

RATCLIFF & COMPANY LLP

Lawyers

GARY R. YABSLEY
GREGORY J. MCDADE, Q.C.
DONALD P. LIDSTONE, Q.C.
R. BRENT LEHMANN
VERONICA SINGER
SHAMIM SHIVJI
MAEGEN M. GILTROW
KRISTY POZNIAK

DARYL J. COLLIER
JOHN R. RICH
CHARLES G. PIERCEY
RENEE COLLINS GOULT
MICHELLE M. ELLISON
KATE M. BLOMFIELD
LISA C. GLOWACKI
MELINDA J. SKEELS

BRIAN A. HANSON
KARL P. STEPHAN
BRENDA A. MCLUHAN
KERRY L. SOMERVILLE
JAMES P. TATE
AARON S. BRUCE
ALEXANDRA E. FLYNN

W. BRUCE CAMPBELL
JIM REYNOLDS
F. MATTHEW KIRCHNER
KEVIN D. LEE
LESLEY A. GIRODAY
PETER I. BONNY
ANGELINE S. B. NYCE

CERTAIN MEMBERS OF THE FIRM ARE ALSO CALLED TO THE BARS OF
ALTA., SASK., MAN., ONT., N.W.T., NUNAVUT, TEXAS AND NEW YORK STATE

March 16, 2009

File No. 09-0296

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

Via Email: execdirector@bclta.org

Attention: Errin Morrison, Executive Director

Dear Ms. Morrison:

Re: TILMA's Applicability to BC Libraries

The British Columbia Library Trustees' Association (BCLTA) has requested our advice respecting the potential implications of the BC-Alberta Trade, Investment and Labour Mobility Agreement (TILMA) on British Columbia's public library sector.

1. APPLICATION OF TILMA TO LIBRARIES

You have asked whether TILMA applies to libraries, noting the classes of libraries set out in the *Library Act*.

In April 2006, British Columbia signed (TILMA) with Alberta. TILMA has been created pursuant to Article 1800 of the Agreement on Internal Trade (AIT). On April 1, 2007, parts of TILMA came into force. A two year transition period means that it will not be fully operational until April 1, 2009 (Article 9.2). The purpose of TILMA is to liberalize trade, investment and labour mobility between BC and Alberta (and any other province that joins) to a greater extent than is facilitated under the AIT.

SHORT ANSWER

TILMA applies to libraries and their boards as defined and classified in the *Library Act*.

www.ratcliff.com

Suite 500, 221 West Esplanade, North Vancouver, BC V7M 3J3 Ph: 604-988-5201 • Fax: 604-988-1452

Public libraries in British Columbia are created and continued pursuant to the *Library Act*, RSBC 1996 Chapter 264. Under the *Library Act* a public library includes a municipal library, a regional library district, a public library association and an integrated public library system.

TILMA applies to, among other things, government entities. A “government entity” is defined (Part VII, p.32) to include:

e) non-governmental bodies that exercise authority delegated by law.

TILMA also defines (Part VII, p.33) “non governmental bodies that exercise authority delegated by law” to mean:

any organization, institution, corporation or association to whom regulatory or supervisory authority has been delegated by a Party [that is a signatory of TILMA].

Accordingly, any and all classes of BC libraries are caught by the definition of a “non-governmental body that exercises authority delegated by law.”

A scan of the Province of Alberta’s *Libraries Act*¹ indicates that their libraries are, due to a very similar statutory structure, likely also subject to TILMA.

LIBRARIES AS DEFINED BY BC’S *LIBRARY ACT*

Public libraries in British Columbia are created and continued pursuant to the *Library Act*, RSBC 1996 Chapter 264. Under the *Library Act* Part I, a public library includes a municipal library, a regional library district, a public library association and an integrated public library system. Each of those ‘classes’ of libraries is further defined according to how they are established under different Parts and Sections of the *Library Act*:

- "municipal library" means a library established under section 3;
- "regional library district" means a regional library district established under section 14.
- "public library association" means a public library association continued under section 31;
- "integrated public library system" means an integrated public library system the operation of which is continued under section 60.

Further, “library boards” are the boards of each of the respective classes of libraries above and also include a federated library board as per sections 46 to 48, 50, 51 and 53 to 55, and an integrated public library system as per sections 46 to 51.

The overarching relevant point is that all libraries are created or continued by, and their operations and governance are specified according to provisions set out in, the provincial *Library Act*. Therefore libraries are “non-governmental bodies that exercise authority delegated by law,” which, as explained below, incorporates them into TILMA.

¹ Chapter L-11, retrieved from <http://www.qp.gov.ab.ca/Documents/acts/L11.CFM>

More specifically:

- Municipal libraries are created by bylaw of a municipality (s.3). Such bylaw-making power is given to municipalities by provincial legislation (either the *Community Charter*, *Vancouver Charter* or *Local Government Act* as the case may be).
- Regional library districts are established by one or more municipalities or electoral districts passing a bylaw that requests that the Lieutenant Governor in Council create a regional library district (s.14). Therefore, these library districts have an even more direct line of delegated authority.
- Public library associations are continued under the *Act* and their powers and duties are dictated by Part 4 of the *Library Act* (s.31).
- Integrated public library systems pre-date the current *Library Act* but are continued under them (s.60) and are subject to the *Library Act*.

One other type of library entity is a federated library board. They are unique as compared to other types of boards because they have the power and capacity of a corporation under the *Interpretation Act* and thus may acquire and dispose of real property (s.49(4)). We think they are captured by TILMA because an agreement between two or more existing library boards (s.49(1)) but such an agreement is of no effect until approved by a minister (s.49(2)) and also such an agreement has specific requirements set out in the statute (s.49(3)).

THE AGREEMENT ON INTERNAL TRADE (AIT)

TILMA is created pursuant to Article 1800, “Trade Enhancement Arrangements” of the Agreement on Internal Trade (AIT). The AIT was signed by all provinces, territories (Nunavut has observer status) and the federal government (in 1994 to promote inter-provincial trade and co-operation in resolving disputes).

Annex 502.4² of the AIT specifies provisions for procurement by municipalities, municipal organizations, school boards and publicly-funded academic, health and social service entities. Libraries would fall within Annex 502.4 (and Part 5 of the AIT) because they would likely be considered a “municipal organization.” Even if they are not considered a municipal organization, the Annex also covers “any corporation or entity owned or controlled by [a municipality, a municipal organization or a publicly-funded academic, health or social service entity],” which would unquestionably capture libraries.

Appendix A (updated July 2008) lists Legislation Applicable to Entities Covered by Annex 502.4. The British Columbia legislation listed does not include the *Library Act*. However, the absence of legislation in that Appendix does not automatically exempt libraries from the AIT or TILMA. There are two reasons for this.

The first is that, as explained above, libraries by definition fall within the scope and coverage of Annex 502.4 of the AIT. Appendix A to that Annex lists legislation applicable *to entities* covered by Annex 502.4; it does not explicitly nor conclusively list the *legislation* that is *covered by* the Annex. In section C.2 of the Annex, a difference in language is demonstrative: “...each Province

² Chapter 5 – Procurement – Annex 502.4 of the AIT: “Procurement – Provisions for municipalities, municipal organizations, school boards and publicly funded academic, health and social service entities.”

shall provide the Secretariat with a list of its legislation applicable to entities covered by this Annex” as compared to, “Each province shall *also* maintain an up to date list of all *its entities covered by this Annex.*”

The second reason that libraries would not be exempt from the AIT or TILMA is because both agreements include provisions that say, where there are inconsistencies, the ‘more liberalizing’ provisions are to apply. In the AIT, this is Chapter 5: Procurement, Section Q.1:

Q. Relationship to Other Agreements

1. Provinces may continue or enter into additional agreements covering procurement by entities covered by this Annex. In the event of an inconsistency between such an agreement and this Annex, the agreement more conducive to trade liberalization prevails to the extent of the inconsistency.

In TILMA the corresponding provision is at the very beginning, Article 1.2:

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.

Thus, even if libraries were not caught under the AIT, they would be included in the ‘more conducive to liberalized trade’ provisions of TILMA. These provisions that ‘capture’ libraries under TILMA are explained below.

LIBRARIES UNDER THE TRADE, INVESTMENT AND LABOUR MOBILITY AGREEMENT (TILMA)

Article 2 of TILMA sets the scope and coverage of the agreement. TILMA covers “measures of the Parties and their government entities that relate to trade, investment and labour mobility. “Government entities” (Part VII, p.32) are 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.

Libraries would most squarely fit within government entity category (e). TILMA further defines “non governmental bodies that exercise authority delegated by law” to mean (Part VII, p.33):
any organization, institution, corporation or association to whom regulatory or supervisory authority has been delegated by a Party [that is a signatory of TILMA].

From the discussion above regarding the legal status and definition of libraries, we conclude that all classes of BC libraries are either organizations or associations that have been given their authority by BC, through the *Library Act*.

The term “measures” are every action not specifically excluded but in particular include:
... any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure;

Under this definition library boards are subject to TILMA. The requirement that government measures *not operate* to restrict or impair trade, investment and labour mobility indicates that it is the *effect*, rather than the *intent* of the measure that matters.

EXCEPTIONS UNDER TILMA

TILMA also has exceptions to safeguard some measures from challenge. Part V of TILMA sets out exceptions, typically broadly worded, that are either jointly agreed to, or stipulated by one of the Parties. The list may change over time but, subject to intervening efforts, will likely only become narrower: Article 17.1(b) obligates the Parties to annually review listed exceptions “with a view to reducing their scope.”

Libraries themselves are not captured by an exemption, but some of their activities may be. This requires further study into what functions of libraries are at issue and how they operate. Some potential exemptions include (Part V – Both Parties’ Exceptions):

Business subsidies

- measures adopted or maintained to provide assistance for book and magazine publishers...
- measures adopted or maintained to provide assistance to non-profit organizations

Government Procurement

- procurements from philanthropic institutions... from a public body or a non-profit organization
- procurements where it can be demonstrated that only one supplier is able to meet the requirements of procurement
- of goods intended for resale to the public.

2. EFFECT ON LIBRARIES

Measures of or relating to municipalities or to municipal organizations are listed under transitional measures (Part VI, p.23) and therefore libraries are not subject to the provisions of TILMA until April 1, 2009.

Generally, the definition of the *measures* TILMA covers is open-ended, but includes: “any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure” (Part VII – General Definitions). As stated, the requirement that measures *not operate* to restrict or impair trade, investment and labour mobility indicates that it is the *effect*, rather than the *intent* of the measure that matters.

The impacts of TILMA are set out in a separate letter.

Yours truly,

RATCLIFF & COMPANY LLP

Donald P. Lidstone, Q.C.
dlidstone@ratcliff.com
DPL:cmc

cc: Deborah Thomas, BCLA Nominations Committee
BC Library Association