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March 30, 2009

File No. 09-0296

Via Email: execdirector@belta.org

British Columbia Library Trustees Association
PO Box 4334
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Vancouver, BC V6B 3Z7

Attention: Errin Morrison, Executive Director

Dear Ms. Morrison:

Re: TILMA – Implications for BC Libraries

You have asked us to comment on the impacts of the Trade, Investment and Labour Mobility Agreement (TILMA) on British Columbia libraries. In our letter dated March 16, 2009 we commented on TILMA's applicability to BC libraries and concluded that TILMA applies to libraries and their Boards as defined and classified in the *Library Act*.

In this letter, we set out a general overview of TILMA and its implications for BC libraries.

Background

TILMA is an interprovincial Agreement between British Columbia and Alberta. Other provinces, including Ontario and Quebec, are reportedly considering whether to enter into the Agreement. TILMA became effective on April 1, 2007. The Agreement was made under Article 1800 of the 1995 Agreement on Internal Trade (AIT) in respect of which Canada, the provinces and territories are parties. The Province has stated that the purpose of TILMA is to liberalize trade, investment and labour mobility among the provinces beyond the AIT level. TILMA applies to measures of the provinces and their government entities in relation to the matters set out in TILMA, including bylaws, resolutions, policies, orders, administrative practices or other procedures (measures) of the signatory provinces and their entities, including "non-governmental bodies that exercise authority delegated by law" and "municipal institutions".

Although library entities are not parties to TILMA, their measures are subject to the Agreement. This does not mean a library board measure will be invalid if it runs afoul of TILMA. It means that even if the measure is valid at law, it may be subject to the dispute process under TILMA, at the instance of a complainant.

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TILMA came into force on April 1, 2007. Article 9.2 provides for a two-year transitional period during which the parties must undertake further consultation and negotiate special provisions, exclusions or transitional provisions to determine coverage to measures of library boards and other entities exempted during the two-year transitional period.

The TILMA approach is such that all measures are included unless expressly excluded. The Agreement generally provides that each province must ensure that its measures and those of government entities do not restrict or impair trade, investment or labour mobility between the provinces.

No Obstacles

Article 3 provides that, in effect, an entity such as a library must 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. This does not prevent libraries from continuing to proceed with measures in accordance with their policies and the public interest. Article 3 would apply to situations where entities adopt measures that affect the flow of investment or trade across the border from Alberta to British Columbia. In some cases, libraries will be able to take the position that their measures may control what can be done with a specific investment, but they may not restrict or impair the act of making an investment in the first instance. The principal issue is that of treating Alberta and Alberta persons in a non-discriminatory manner under Article 4. Potential examples raised by staff include library policies restricting advertising or commercial opportunities in libraries or on library web sites, or using free open source software. We think such would be an “internal measure” which does not restrict or impair trade between or through BC territory, but which might be reviewable under Article 4 [“non-discrimination”, discussed in the next paragraph].

Non-Discrimination

Article 4 of TILMA provides that each party must accord the other party treatment no less favourable than the best treatment that it accords, in like circumstances, to its own or those of any non-party. In our view, a library would only run afoul of TILMA Article 4 if the library entity adopted a one-off measure that resulted in material injury to a competing Alberta business.

TILMA requires libraries to give the highest level of consideration to “... like, directly competitive, or substitutable goods; persons; services and investors and investments”. The UBCM requested that local governments be exempt from this requirement. The local governments were concerned that although there were some exceptions for some narrowly defined “legitimate objectives”, these did not include protection or favouring of the production of an enterprise of a local government itself. The provinces have not exempted the MASH sector from Article 4. Accordingly, libraries may be concerned that the exceptions for the narrowly defined “legitimate objectives” do not go far enough to include protection or favouring of the “production” of an enterprise of a library. We are aware of at least one public library in British Columbia that provides specialized reference services for a fee. It is at least arguable that this service might be challenged by private research or database firms from Alberta which provide competing services unless the library service is fairly competing with the Alberta private tender [we do not think local BC bookstores, internet cafes or video rental outlets can complain under TILMA about library competition].

Article 4 treatment applies in relation to purchasing policies, discussed in the next section.

Procurement Issues

Government entities must provide open and non-discriminatory access to procurement under TILMA. Accordingly, if libraries are government entities, as the Province says they are in a March 5, 2009 library bulletin, the TILMA procurement rules apply. There is some doubt about whether the TILMA procurement rules apply to libraries, as discussed at the end of this section. This must be addressed before libraries determine whether they must comply with the TILMA procurement rules.

If TILMA Applies

If the TILMA procurement rules apply to libraries, TILMA as originally executed by the parties would require libraries to tender goods, services and construction that exceed much lower thresholds, despite the higher AIT tender procurement thresholds. Under the AIT, goods were required to be tendered above the value of \$100,000.00, whereas the TILMA threshold was to be \$10,000.00. Under the AIT, the threshold for tendering services is \$100,000.00, whereas it was originally \$75,000.00 under TILMA. Construction under AIT is \$250,000.00, and under TILMA it was originally \$100,000.00.

The Union of British Columbia Municipalities (UBCM), further to a resolution passed at its 2007 convention, took the position that these thresholds were too low for local governments given the real costs of preparing notices and documentation in respect of comparatively small procurement exercises traditionally addressed by less formal competitive measures. Accordingly, UBCM and the other provincial local government associations requested that the TILMA requirements that municipal governments tender goods, services and construction over significantly reduced prescribed thresholds be amended such that the levels contained in the AIT would continue to apply. The provinces ultimately agreed to amend TILMA in response to the UBCM submissions to provide for procurement thresholds significantly higher than those applying to the Provincial Government itself or to provincial entities. The original TILMA thresholds will apply to the Province and its provincial entities, but for municipal institutions, school boards, universities and libraries, the goods threshold will be increased to \$75,000.00 from \$10,000.00, the construction threshold will be increased from \$100,000.00 to \$200,000.00, and the services threshold will remain at \$75,000.00. At no time were the provinces prepared to maintain the thresholds at the AIT level or to exempt local governments, libraries or other entities under the MASH sector.

UBCM conducted a procurement practices survey and concluded that the higher thresholds are reasonable in the circumstances.

Although libraries may be of the view that the TILMA thresholds, particularly in relation to goods, will result in minimal trade benefits and create an administrative burden on staff in relation to an expanded tendering process, we have concluded that:

- (1) the provinces, after extensive negotiations with UBCM, refuse to exempt municipalities or other MASH sector entities;
- (2) the provinces agreed to amend TILMA to increase the procurement thresholds, as discussed, and we are morally convinced that the provinces will not increase these thresholds to the AIT level;

- (3) the UBCM on behalf of the local governments is now prepared to move forward with these new TILMA thresholds, based on a procurement practices survey and input from member municipalities;
- (4) despite the three previous points, we think these thresholds should be revisited routinely in relation to inflation and emergent library procurement issues.

The AIT rules apply, given that TILMA is merely a sub-set of AIT. Under AIT and TILMA, advertising must be run on "BC Bid" or any other electronic system. The existing AIT procurement thresholds still need to be advertised nationally, beyond the Alberta-British Columbia TILMA area, in accordance with existing AIT procurement thresholds. Advertising in Alberta must be consistent with the final TILMA procurement thresholds. Nothing in the AIT or TILMA prevents libraries from advertising in other media in addition to BC Bid or any other electronic system.

The Province has issued a media release dated February, 2009 that informs school boards that "solicitations for the services of architects and engineers are now covered under TILMA and must be openly tendered". In our view, this applies to libraries as well.

As of April 1, 2009, when TILMA applies to libraries, TILMA will eliminate a number of AIT exemptions and exclusions. The following will be covered by TILMA for libraries:

- (1) advertising and public relations services;
- (2) services of licensed professionals such as architects, engineers, veterinarians, land surveyors, and accountants.

If libraries have any contracts funded in whole or in part by an international cooperation organization, such contracts are no longer exempted (noting that they were exempt under AIT).

A number of AIT procurement exceptions are continued under TILMA, if the procurement procedures are not used by the procuring entity to avoid competition, discriminate between suppliers or protect suppliers. These exceptions are under Part V, "Government Procurement", Articles 1 and 2, and include:

- (1) procurements from non-profit societies;
- (2) where only one supplier satisfies the stipulated requirements;
- (3) an unforeseeable situation of urgency;
- (4) confidentiality;
- (5) services of lawyers.

The procurement of prescribed financial products and services are also exempted.

Libraries may continue to use the following procurement mechanisms so long as they do not contravene the non-discrimination provisions under Article 4, according to the February 2009 media release issued by the Province:

- (1) pre-qualified lists of suppliers;
- (2) purchasing co-ops, buying groups;
- (3) long term supply contracts;
- (4) specifications for service, such as specifications relating to time or maintenance.

Libraries may not make decisions based on supporting local economies, favouring quality over price, or other factors that might run afoul of TILMA. We do not think smaller libraries could base their purchasing decisions on those made by larger libraries. They will have to proceed with tendering unless they pool procurement. In regard to local preferences, the provinces took a strong position that they are not prepared to amend TILMA to allow local preferences over the TILMA thresholds. In our opinion, however, to the extent that local preferences are valid under British Columbia law, the provinces have provided libraries with room under the increased thresholds to procure locally.

Why TILMA May Not Apply

Article 3 of the “Government Procurement” section of Part V provides that Articles 3 [No Obstacles], 4 [Non-discrimination] and 14 [Procurement] do not apply to any procurement undertaken by non-governmental bodies that exercise authority delegated by law. In our March 16, 2009 opinion letter in regard to the application of TILMA to libraries, we concluded that libraries are “Government Entities” and therefore TILMA applies generally because libraries are “non-governmental bodies that exercise authority delegated by law”. In Part VII [General Definitions], “a non-governmental body that exercises authority delegated by law is defined as any organization, institution, corporation or association to whom regulatory or supervisory authority has been delegated by a Party”. Libraries are unique entities in terms of their statutory creation and do not fit any of the definitions of “Government Entity” in Part V other than “non-governmental bodies that exercise authority delegated by law”:

- (1) libraries are certainly not agents of the Crown by virtue of the *Library Act*;
- (2) they are not owned by the Crown;
- (3) they are not government, and in light of being separate corporations with exclusive control over budgets we do not think even municipal libraries are owned or controlled by municipal governments under Part VII, “government entities”, paragraph (c); and
- (4) they are not school, academic, health or social service entities.

Accordingly, it is at least arguable contrary to the March 5, 2009 bulletins to libraries issued by the Province that library procurements are exempt from Articles 3, 4 and 14. This is a major issue that must be addressed before libraries determine whether their procurements should be conducted under TILMA.

Standards and Regulations

Article 5(1) provides that parties must reconcile standards and regulations that operate to restrict or impair trade, investment or labour mobility. A standard is defined as a specification that sets out rules for goods, services and providers or occupational qualifications. A regulation is a standard adopted as law, so libraries are affected only to the extent they adopt standards. Examples would be rules of a library relating to goods or services acquired or occupational qualifications. Article 5(1) would require libraries to reconcile BC-Alberta library rules in regard to goods and services and occupational qualifications. As discussed under “Labour Mobility” below, BC and Alberta libraries have different occupational qualifications [Community Librarian Training Program (CLTP) certificate required for staff in some BC libraries but not in Alberta, while libraries serving over 10,000 population in Alberta require a professional librarian] and these standards are not immediately or reasonably reconcilable.

Article 5(3) provides that libraries must not establish new standards (rules) that operate to restrict or impair trade, investment or labour mobility. Other than in respect of occupational qualifications, given the legitimate objectives exceptions set out in Article 6, it is difficult to identify potential new library rules/standards that might restrict trade or investment. It is arguable, however, that a decision to make a general rule to refuse goods from a black-listed Alberta provider could offend Article 5(3) as well as Article 4 if the boycott grounds are not found in the definition of legitimate objectives under Article 6. It should also be noted that a legitimate objective exception is subject by its terms to a superseding TILMA obligation to establish the level of protection necessary to achieve the objective. [Note: although UBCM sought exceptions for local government measures, the Province took the position that municipal measures were likely covered by legitimate objectives exceptions but for certainty the provinces created a new exception for land use measures].

Labour Mobility

Article 13(1) provides that 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. A library entity policy that staff have a CLTP is not certification by a regulatory authority because a “regulatory authority” is defined as a government entity with authority to certify or “regulate” (defined as to make “laws”) in regard to an occupation, and libraries do not have power to make laws. So even though a library may have a CLTP policy, this is not a law made by a regulatory authority. The Alberta requirement that communities with a population over 10,000 must employ a professional librarian derives from Alberta’s *Library Act* and *Library Regulation*, so this barrier to labour mobility is made by a government entity with authority to certify or regulate an occupation, and libraries are not listed as an exception under Part VI. On the plain language of Article 13(1), however, this does not mean BC library staff may work in Alberta without being a professional librarian – instead it means that a librarian accepted under Alberta law must be accepted by a library in BC.

Dispute Resolution

Under Part V of TILMA, Alberta, or an Alberta person (including a corporation), may commence dispute resolution proceedings against BC if a BC entity has restricted trade, investment or labour mobility contrary to TILMA or where there is a need to resolve a matter respecting interpretation or application of TILMA. If consultation under Part V fails, the complainant may cause a dispute resolution panel to be established. If BC fails to comply with a panel recommendation, such as causing a government entity such as a library to change an offending measure by a deadline, the

panel may issue a monetary award or authorize retaliatory measures of equivalent economic effect. The award may address the extent to which the measure caused economic injury. Monetary awards are limited to \$5 million in regard to each matter.

According to the March 2009 media release from the Province, BC and Alberta are considering alternatives to improve dispute resolution in regard to procurement. One option is a bid protest mechanism. Until agreement is reached on such, the provinces have agreed that the monetary award provisions do not apply.

In regard to local government, UBCM asked the provinces to amend TILMA to allow local governments to defend their measures in the dispute resolution process, whether or not the provinces appear as a party. The Province of BC agreed to enter into a consultation agreement with UBCM to provide that UBCM and an affected local government affected would be notified about a complaint, be consulted, and have an opportunity to appear at a hearing to present an *amicus* brief.

Given the nature of TILMA and BC's positions in favour of liberalization, libraries cannot assume BC will defend a library entity's measures. Accordingly, a consultation agreement for libraries would be advisable.

Yours truly,

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cc: Deborah Thomas
BC Library Association