

TO: UBCM Members
FROM: UBCM Executive
DATE: September 5, 2007
RE: **LOCAL GOVERNMENTS AND THE
TRADE, INVESTMENT AND LABOUR
MOBILITY AGREEMENT (TILMA)**

POLICY PAPER

#4

2007 CONVENTION

1. Introduction

The purpose of this policy paper is to provide the UBCM membership with an overview of the Trade, Investment and Labour Mobility Agreement (TILMA), identify areas of specific interest to local governments and seek member support for UBCM to move forward in representing the interests of BC local governments.

The first part of the paper will provide an overview of the TILMA, including its scope and implications for local governments. A summary of activities and discussions undertaken by UBCM on the TILMA is provided in the next section. Key elements of the Agreement that have been identified as potential areas of concern by the membership are outlined and discussed with respect to their possible impact on local governments. While the list of identified issues is not exhaustive it does provide a starting point for discussions with our provincial counterparts. As well, where the Ministry of Economic Development has provided a response to the issue or provided an interpretation of the Agreement, those have been included to assist members in gaining an understanding of the Agreement and its application to local governments. And finally, based on the issues that have been identified, a series of recommendations are offered for member consideration. If endorsed, these recommendations will provide UBCM with the direction it needs to engage the Province in discussions and prepare us for the next step - negotiations.

2. Overview

On April 28, 2006 the Province of BC and the Province of Alberta signed the Trade, Investment and Labour Mobility Agreement (TILMA). The purpose of the Agreement is to liberalize trade, investment and labour mobility between the two provinces beyond the level imposed under the Agreement on Internal Trade. The TILMA took effect between the two provincial governments on April 1, 2007.¹

Article 2 of the TILMA states that the scope and coverage of the Agreement applies to *measures* of the Parties and their *government entities* that relate to trade, investment and labour mobility. The term *measures* includes any legislation, regulation, standard,

¹ A full copy of the Agreement can be found at:
www.gov.bc.ca/ecdev/down/BC-AB_TILMA_Agreement-signed.pdf

directive requirement, guideline, program, policy, administrative practice or other procedure subject to a number of narrowly defined exceptions that are identified as "legitimate objectives." *Government entities* are defined to include regional, local, district or other forms of municipal government. Consequently, all local governments and their many forms of decision-making powers are captured under the scope of the Agreement.

As well the Agreement has purposefully been written in a manner that will maximize its application. Unlike other agreements that identify what is specifically covered within it - a positive listing - the TILMA utilizes what could be defined as an exclusion listing which means everything is included unless expressly excluded. The lack of precedents and the wording of the exceptions combined with the general language and broad scope of the Agreement generate a level of vagueness or lack of clarity as to how to interpret the Agreement. As a result, an environment of uncertainty for local governments and others has been created. This uncertainty for many UBCM members has translated into angst and, in some cases, opposition to the Agreement. Members have expressed their opinions through the 10 resolutions that have come forward from the membership on the TILMA, one of which, A3, is recommended for delegate consideration. While UBCM recognizes the concerns amongst the membership, it also recognizes that the Agreement requires both BC and Alberta to extend the Agreement to its government entities. However, it also requires both provincial governments to engage the broader public sector in consultations and negotiations prior to extending its coverage to local governments by April 1, 2009. UBCM views this as an opportunity to consult and ensure that the interests of our members are reflected and addressed prior to the Agreement's extension to local governments.

This window for consultation as outlined under Article 9.2 is a two-year transitional period during which the parties to the Agreement, the two provincial governments, must undertake further consultations and negotiate special provisions, exclusions or transitional provisions to determine coverage to measures of their respective government entities which, as has been noted, includes all local governments.

In its discussions with Ministry staff and the Minister of Economic Development, UBCM has been assured that the Province is committed to working with UBCM during the transitional period. It has been acknowledged that, unlike other sectors, local governments are recognized as being in the nature of orders of government and, as such, must be consulted and dealt with a unique manner in keeping with their status. This acknowledgement of local government status has been formally supported by a recently signed Consultation Agreement. This Agreement, signed by the Ministers of Economic Development and Community Services with UBCM's President, provides a definitive framework for consultations and discussions and provides an opportunity for a UBCM representative to be present for negotiations involving local government matters. A copy of that Consultation Agreement is appended to this paper.

So what will the TILMA mean for local governments and how will it impact existing areas of jurisdiction and day-to-day operations? At this point, many questions need to be answered and a better understanding of how the Agreement is to be interpreted is imperative. To assist, UBCM has organized a special pre-conference session on the

TILMA for the membership so there will be an opportunity to learn more about the Agreement and determine a course of action for UBCM.

In his April 30, 2007 summary of the Agreement for UBCM, Don Lidstone concluded:

On balance, TILMA will not have major impacts on local government that cannot be addressed during the current two year consultation period during which the Province of BC is consulting with the Union of BC Municipalities. The key issues relate to threshold values for tendering; clarity around procurement policies; whether business regulations will be harmonized; assistance to business under section 21 of the Community Charter; and the remote possibility that a regulatory (including land use bylaw) might have the effect of restricting or impairing an investment in British Columbia by an Alberta investor. The Agreement is vague and there are no precedents, so one of the issues for councils and boards is the uncertainty that surrounds TILMA.²

3. UBCM Activities to Date

The following provides a chronology of UBCM activities and discussions in regard to the TILMA.

- December 2005

Ministry of Economic Development officials advised UBCM staff that discussions were taking place between BC and Alberta on an enhanced trade agreement. At that time UBCM was not privy to the details of the proposed agreement as negotiations were still underway between the two provincial governments. UBCM was however advised that local governments would be included in the transitional provisions of the TILMA and as such, the Province would be seeking to engage UBCM and its members in discussions as to how to extend coverage to the broader public sector, including local governments. [The Agreement was signed on April 28, 2006.]

- January 2007

UBCM staff met with Ministry of Economic Development officials and engaged in preliminary discussions about the TILMA and potential implications for local government. At that meeting Ministry staff confirmed that the Agreement provides for a transitional period, extending to April 1, 2009.

- February 2007

The following direction was received from the UBCM Executive at the February 2007 meeting:

² Trade, Investment and Labour Mobility Agreement: Overview of Immediate Implications for Local Government, April 30, 2007 by Don Lidstone of Lidstone, Young, Anderson (located on UBCM website at www.civicnet.bc.ca under Featured Policy Topics / TILMA)

That staff be directed to work with Ministry staff in developing an information piece to be circulated to UBCM members, solicit member issues and concerns and that staff be directed to undertake discussions/negotiations with the Province on TILMA.

With this direction, further discussions were held with Ministry staff and on February 9, 2007, a memo was sent to all UBCM members with a copy of a joint letter from the Minister of Economic Development, Colin Hansen and his Alberta counterpart, Guy Boutilier on the TILMA. The letter was addressed to UBCM and the two Alberta associations and was in response to specific local government issues that had been raised.

- March 2007

Minister Hansen issued a separate open letter to UBCM members through the March 2007 *UBCM News*, which specifically addressed the issue of consultation:

During the two-year transitional period between now and then, we will consult with local government bodies in both provinces, including the Union of B.C. Municipalities and other interested local governments, and negotiate any required exclusions or special provisions.

Concerns about the potential impact of the Agreement continued to be raised and in response UBCM requested Don Lidstone, municipal lawyer of Lidstone, Young, Anderson to undertake an overview of the TILMA in the context of local government issues and interests. That paper was posted to the UBCM website (www.civicnet.bc.ca) on March 28, 2007. An update to Lidstone's paper has since been posted, dated April 30, 2007.

- April 2007

The Presidents Committee of the UBCM Executive met with Minister Hansen at which time the concerns of the membership were raised and the Committee sought assurances that UBCM would be consulted during the two-year transitional period. As a result of our meeting, the Minister committed to:

- providing UBCM with the opportunity to appoint a member to the TILMA provincial negotiating team in a manner similar to treaty negotiations; and
- developing a consultation agreement as provided for under s. 277 of the *Community Charter* that would outline the process whereby the Province would engage UBCM in consultations.

- April – May 2007

UBCM responded to letters received from the membership providing information on our activities, shared our understanding of the TILMA, and provided advice as to where members could obtain additional information. In some instances, member letters were also conveyed to Ministry officials for comment and response where specific technical questions were asked about the Agreement.

UBCM also held initial discussions with the Alberta Urban Municipalities Association to determine what potential areas of common concern are held between the associations.

- July 2007

Based on the commitment made by Minister Hansen, the UBCM Executive reviewed a draft Consultation Agreement at their July meeting. Staff was directed to continue to work with the Province to finalize the Agreement.

The Executive also received a second report from Don Lidstone recommending issues to be raised by UBCM during the consultation process with the Province. Those issues were supported by the Executive but are by no means exhaustive, recognizing that other issues may be identified once we engage in discussions. Those issues are discussed in detail under section 5 of this paper.

UBCM met with Greater Vancouver Regional District board members jointly with the Minister of Economic Development, the Honourable Colin Hansen, Ministry staff person Robert Musgrave and municipal lawyer, Don Lidstone. At this time Ministry staff also extended an invitation to meet with specific municipalities to provide technical briefings on the Agreement.

- August 2007

The Consultation Agreement was finalized and signed by UBCM's President and the Ministers of Economic Development and Community Services. The purpose of the Agreement is to provide the framework whereby the Ministry and UBCM will consult on and negotiate any proposed special provisions, exclusions and transitional provisions. The Agreement acknowledges both the Province's commitment to consult with UBCM and provides UBCM with observer status at the negotiating table for those "Municipal" and "Municipal Organization" interests.

4. Areas Identified for Discussion/Negotiation

Local governments, through their correspondence to UBCM and the provincial government, have identified a number of questions and issues related to the TILMA. The following provides an overview of what those key issues are and, where appropriate, UBCM has noted what written response the Minister has provided to a UBCM member.

a) TILMA Application prior to April 2009

While TILMA has identified a two-year transitional period prior to its extension to local governments, Lidstone and others have noted that there are sections of the Agreement that do appear to apply to local governments during this transitional period and the Province in March concurred with this interpretation. Consequently many communities are concerned that measures taken now, and some back to April 28, 2006 when the Agreement was first signed, may be viewed to be inconsistent with the TILMA.

Ministry Response:

The Minister of Economic Development in his responses to UBCM members on this point, has stated to members the following opinion in regard to existing (but not necessarily new) local government measures: *[D]uring the two-year transitional period existing measures of local governments are not covered by the TILMA.*

As well, in his open letter to UBCM members in the March issue of the *UBCM News*, the Minister expressed the interpretation that the TILMA would not apply to local governments in advance of the April 1, 2009 date:

Once the TILMA is fully implemented in April 2009, it will also apply to local governments. During the two-year transitional period between now and then, we will consult with local government bodies in both provinces, including the Union of B.C. Municipalities and other interested local governments, and negotiate any required exclusions or special provisions.

b) Lower Procurement Thresholds

Under the Agreement on Internal Trade (AIT), specific procurement thresholds were set and extended to local governments. The TILMA proposes lower procurement thresholds, as noted below:

	TILMA	AIT
Goods	\$10,000	\$100,000
Services	\$75,000	\$100,000
Construction	\$100,000	\$ 250,000

The proposed new thresholds under the TILMA have been an area of concern identified by many local governments. Many members have stated that these proposed thresholds are far too low based on the costs associated with preparing notices and documentation for what are viewed to be small procurement projects which, under present threshold levels, would have been conducted in a less formal manner.

On behalf of the membership, UBCM had expressed concerns when the AIT thresholds were extended. The Province agreed to assist local governments in meeting the AIT requirements by offering the use of the BC Bid process to facilitate the tendering process.

c) Clarity around Procurement Policies

Separate from the issue of threshold values is the matter of procurement policies. Many BC communities have local preference policies that place specific requirements on potential service providers (eg. use of local labour for job creation). Certain types of local preference policies are permissible under the *Community Charter* and common law and others are not. Will valid procurement policies under the *Charter* be challenged under the TILMA?

For example, many councils and boards have adopted procurement policies in an effort to reflect community values and interests. The TILMA identifies specific legitimate objectives, such as protection of the environment; public security and safety; protection

of human, animal or plant life or health; but legitimate objective exceptions do not include “protection or favouring of the production of an enterprise of a Party” “local preferences”, or public policy (political) preferences. If a council was able to use one of these legitimate objectives as the rationale for its policies, there may be no challenge. Language reflecting community values and interests is not included in the list of legitimate objectives.

Ministry Response:

In his response to the City of Richmond, the Minister stated:

The TILMA is an extension of the Agreement on Internal Trade (AIT) which was signed by British Columbia in 1994. The AIT includes a number of provisions that already apply to local governments similar to those found in TILMA. Under the AIT, for example, local governments are subject to a requirement to conduct non-discriminatory procurement and to avoid discriminating in favour of local goods and services.

d) Impact on Standards and Regulations

Article 5 of the TILMA speaks to the issue of standards and regulations. Of specific interest are:

- 1. Parties shall mutually recognize or otherwise reconcile their existing standards and regulations that operate to restrict or impair trade, investment or labour mobility.*
- 5. Parties shall cooperate to minimize differences in standards or regulations adopted or maintained to achieve legitimate objectives.*

Local governments have expressed concerns that they may be required to harmonize or reconcile existing standards or regulations to the lowest common denominator in order to meet the TILMA requirements. While the word harmonization is not used in the Agreement, there is concern amongst the membership that this is in fact what Article 5 might mean.

Ministry Response:

In his response to Valemount’s letter, the Minister stated:

One of the main misinterpretations about the Agreement concerns its potential impact on municipalities. Under TILMA, different standards and regulations may continue and there is no requirement to de-regulate or harmonize to Alberta’s regulation or standards. The Agreement does not require changes to land use decisions applying to areas like sign bylaws, building height restrictions, zoning, agricultural land reserves or parks, unless they are discriminatory. The objective of the TILMA is to reconcile or mutually recognize these measures where there are any unnecessary differences, overlaps or duplications.

He continued to state, in response to the Islands Trust:

As the party to the Agreement, the Province is solely responsible for reviewing measures in relation to TILMA.

With respect to concerns around the effect of the TILMA on local government measures that might impede investment by Alberta interests, the Minister offered the following interpretation:

Under the General Rules of TILMA, Article 3 entitled “No Obstacles”, reads: “Each party shall ensure that its measures do not operate to impair or restrict trade between or through the territory of the Parties, or investment or labour mobility between the Parties.” This applies to the flow of trade, investment or workers across provincial borders. [Ministry emphasis] This does not extend to “internal measures” like domestic laws or regulations made by governments. TILMA’s “Non-Discrimination” clause (Article 4) requires regulations to apply equally to investors, workers or businesses from Alberta. If a government measure applies equally to trade, investors, and workers in both Alberta and British Columbia, then it is not contrary to the Non-Discrimination clauses. The TILMA does not remove the right of governments to regulate as long as they do so in a non-discriminatory manner.

e) Assistance to Business

Under Article 12 of the TILMA the issue of business subsidies is addressed. Although most assistance that is provided for under the *Community Charter* does not constitute subsidization, there are a number of examples of valid local government subsidies to businesses. For instance, municipalities can provide tax exemptions and enter into partnering agreements with business under which the municipalities provide assistance that amounts to a business subsidy.

In his April 30, 2007 paper for UBCM, Don Lidstone explained subsidies as follows:

The agreement also provides that municipalities must not directly or indirectly provide business subsidies unless to offset a subsidy offered by a non-party or by another government entity. TILMA prohibits local governments from providing “one-off” assistance that might favour one investor or business undertaking over another. Exceptions include grants to non-profit entities, subsidies to aboriginals, grants to persons for social policy reasons, or assistance in respect of culture, academic research, disaster relief or prescribed agricultural matters. Since Alberta municipalities currently have more authority to provide subsidies, this provision may be of indirect benefit to local governments in British Columbia.

Ministry Response:

In response to the Islands Trust, Minister Hansen stated:

Many local governments have also expressed concerns about the ability to continue offering local incentives under TILMA. This could include things like lease subsidies, heritage incentives, revitalization tax exemptions and tax abatements. As a general rule, subsidies are acceptable as long as they are not designed as “one-offs” that favour a single business to the detriment of another.

f) Dispute Resolution

Part IV of the TILMA outlines the dispute resolution process. This paper will not attempt to go into the details of the process, but members are referred to the April 30, 2007 paper by Don Lidstone, which provides a detailed overview of the dispute resolution process and its implications for local governments. Local governments have raised the following questions with respect to the dispute resolution process:

- Will local governments be required to compensate the Province for the payment of monetary awards if a measure is deemed to be in violation of the TILMA and repealed or amended to be consistent with TILMA?
- Are local governments provided with the opportunity to defend their own measures in a dispute resolution hearing?
- What will happen to a local government that is found to be in violation of a measure but refuses to change the measure?
- How will the Province deal with a local government measure that is found to be in contravention of the TILMA but valid under other legislation (eg. *Community Charter*)?

Ministry Response:

In response to Valemout, Minister Hansen stated:

....under TILMA's dispute resolution mechanism, municipalities are not required to defend their own measures or pay monetary awards. Only the provincial government, as a party to the Agreement, is responsible for responding to the dispute settlement process. It has not been determined at this point what the Province would do in the case of non-compliance by local governments, but I would expect local governments to abide by their existing commitments under the AIT (like TILMA).

5. Preliminary Areas for Discussion with the Province

After providing an overview of the Agreement, UBCM consulted with Don Lidstone with respect to issues that UBCM should raise with the Province in our discussions. This section outlines the recommended actions to address each of the issues that have been identified in Part 4 of this policy paper. The recommendations are not meant to be exhaustive but are designed to provide the preliminary list of issues that need to be raised in initial discussions with the Province.

Application of TILMA during Consultation Process

1. UBCM obtain an amendment to the TILMA to exempt expressly all measures of "municipalities or municipal organizations" as defined in the TILMA during the two-year transition period referred to in Articles 9.1 and 9.2 of the TILMA.

Procurement

2. UBCM request that local government be exempt from the requirement under the TILMA that procurement must give the highest level of consideration to "...like, directly competitive, or substitutable goods; persons; services and investors or investments."

3. UBCM request that the TILMA requirement that municipal governments tender goods, services and construction over prescribed thresholds be amended such that the levels contained in the AIT will continue to apply.

Subsidies

4. UBCM request that the TILMA be amended to exempt any municipal assistance to, subsidization of, or incentive to a business that would otherwise be a valid exercise under the *Community Charter* or *Vancouver Charter*.

Harmonization

5. UBCM request that the TILMA be amended to exempt municipalities from the requirement to reconcile standards or regulations if the reconciliation would obviate local control over what the community considers to be unacceptable business practices (or other issues of local interest).

Regulatory Bylaws

6. UBCM request that the General Exceptions contained in Part V of the TILMA be expanded to cover land use regulation by municipalities and municipal organizations and the spheres listed in section 8 (3) of the *Community Charter*. Analogous exceptions for Vancouver and Alberta municipalities should be listed as General Exceptions.

Dispute Resolution

7. UBCM request that the TILMA be amended to allow local governments to defend their measures in the dispute resolutions process, whether or not the Province appears as a party or intervenor.

8. UBCM negotiate an agreement with the Province to prohibit the Province from requiring local governments to either pay penalties for or repeal constitutionally valid measures that are found by dispute panels to be in breach of the TILMA.

9. UBCM request that the provincial government negotiate amendments to the TILMA dispute resolution process including a provision that protects against vexatious or frivolous claims.

Consultation

10. UBCM request the provincial government negotiate these amendments under the consultation agreement under section 277 of the *Community Charter*, and further collaborate during the consultation process with the Alberta Urban Municipalities Association and the Alberta Association of Municipal Districts and Counties.

6. Concluding Remarks

The TILMA requires extension to local governments as part of the broader public sector. UBCM has taken steps to engage the Province in discussions, identified the issues of interest to members, developed a consultation agreement that ensures that consultation and negotiations take place and has put forward some preliminary recommendations that will provide the focus of our discussions with the Province.

UBCM recognizes that we need to move forward and ensure that we are prepared to engage in those consultations and negotiations in order to effectively represent the interests of the membership. We have developed an initial recommended plan of action and will work over the next 18 months to seek amendments to the Agreement that are in the interests of our membership.

Recommendation

That the membership indicate their support for the proposed course of action, including the recommendations that have been proposed under Part 5 of this policy paper.

Att.

- Consultation Agreement on TILMA

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