealing with a claim by one of Canada's trading partners alleging that the AIT had created a right, claim or remedy that could be asserted under an international agreement to which it is a Party – in other words NAFTA or the WTO.

Article 1809(3) of the AIT provides:

> *Where, notwithstanding any action the Committee may take under paragraph 2, the trading partner proceeds to an international panel and is successful in establishing a right under an international agreement based on a provision of this Agreement, that provision is to that extent of no force or effect, unless the provision expressly states that it shall continue to exist notwithstanding the panel ruling.*

By comparison, TILMA offers no more than the stipulation that "The benefits of this Agreement accrue only to the Parties and their persons" [Article 2.3]. However, it is simply not possible for a provincial government to modify or qualify its obligations under NAFTA, either by statute, contract or inter-provincial agreement. The only means for modifying the requirements of NAFTA is to amend the provisions of this trade agreement, or establish new exceptions to it.

The problems that Article 1809 anticipates do not appear to have yet arisen, but unlike TILMA, the private enforcement procedures of the AIT cannot give rise to an award of damages or to any other enforceable remedy, so there is little incentive for foreign investors to invoke such AIT-based rights. Conversely, the promise of substantial monetary awards under TILMA may be sufficient to open the floodgates to private claims, including those brought by foreign investors.

Conclusion:

We summarized our key conclusions in the introduction to this opinion and will not repeat that exercise here. In our view, TILMA represents a far reaching and corrosive cconstraint on the future capacity of the governments of British Columbia and Alberta to exercise the policy, legislative, and programmatic authority that is essential to their governance mandates. Given the enormous impacts this regime in likely to have on virtually every sphere of public policy and law, it would be unconscionable for Ontario or any government considering TILMA-like obligations to proceed without the fullest and informed public discussion and debate.

Sincerely,

Steven Shrybman

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