

## **TILMA – Key Implications for BC Libraries** by Ellen Gould

### **Introduction**

On April 1, 2007 the Trade, Investment and Labour Mobility Agreement came into force in BC And Alberta. As of that date, the agreement governed a wide range of governmental measures<sup>1</sup> in the two provinces. In addition, more government bodies and measures affecting specific sectors will be covered after a transition period ending on April 1, 2009.

The most immediate impact of TILMA on BC libraries is that unless they obtain changes to the agreement they are likely to have to tender far more contracts. They also may see TILMA challenges to library service provision in the public sector and to any of their standards, guidelines, regulations or administrative practices that restrict commercial interests.

The stated intent of the BC and Alberta governments in establishing TILMA was to create a comprehensive agreement that eliminates barriers to inter-provincial trade, investment, and labour mobility.<sup>2</sup> Because of the broad wording of the agreement<sup>3</sup> and the limited number of exceptions (Part V)<sup>4</sup>, concerns have been expressed that virtually any government program or regulation could be ruled to be a TILMA violation.

TILMA creates a separate, quasi-judicial dispute settlement mechanism (Part IV) that allows both private individuals and governments to enforce the agreement by taking complaints to arbitration panels. These panels are empowered to give awards of up to \$5 million for TILMA violations. This enforcement mechanism has been promoted as an improvement over the Canada-wide Agreement on Internal Trade, which does not allow private individuals and corporations to pursue complaints against governments.<sup>5</sup>

Reports and surveys have been commissioned by provincial governments, municipalities, unions, business associations, and non-governmental organizations on TILMA's potential benefits and risks (a short list of these is provided below). In terms of benefits, opinions vary widely. Some are predicting billions of dollars of new economic activity from removing barriers to trade between BC and Alberta. Others have stated that since trade between the provinces is already unrestricted, TILMA cannot achieve the benefits predicted. The methodology used to assert the benefits for TILMA has been faulted for relying primarily on limited surveys of business views of TILMA and inadequate rationale for why positive opinions of the agreement would translate into actual economic gains.

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<sup>1</sup> TILMA applies to : “measures of the Parties and their government entities that relate to trade, investment and labour mobility (Part II, Article 2.1) with measures defined as “any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure” (Part VII General Definitions).

<sup>2</sup> “The BC-Alberta Trade, Investment, and Labour Mobility Agreement”, BC Government fact sheet, October 2006.

<sup>3</sup> The agreement is available at: [http://www.gov.bc.ca/ecdev/down/BC-AB\\_TILMA\\_Agreement-signed.pdf](http://www.gov.bc.ca/ecdev/down/BC-AB_TILMA_Agreement-signed.pdf)

<sup>4</sup> In addition to the General Exceptions under Part V, Part II Article 7.4(a) provides an exception for freedom of information and privacy legislation.

<sup>5</sup> The AIT was recently changed to allow parties to the agreement (but not individuals and corporations) to be awarded compensation if panels find for complainants.

## **TILMA's Provisions on Procurement**

For government entities covered by TILMA as of April 1, 2007, Article 14 applies the agreement's "no obstacles" to trade and investment obligation (Article 3) and no discrimination obligation (Article 4) to government purchases above a certain value. Government entities are required, with some exceptions (see Part V Exceptions), to tender purchases above \$10,000 for goods, \$75,000 for services, and \$100,000 for construction.

If these thresholds are applied to library purchases, they would have a marked impact on library administrations; for goods, TILMA's threshold is one tenth of the current requirement for tendering. Local preferences in purchasing above TILMA thresholds would be a violation of the agreement. This may prove problematic in areas such as contracting for bindery services where having a local supplier work on a library's collection is to be preferred. Smaller libraries could not take their lead from the purchasing decisions made by larger, better resourced libraries, but would have to seek and review competitive bids for themselves.

Procurement decisions can be challenged under TILMA's dispute settlement process, although currently dispute panels cannot award compensation to successful complainants. BC and Alberta are committed under the agreement to enhance the recourse unsuccessful bidders have, such as by the creation of bid protest mechanisms (Article 14.3).

While complainants cannot get compensation for successful challenges to government procurement decisions, they could launch a challenge and win compensation if covered government entities failed to tender purchases as TILMA requires. Article 2.1 stipulates that: "Each Party is responsible for compliance with this Agreement by its government entities", so not securing compliance with TILMA's procurement provisions from covered government entities would be a violation that could qualify for compensation. Colin Hansen, the BC minister responsible for TILMA, has been quoted as saying that the government would "rein in" government entities that did not comply with the agreement.<sup>6</sup>

## **Local Government Concerns**

The Union of BC Municipalities at its 2007 convention passed a resolution asking the BC government to amend TILMA, exempt municipalities, or rescind the agreement. Local governments are covered under the transitional measures of the agreement – Part VI – and they entered into consultations with the BC and Alberta governments to achieve changes in key areas of concern.

Local governments were able to get the BC and Alberta governments to agree to amend TILMA to make land use regulations exempt from the agreement as long as they are applied on a non-discriminatory basis. They were also able to get their tendering thresholds increased to \$75,000 for goods and to \$200,000 for construction. The threshold for services - \$75,000 – will remain unchanged.

Donald Lidstone, the municipal lawyer advising the Greater Vancouver Regional District on TILMA, characterized TILMA's procurement thresholds as "way too low" and said that they would tend to increase procurement costs. He also said that

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<sup>6</sup> Peace Arch News, "GVRD Questions Minister", July 31, 2007.

ethical purchasing requirements, such as refusing to accept bids from companies engaged in slave labour, would also be constrained by the agreement.<sup>7</sup>

### **Ambiguous Status of BC Libraries under TILMA**

Do TILMA's original low thresholds or the higher ones negotiated by local governments apply to library purchasing? This depends on what legal status libraries have under the agreement, whether they would be defined as part of the group of provincial government entities covered by the thresholds stipulated in Article 14 or as part of the "MASH" sector - municipalities, academic Institutions, school boards, and hospitals – where higher thresholds have been negotiated for goods and construction contracts.

Article 2.1 states that the agreement "applies to measures of the Parties and their government entities that relate to trade, investment and labour mobility."

Government entities are defined by TILMA as a Party's:

- "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."

It would seem that university and school libraries clearly would be covered under the MASH sector and therefore qualify for the lower thresholds negotiated by local governments. However the BC Library Act governs other libraries - "municipal libraries" (Part 2), "regional library districts" (Part 3), and "public library associations" (Part 4) – that do not fit neatly under TILMA's definitions of government entities.

Municipal libraries are established by municipal bylaws, members of their boards are appointed by municipalities, and they get most of their funding from municipal governments. But municipal library boards enjoy a certain degree of autonomy and exercise authority delegated to them by the BC Library Act, including "exclusive control" over library expenditures. Despite these areas of autonomy, would a TILMA panel still consider municipal libraries a "form of municipal government"?

Regional library districts have boards made up of representatives of municipal and regional districts, so their governance is directly exercised by municipal elected officials. However, the establishment or "disestablishment" of regional library districts is subject to approval of the Lieutenant Governor in Council, giving the province a determining say in whether they can be set up. What importance would a TILMA panel attach to these legislative details in defining libraries under the agreement?

Public library associations have boards elected from members of their associations. They are independent of municipal government. For example, the library association for Saltspring Island states that: "The Public Library Association, constituted under the BC Society Act, is independent of the CRD [Capital Region District] with its own

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<sup>7</sup> Peace Arch News, "GVRD Questions Minister", July 31, 2007.

constitution and directors.”<sup>8</sup> Would a TILMA panel classify public library associations as non-governmental bodies exercising authority delegated by law?

The practical implication of where libraries fit under TILMA’s definitions is significant. If a library is covered as an “agency” of the provincial government or as a non-governmental body exercising authority delegated by law, then as of April 1, 2007 library contracts for goods with a value of \$10,000 and over should have been tendered and will have to be tendered henceforth.

It is conceivable that BC and Alberta did not intend TILMA to cover municipal libraries, regional library districts, and public library associations. If they had intended libraries to be covered, they could have included library boards under d), where they have explicitly defined “school boards” as entities covered by the agreement. This category of entities covered by TILMA could have read “d) school and library boards, publicly-funded academic, health and social service entities.”

Library boards may want to seek clarification from the provincial government that libraries are not covered by TILMA. Article 9.2 establishes a requirement that BC and Alberta consult on “any required special provisions, exclusions and transitional provisions to determine the extent of coverage” of the obligations created by the agreement for entities listed under Part VI Transitional Measures. Again, due to the ambiguous status of municipal and regional district libraries under TILMA, it could be argued that these entities should qualify for the consultation required by the agreement.

### **TILMA and Publicly-Provided Library Services**

In his report for the Saskatchewan government on TILMA, UBC Professor Emeritus of Economics John Helliwell stated: “In general, the combination of unrestricted private access to the dispute mechanisms combined with a commitment to neutrality of treatment, would make almost any provincial or municipal programme subject to attack.”<sup>9</sup>

Two NAFTA cases against publicly delivered services suggest avenues that private complainants may pursue under TILMA against publicly delivered services. The US company United Parcel Services launched a challenge under NAFTA Chapter 11 claiming Canada Post was unfairly competing in the commercial aspect of its operations through access to publicly subsidized infrastructure, that Canada Customs was not allowing UPS to compete with Canada Post for its business, and that UPS was not being allowed to compete with Canada Post and access the cultural subsidy for distribution of Canadian magazines. The complaint failed, but one member of the NAFTA panel issued a strong dissenting opinion suggesting grounds that complainants may successfully use public services in the future.<sup>10</sup>

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<sup>8</sup> Capital Regional District, “Library & Arts Services – Mary Hawkins Library”, <http://www.crd.bc.ca/saltspring/libraryarts.htm>

<sup>9</sup> John Helliwell, “Review of the Conference Board of Canada’s report: Assessing the impact of Saskatchewan joining the BC-Alberta Trade, Investment and Labour Mobility Agreement”, January 2007, p. 4. “Neutrality of treatment” refers to the requirement that BC and Alberta give the services, persons, investors or investments, or like goods of the other party the best treatment it accords, in like circumstances, to its own or those of any non-Party (Article 4).

<sup>10</sup> United Parcel Service of America Inc. and Government of Canada – An Arbitration under Chapter 11 of NAFTA, Award on the Merits, May 24, 2007.

In addition, Canada has recently received a NAFTA notice of intent to launch a complaint by American investor Melvin Howard seeking \$160 million in damages for not being allowed to provide for-profit health care in BC. According to a published report on the case, "Having allowed private investors into the health-care market, Mr. Howard contends that the provincial government of British Columbia was bound to treat American and Canadian investors with the same standard of treatment."<sup>11</sup>

Because TILMA affords private interests broader grounds than NAFTA to challenge public services, it may be prove to be the preferred vehicle to undertake such complaints. NAFTA allows investors to launch complaints under the provisions of one of its chapters, Chapter 11. TILMA enables private access to its dispute system for violations of any of its provisions, including the requirement that government programs cannot "restrict or impair" trade and investment (Article 3). On its TILMA Web site<sup>12</sup>, the BC government has said the specific meaning of "restrict or impair" is "control, curtail, reduce, damage or weaken". All public services may curtail or reduce investment if they supply services that could be provided in the private sector.

Potential TILMA challenges to library services delivered as public services might come from:

- For-profit service suppliers in areas such as cataloguing, bindery, IT, and library management that are not permitted to bid to supply these services, especially where precedents have been established that these services can be contracted out;
- Private educational institutions that are required to provide "bricks and mortar" library facilities – rather than being able rely on the services of public libraries - as a condition for provincial accreditation;
- Public library services – eg. DVD loans, Internet access, database research – that could be provided by for-profit companies.

### **Impacts on Regulations**

In relation to regulations, TILMA requires that:

- BC and Alberta mutually recognize or otherwise reconcile their existing standards and regulations (Article 5.1);
- BC and Alberta "shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility"(Article 5.3); and
- after the end of the transition period, BC and Alberta shall not maintain "existing standards that operate to restrict or impair trade, investment or labour mobility" (Part VI, Transitional Measures).

TILMA may be used to challenge standards, guidelines, or administrative practices that libraries maintain or adopt if these create an obstacle to investment.<sup>13</sup>

### **Options for Responses to TILMA**

If TILMA raises concerns about encroachment on public policy space, responses to the agreement can vary. BC and Alberta local governments have achieved

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<sup>11</sup> Investment Treaty News, "US investor threatens arbitration over investments in Canadian health-care sector", September 24, 2008.

<sup>12</sup> <http://www.tilma.ca/agreement>

<sup>13</sup> Note that Article 7.4(a) does address the question of freedom of information and privacy by stating: "Nothing in this Agreement shall be construed to require a Party to provide r allow access to information the disclosure of which would: be contrary to its freedom of information or privacy legislation..."

*amendments* to the agreement in order to protect their authority in areas like land use and business licensing.

However, in the study commissioned by Saskatchewan municipalities on how they should respond to possible extension of the agreement to that province, the Estey Centre for Law and Economics in International Trade recommended Saskatchewan municipalities seek a complete exemption:

"The text of the agreement is what will endure past governments' terms in office and the text of the agreement itself contains no provisions to support these reassurances [that TILMA will not narrow municipal public policy space]. The best means of ensuring that space exists is to exclude cities from such agreements entirely."<sup>14</sup>

An exception for libraries from TILMA could be included in Part V - General Exceptions and be worded as follows:

"PART V  
EXCEPTIONS TO THE AGREEMENT  
BOTH PARTIES

General Exceptions

1. Measures adopted or maintained relating to:

....

g) Libraries, and services and investments pertaining to libraries."

#### **Selected Resources on TILMA:**

The BC government Web site on TILMA has a series of fact sheets on TILMA as well as the Conference Board report "An Impact Assessment of TILMA"

Online: [http://www.gov.bc.ca/ecdev/popt/media\\_room/bc\\_ab\\_trade\\_investment\\_mobility\\_agreement.htm](http://www.gov.bc.ca/ecdev/popt/media_room/bc_ab_trade_investment_mobility_agreement.htm)

Ferguson, Keith. "TILMA and the Environment", Sierra Legal Defence Fund, March 30, 2007.

Online: [www.sierralegal.org/reports/tilma\\_mar302007.pdf](http://www.sierralegal.org/reports/tilma_mar302007.pdf)

Shrybman, Steven. "An Assessment of The Trade, Investment and Labour Mobility Agreement (TILMA) Between the Provinces of British Columbia and Alberta" CUPE: Ottawa, May 2007.

Online: [http://cupe.ca/Trade/An\\_assessment\\_of\\_the](http://cupe.ca/Trade/An_assessment_of_the)

Weir, Erin and Marc Lee. "The Myth of Inter-provincial Trade Barriers and TILMA's Alleged Economic Benefits." Canadian Labour Congress: Ottawa, Feb. 2007.

Online: [www.policyalternatives.ca/documents/BC\\_Office\\_Pubs/bc\\_2007/bc\\_ab\\_tilma\\_btn.pdf](http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_2007/bc_ab_tilma_btn.pdf)

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<sup>14</sup> The Estey Centre for Law and Economics in International Trade, "A Space for Cities in Trade Agreements", January 2008, <http://tiny.cc/SLXzR>, p. 30.